

# US Supreme Court hears Facebook bid to escape securities fraud suit

 [reuters.com/legal/us-supreme-court-hear-facebook-bid-escape-securities-fraud-suit-2024-11-06](https://www.reuters.com/legal/us-supreme-court-hear-facebook-bid-escape-securities-fraud-suit-2024-11-06)

John Kruzel



Facebook app logo is seen in this illustration taken, August 22, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

- Lower court let suit led by Amalgamated Bank proceed
- Supreme Court to hear similar Nvidia case on Nov. 13
- At issue is data breach involving Cambridge Analytica

WASHINGTON, Nov 6 (Reuters) - The U.S. Supreme Court heard arguments on Wednesday in a bid by Meta's (META.O) , opens new tab Facebook to scuttle a federal securities fraud lawsuit brought by shareholders who accused the social media platform of misleading them about the misuse of its user data.

Facebook appealed a lower court's decision allowing the 2018 class action led by Amalgamated Bank (AMAL.O) , opens new tab to proceed. It is one of two cases coming before them this month - the other one involving artificial intelligence chipmaker Nvidia (NVDA.O) , opens new tab - that could lead to rulings making it harder for private litigants to hold companies to account for alleged securities fraud.

The arguments were ongoing.

The plaintiffs accused Facebook of misleading investors in violation of the Securities Exchange Act, a 1934 federal law that requires publicly traded companies to disclose their business risks. They claimed the company unlawfully withheld information from investors about a 2015 data breach involving British political consulting firm Cambridge Analytica that affected more than 30 million Facebook users.

Conservative Justice Clarence Thomas pressed Kannon Shanmugam, the lawyer for Facebook, on whether the company's risk statement was misleading.

"The problem is that the reasonable person could look at the statement and assume that, because it only talks about future probabilities of this harm or this event occurring, that it never occurred," Thomas said.

"So why wouldn't one be able to read this and assume that it never happened?" Thomas asked.

Shanmugam replied, "We don't think that a reasonable person would draw that inference from a statement of this variety. Where a statement says 'if something occurs, harm may follow from that' - I don't think it's a necessary premise of that statement that the event has never occurred."

Facebook's stock fell following 2018 media reports that Cambridge Analytica had used improperly harvested Facebook user data in connection with Donald Trump's successful U.S. presidential campaign in 2016. The suit seeks unspecified monetary damages in part to recoup the lost value of the Facebook stock held by the investors.

At issue is whether Facebook broke the law when it failed to detail the prior data breach in subsequent business-risk disclosures, and instead portrayed the risk of such incidents as purely hypothetical.

Facebook argued in a Supreme Court brief that it was not required to reveal that its warned-of risk had already materialized because "a reasonable investor" would understand risk disclosures to be forward-looking statements.

"When we think about these questions, we're not looking only to lies or complete false statements," liberal Justice Elena Kagan told Shanmugam. "We're also looking to misleading statements or misleading omissions."

## **'ALWAYS FORWARD-LOOKING'**

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Conservative Justice Samuel Alito asked Shanmugam, "Isn't it the case that an evaluation of risks is always forward-looking? Isn't it inherently forward-looking? When you want to know about what risk you face, you want to know what your risk is in the future, right?"

"It is. And that is essentially what underlies our argument here," Shanmugam responded.

Conservative Justices Brett Kavanaugh and Neil Gorsuch asked Shanmugam whether other disclosure requirements in regulatory filings might be available for companies to outline the kind of past events at issue in this case.

Conservative Chief Justice John Roberts, however, questioned Shanmugam on the use of other disclosure provisions.

"Is your position basically that 'don't worry about half-truths'" in disclosing the risk factors, "because the basic problem is already going to be disclosed under other provisions?"

Thomas asked Kevin Russell, the lawyer representing the shareholders, what else Facebook should have provided in its statement.

"So I think they could have said what they said, and then said something like, 'Such improper disclosure or misuse or use of data has occurred in the past including recently on a substantial scale,'" Russell said. "I think that would have removed any misimpression that an event like what happened in Cambridge Analytica hadn't occurred."

U.S. District Judge Edward Davila dismissed the lawsuit in 2021 but the San Francisco-based 9th U.S. Circuit Court of Appeals in a 2-1 ruling revived it in 2023. A ruling by the Supreme Court is expected by the end of June.

The Cambridge Analytica data breach prompted U.S. government investigations into Facebook's privacy practices, various lawsuits and a U.S. congressional hearing at which Meta Chief Executive Mark Zuckerberg was grilled by lawmakers.

The U.S. Securities and Exchange Commission in 2019 brought an enforcement action against Facebook over the matter, which the company settled for \$100 million. Facebook paid a separate \$5 billion penalty to the U.S. Federal Trade Commission over the Cambridge Analytica issue.

The Supreme Court on Nov. 13 is due to hear arguments in Nvidia's similar appeal to avoid a securities class action accusing it of misleading investors about how much of its sales went to the volatile cryptocurrency industry.

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Reporting by John Kruzel; Additional reporting by Andrew Chung; Editing by Will Dunham

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# US Supreme Court to hear Facebook bid to escape securities fraud suit

 [reuters.com/legal/us-supreme-court-hear-facebook-bid-escape-securities-fraud-suit-2024-11-06](https://www.reuters.com/legal/us-supreme-court-hear-facebook-bid-escape-securities-fraud-suit-2024-11-06)

John Kruzel

By John Kruzel

November 6, 2024 3:05 AM PST Updated 4 hours ago



Facebook app logo is seen in this illustration taken, August 22, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

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WASHINGTON, Nov 6 (Reuters) - The U.S. Supreme Court is set on Wednesday to consider a bid by Meta's (META.O) , opens new tab Facebook to scuttle a federal securities fraud lawsuit brought by shareholders who accused the social media platform of misleading them about the misuse of its user data.

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U.S. District Judge Edward Davila dismissed the lawsuit in 2021 but the San Francisco-based 9th U.S. Circuit Court of Appeals in a 2-1 ruling revived it in 2023.

"The problem is that Facebook represented the risk of improper access to or disclosure of Facebook user data as purely hypothetical when that exact risk had already transpired," Judge Margaret McKeown wrote in the 9th Circuit decision.

A ruling by the Supreme Court is expected by the end of June.

The Cambridge Analytica data breach prompted U.S. government investigations into Facebook's privacy practices, various lawsuits and a U.S. congressional hearing at which Meta Chief Executive Mark Zuckerberg was grilled by lawmakers.

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The Supreme Court on Nov. 13 is due to hear arguments in Nvidia's similar appeal to avoid a securities class action accusing it of misleading investors about how much of its sales went to the volatile cryptocurrency industry.

The Supreme Court in prior rulings has limited the authority of the SEC, the federal agency that polices securities fraud. Its rulings in the Facebook and Nvidia cases now could make it more difficult for private litigants to hold companies liable for such conduct.

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Reporting by John Kruzel; Editing by Will Dunham



# Long battle over Refugio oil pipeline spill comes to an end

DJ [dailyjournal.com/articles/381851](https://www.dailyjournal.com/articles/381851)

**Nov. 6, 2024**

Nearly a decade after the Refugio State Beach oil spill, Santa Monica property owners who held easements contracts with the oil pipeline's original constructor are set to be compensated.



Payments of a \$70 million settlement agreement are set to be disbursed to landowners affected by the 2015 Refugio State Beach oil spill in Santa Barbara County this month following the expiration of the final appeal period. The settlement with the Pacific Pipeline Company brings an end to a long-running legal battle between the company and the property owners.

"The settlement ends a nine-year battle to win compensation for the property owners whose land is burdened with the pipeline," Barry Cappello of Cappello & Noël LLP, who represented the plaintiffs, said in a news release on Monday. "It was a long process, but justice has finally been delivered."

Counsel for the plaintiffs included attorneys from three firms, including Cappello, David L. Cousineau, Lawrence J. Conlan and Leila J. Noël of Cappello & Noël in Santa Barbara, Robert J. Nelson of Lieff Cabraser Heimann & Bernstein LLP in San Francisco and Keller Rohrback attorneys Juli E. Farris and Lynn L. Sarko in Seattle.

Pacific Pipeline Company was represented by Dawn Sestito and Lauren F. Kaplan of O'Melveny & Myers LLP in Los Angeles and Jessica L. Stebbins Bina of Latham & Watkins LLP in Los Angeles. They did not respond to phoned or emailed requests for comment by press time on Tuesday.

Signatories to the settlement included Pacific Pipeline Co. and its parent, Sable Offshore Corp.

The class members were property owners who held easements contracts with the pipeline's original constructor entered some 30 years prior to the spill. *Grey Fox LLC et al v. Plains All American Pipeline LP et al.*, 2:16-CV-03157 (C.D. Cal., filed Jan. 28, 2020).

According to Cappello, they became concerned in the aftermath of the 2015 spill after the pipeline's owners at the time, Plains All American Pipeline LP, announced plans to build a new pipeline without new easements.

Plains settled out of the case before selling the pipeline to Exxon Mobil Corp., which subsequently sold it to Sable, Cappello said in a phone call on Tuesday.

"By this time, everybody is now talking about, 'Maybe we got to mediate this thing,'" Cappello said. "So, we go to a series of mediations with Exxon and Sable, and ultimately make a deal, and Sable puts up the money."

In addition to monetary relief for the landowners, the settlement also holds Pacific Pipeline to the terms of a consent decree requiring the use of certain safety technologies, as well as a commitment to installing automatic shutoff safety valves.

"In exchange, the class agrees that settling parties may repair and reopen the pipeline, record notice of easement clarifications, and install automatic shutoff valves," the settlement read.

Cappello said Pacific Pipeline has elected to repair the pipeline, gaining approval from government agencies including the state fire marshal.

Sable Offshore announced in October that repairs on the pipeline had already begun.

"PPC has more than 30 predominantly union pipeline repair crews making these repairs and is currently working with all landowners and government agencies to complete this important work, with restart of the pipeline expected by the end of 2024," the company's statement read.

The \$70 million will be distributed in two installments, with the first checks going out this month, Cappello said.

Capello said the settlement is unique as an agreement based on the language of specific documents, describing the work of his colleagues as a "master class" for attorneys in actions concerning similar easements moving forward.

"If another oil spill occurs involving a pipeline in California - actually anywhere, because this was a federal court case - you can use the theories we used in this case to make sure landowners are properly compensated," he said.

#381851

# Lawyers increase talc ad spending after J&J's \$9 billion settlement offer

 [reuters.com/legal/litigation/lawyers-increase-talc-ad-spending-after-jjs-9-billion-settlement-offer-2024-11-05](https://www.reuters.com/legal/litigation/lawyers-increase-talc-ad-spending-after-jjs-9-billion-settlement-offer-2024-11-05)

Diana Jones

A bottle of Johnson and Johnson Baby Powder is seen in a photo illustration taken in New York, February 24, 2016. REUTERS/Mike Segar/Illustration/File Photo Purchase Licensing Rights , opens new tab

Nov 5 (Reuters) - Television advertisements soliciting claims from people who say they got cancer from talc powder products dramatically increased in September, the same month that Johnson & Johnson said it would pay more than \$9 billion to resolve talc claims as part of a proposed bankruptcy settlement, according to new data.

Data from mass tort advertising tracker X Ante shows plaintiffs' attorneys spent more than \$778,000 to air more than 4,600 TV ads soliciting the claims, the most spent on talc ads since August 2023, according to X Ante founder Rustin Silverstein.

September's ad spending, an increase of more than 65% over the previous month, is still far less than lawyers were spending on ads in 2023, according to Silverstein. But it could represent a final push for clients from plaintiffs' attorneys who see the latest settlement offer as a potential end to the litigation.

Johnson & Johnson is facing lawsuits from more than 62,000 plaintiffs who say they were diagnosed with cancer after using baby powder and other talc products, according to a company filing.

That number is as high as 100,000 when counting claimants who haven't sued, Erik Haas, J&J's global vice president of litigation, has said.

The company has maintained its talc products are safe and do not cause cancer.

A spokesperson for Johnson & Johnson declined to comment on the ad spending.

Johnson & Johnson has sought to resolve the claims through bankruptcy, a proposal that faced stiff opposition from some plaintiffs' attorneys and has been rebuffed twice by federal courts.

Some plaintiffs' attorneys support the deal as the best way to get compensation for their clients, while others argue that the settlement value is too low and that wealthy companies like J&J should not be allowed to use the legal system to gain bankruptcy protections meant for people and companies that cannot afford to pay their debts.

The jump in advertising came after Johnson & Johnson upped its proposed settlement in early September to resolve the claims by an additional \$1.1 billion, bringing the potential value of a settlement to more than \$9 billion paid over 25 years.

J&J's latest settlement offer addresses allegations that talc caused ovarian and other gynecological cancers, which are the bulk of the claims J&J faces.

On Sept. 20, a Johnson & Johnson subsidiary filed for bankruptcy for a third time after the company said the majority of talc claimants had voted in support of another filing. The goal is to use the proceeding to resolve all current and future claims over talc.

After September's increase, the TV advertising for talc claims dropped off steeply in October, according to Silverstein. Silverstein and his company X Ante track spending in television, radio and social media advertising of attorneys seeking claimants for mass torts.

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Diana Novak Jones  
Thomson Reuters

Co-author of the Daily Docket, Reuters' daily legal industry newsletter. Diana reports on litigation, mass torts and the plaintiffs' bar. She previously worked at Law360 and the Chicago Sun-Times.

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# Hawaiian Electric Finalizes \$2 Billion Maui Fire Settlement

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Litigation

Nov. 5, 2024, 12:54 PM PST

Mark Chediak

Bloomberg News

- Utility-owner signs off on tentative pact reached in August
- Settlement won't resolve separate claims by insurers

formalized a \$2 billion agreement to settle damage claims from a wildfire that razed the historic town of Lahaina and killed more than 100 people.

The utility-owner had reached a tentative agreement in August in which it, along with other defendants including the state of Hawaii, Maui County and landowners, would pay \$4 billion to resolve hundreds of lawsuits stemming from last year's wildfire, according to a

Tuesday.

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The settlements don't resolve claims with insurers that are part of separate lawsuits.

Multiple conditions must be met before payments are made by Hawaiian Electric, including resolving insurer claims either through an agreement or final court order, the filing said.

Hawaiian Electric's stock was halted pending the news. Shares were 1.6% higher in after-market trading.

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Simar Khanna

# Litigation Funding Is Here to Stay, But Faces New Challenges

By David Lat

Column

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*Columnist David Lat surveys the state of litigation funding in 2024, noting its shifting priorities as it has evolved from fringe industry to \$15 billion market.*

Bloomberg Law News 2024-11-06T09:46:17217309745-05:00

Litigation Funding Is Here to Stay, But Faces New Challenges

By David Lat2024-11-06T04:30:03000-05:00

When I first started writing about litigation finance in 2013, the field was, according to the New York Times, “an obscure corner of Wall Street.” Today, it has emerged from obscurity—and grown into a \$15.2 billion industry, up from \$9.5 billion five years ago.

I’ve remained interested in litigation funding over the years, and in September, I headed out to Los Angeles to attend LitFinCon, a well-known conference hosted by Siltstone Capital. The three-day event—attended by a wide range of industry participants, including funders, investors, lawyers, bankers, and even a few judges—provided me with an excellent overview of the state of litigation funding. It also allowed me to compare the key issues facing the industry today with those from a decade ago.

## From Legality to Disclosure

In the early days of litigation finance, the industry confronted significant questions about its legitimacy—and even its legality. A number of states had common-law or even statutory prohibitions of maintenance and champerty, ancient doctrines that prevent third parties from financing another person’s litigation (maintenance) or for doing so in exchange for a share in the damages (champerty). Would states interpret and apply these laws aggressively, in a way that would threaten the viability of litigation funding?

Fortunately for supporters of the practice, that didn't happen. Some states construed their laws so narrowly that they became irrelevant to commercial funding—like New York, which bans champerty only when the purpose of taking the claim is “with the intent to sue.” Other states abandoned their laws entirely—like Minnesota, whose state supreme court abolished its common-law prohibition against champerty in a 2020 decision.

Instead of litigation finance's underlying legality, the critical question the industry now faces is disclosure: Must funding arrangements be disclosed in litigation, and if so, what exactly must be disclosed? Some states—including New York, Wisconsin, West Virginia, and Indiana—passed laws requiring varying levels of disclosure, depending on the context.

On the federal level, legislation has been introduced that would require the disclosure of litigation funding. The US Judicial Conference's Advisory Committee on Civil Rules is also studying the issue. And some individual federal courts, such as the District of New Jersey, have adopted or are considering disclosure rules.

Not surprisingly, funders have raised concerns or even opposed some of these proposals. But they should really view them as a victory: Opponents of litigation finance, such as the US Chamber of Commerce, have given up hope on shutting down funding entirely—and have turned to disclosure as a fallback position.

### From Fringe to Mainstream

“My firm was somewhat reluctant to embrace litigation funding,” said Casey Grabenstein, a litigation partner at Saul Ewing. Mayer Brown litigation partner Michael Lackey put the point in even stronger terms: A decade ago, litigation finance “was just anathema” to him.

Their recollections are consistent with mine. When I first started covering the industry and would mention it to attorneys in Big Law, they'd respond with either befuddlement or skepticism. I wondered: Would litigation finance remain on the fringes of law and finance—a profitable little niche for its participants, but a bit “sus” to the establishment?

The answer started becoming clear a few years ago. In 2021, Willkie Farr became the first major firm to publicly announce a partnership with a funder—a \$50 million deal with Longford Capital. Other firms, including Cadwalader and Quinn Emanuel, followed suit.

Today, according to Lackey, “virtually every large law firm that does litigation probably has a funded case somewhere”—including his firm, Mayer Brown. In fact, according to Westfleet Advisors, the 200 largest US law firms by revenue accounted for more than a third of total capital commitments in two of the past three years.

And funding has gone mainstream not just in law, but finance. Treating it as an important new asset class, major investment-management firms are now investing in litigation—like Fortress Investment Group, which has roughly \$6.6 billion committed to legal assets.

Even insurance companies, some of the most staid players in finance, started exploring the space. For example, insurers like Liberty Mutual and HDI Global Specialty began issuing judgment-preservation insurance, which protects the trial-court awards of plaintiffs—and their law firms—if the judgments get reduced or reversed on appeal.

### From Growth to Commoditization?

A decade ago, those of us who followed litigation funding wondered whether it was here to stay—and even if it didn't get shut down by legal challenges, whether it had the potential for real growth. Now that it's a \$15 billion industry, the answer to that question is clear.

Now, if anything, some are wondering: Has the industry grown too much, or too quickly? Several speakers at LitFinCon mentioned the dreaded C-word: "Commoditization."

Burford Capital, the world's largest provider of legal finance, described commoditization in a 2019 report as "more and more capital providers vying to enter the market, flooding lawyers with capital, thus resulting in lowered standards and race-to-the-bottom costs." But after raising the prospect, Burford rejected it, arguing that even "as the industry continues to grow dramatically, the shift in front of us is—and indeed must be—the maturation of legal finance."

Maturation but not commoditization seemed to be the dominant view among panelists at LitFinCon as well. As Wendie Childress of Westfleet noted, key indicators of commoditization, such as standardization in funding agreements and transparency in pricing, are still missing.

According to Benjamin Blum of the Flexpoint Ford private-equity firm, signs of commoditization might be starting to emerge in certain areas, such as the funding of litigation portfolios. But it's not that widespread, and one can understand why: The underlying assets don't lend themselves to commoditization.

Every lawsuit is different—not just in terms of the law and the facts, but with the law firm handling the case, the jurisdiction where it's pending, and the judge overseeing it—and therefore presents a different investment proposition. This is especially true in terms of large commercial cases, the traditional focus of litigation funders, as opposed to consumer or mass-tort cases.

What does the future hold for litigation finance? In his opening remarks at LitFinCon, Mani Walia, general counsel of Siltstone Capital, expressed optimism.

Walia noted the arrival of many new industry participants, from Big Law firms to investment funds to insurers. He highlighted recent innovations, including the rise of post-judgment insurance, secondary investing, and harnessing artificial intelligence, both to hedge existing investments and to make better investments in the future.

But he stressed that if litigation funding is to enjoy continued success, industry participants must continue to act ethically, responsibly, and with a focus on increasing access to justice.

"There will continue to be innovation," Walia said. "But ours is a young industry, and we need to make sure that there are no bad apples."

*David Lat, a lawyer turned writer, publishes Original Jurisdiction. He founded Above the Law and Underneath Their Robes, and is author of the novel "Supreme Ambitions."*

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# Hueston Hennigan Secures Dismissal of SEC Action Against Ex-PwC Auditor in Mattel-Linked Case

**LAW** [law.com/therecorder/2024/11/06/hueston-hennigan-secures-dismissal-of-sec-action-against-ex-pwc-auditor-in-mattel-linked-case](https://www.law.com/therecorder/2024/11/06/hueston-hennigan-secures-dismissal-of-sec-action-against-ex-pwc-auditor-in-mattel-linked-case)

Kat Black



## What You Need to Know

- In 2022, the SEC charged Mattel with financial misstatements in its Q3-Q4 2017 financial results and ordered it to pay a \$3.5 million settlement.
- It concurrently launched an administrative action against Joshua Abrahams, a PwC auditor who led audits for the company during that period.
- On Nov. 1, the SEC voluntarily dismissed the action against Abrahams after years of litigation by a defense team from Hueston Hennigan.

Former PricewaterhouseCoopers auditor Joshua Abrahams, defended by Hueston Hennigan, has won the dismissal of a U.S. Securities and Exchange Commission administrative action linked to a concurrent action against toymaker Mattel.

The federal agency issued a one-page order dropping the action against Abrahams last Friday after the Division of Enforcement filed a motion to dismiss it on Aug. 12, simply stating: "Under the circumstances, it appears appropriate to grant the Division's motion and dismiss the proceeding."

The Hueston Hennigan team representing Abrahams included Thomas Zaccaro, Kelsey Dayton, Stephen Mayer, Alexis Blackmore, Arianna Demas, Mariah Rivera, Jessica Trafimow and Collin Yeung.

The SEC launched the action against Abrahams, who formerly led audits for Mattel in 2017 and resigned from PwC in 2019, for alleged "improper professional conduct" on Oct. 21, 2022, the same day it charged Mattel with misstating its third and fourth quarter 2017 financial results. Mattel was ordered to pay a settlement of \$3.5 million as the SEC pursued separate litigation against Abrahams.

According to the order against Abrahams, Mattel, the iconic El Segundo, California-based manufacturer of Hot Wheels toys and Barbie dolls, revealed in an August 2019 Form 8-K that it had received intelligence from an anonymous whistleblower "[alleging] accounting errors and [questioning] Abrahams' independence."

The company disclosed that an audit committee's investigation had found the tax-related valuation allowance for Q3 2017 was understated by \$109 million and the tax expense for Q4 2017 was overstated by \$109 million. As a result, it said, its third and fourth quarter 2017 net loss was understated by 15% and its net loss per share for the same period was overstated by 63%.

The SEC accused Abrahams of breaching the Securities Exchange Act and Rule 102(e)(1)(ii) of the commission's rules of practice by failing to inform Mattel's audit committee of the \$109 million error or confirm that it was documented.

"The order further alleges that Abrahams failed to maintain independence by providing prohibited human resource advice to Mattel, including suggesting to Mattel's then-CFO which candidate would be the best fit for a senior position at the company, as well as who should not be hired," it said in a news release.

The action joined a rising tide of accounting and auditing enforcement actions initiated by the SEC in the past few years. According to a report published by Cornerstone Research, the SEC launched 83 such actions in fiscal year 2023, 22% higher than those documented in 2022 (68) and the highest number on record since fiscal year 2019.

Zaccaro, one of the Latham partners representing Abrahams, said in an interview that he felt that the SEC's decision to target only Abrahams, an auditor external to Mattel, and no Mattel employees amounted to "scapegoating."

Though the SEC did not provide a reason for its dismissal of the action against Abrahams, Zaccaro believes that it can be partially attributed to the U.S. Supreme Court's June decision in *SEC v. Jarkesy*, which ruled that the SEC's use of in-house administrative proceedings in seeking civil penalties against defendants charged with securities fraud was unconstitutional.

"I think what was on the SEC's mind was that they would continue to have to fight over the constitutionality of their administrative proceedings, and they were on the losing end of that battle," Zaccaro said. "I think they looked at the administrative cases that were being rigorously contested and decided it wasn't worth the effort to continue to pursue them. ... I think the SEC's administrative process is broken, period."

The SEC did not immediately respond to a request for comment.

NOT FOR REPRINT

Bloomberg Law News 2024-11-06T11:17:31519613456-05:00

# Kakao Mobility Fined by S. Korea Over Alleged Accounting Fraud

By Seyoon Kim2024-11-06T00:49:34388-05:00

South Korea's Securities and Futures Commission fines Kakao Mobility and some of its current and former executives 4.14b won over alleged accounting fraud and will refer the case to the prosecution for further investigation, according to statement from Financial Services Commission.

- The Securities and Futures Commission, a panel under FSC, to fine 3.46b won on Kakao Mobility, 340m won each on its CEO and former CFO for allegedly inflating revenues in preparation for an IPO
- NOTE: Kakao Mobility Fined \$55m by S.Korea for Monopolistic Activities

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Gareth Allan

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Nov. 5, 2024, 11:48 AM PST

# Matt Levine's Money Stuff: Algorithmic Pricing for Kale

By Matt Levine

Opinion

Bloomberg Law News 2024-11-06T09:46:59724709584-05:00

Matt Levine's Money Stuff: Algorithmic Pricing for Kale

By Matt Levine 2024-11-05T14:48:17701-05:00

Farmer's market power

Traditionally there are a lot of markets with many, diverse, disorganized, somewhat low-tech sellers. This creates the possibility of getting a bargain: Every so often, you will show up at a yard sale and there will be a Caravaggio for sale for \$20 and you will be like "the Caravaggio is \$20?" and the seller will be like "yes that seems like a fair price for a Caravaggio" and you will be like "ah yes I see." This does not happen that often, though yard sales are sort of the paradigmatic location for it.

I guess another classic case is rental apartments. There are a lot of landlords in big cities who are not fundamentally in the landlord business, who own the house they live in and also rent out a floor. Some of these people might rent to you at below-market rates, either because they like you for some non-pecuniary reason and are not totally motivated by money, or just because they don't know what the market rate is. Even small professional landlords who own one or two small apartment buildings might undercharge tenants because they are not up to speed on the latest market rates.

But that has changed, because "knowing what market rates are" is (1) a useful important skill for landlords, (2) not a skill that every landlord will naturally have and (3) pretty easy to automate. So we talked a while back about RealPage, which is approximately a piece of commercial software that ingests apartment rental market data and tells landlords how much they should charge.

You might assume that this sort of thing would reduce consumer surplus: It's harder to get a bargain on rent, if the landlords all know what the market rate is. Also the US Department of Justice is suing RealPage, arguing that this sort of automation is an antitrust problem, a way for landlords to collude to drive up rents. By sharing information about rents and then taking RealPage's recommendation, the theory goes, the landlords effectively cooperate to set prices.

There are probably other artisanal sorts of markets like this where giving all the sellers the same software will allow them to coordinate on prices and reduce random windfall consumer surplus. Here is a Marketplace story about farmer's markets:

Small-scale farmers staff the booths. They come from the surrounding rural communities. Their produce is painstakingly grown, and when they come to the market, they have to figure out how to price it. ...

Oftentimes, it leads to local farmers undercharging at the farmers market. Now, researchers want to help by giving farmers more data to make pricing decisions.

"[Farmers] can be nervous about setting the prices up where they really need to be," said Matt LeRoux, an extension associate at Cornell University.

LeRoux and a team of researchers have created weekly pricing reports for farmers. Producers can look up items like honeynut squash, cherry tomatoes or eggs and see how much they're selling for at farmers markets around New York State. ...

Farmers can sign up to be part of the project, and researchers connect to their point-of-sales system, Square.

Researchers collect the data and create weighted average prices for each item, and then post the reports online for free.

I do not think that the Justice Department will bring an algorithmic collusion antitrust case against Cornell for helping farmers drive up the price of kale at the farmer's market, but arguably that is kind of what is happening here.

### CVA hedges

A theme of modern finance that we often discuss around here is:

1. Historically, banks were good at making loans, because they had cheap funding: Banks had deposits, which were cheap, and they used that money to make loans and earn interest. You could start a loan fund and raise money from investors and make loans and try to compete with banks, but it was hard, because your cost of capital was much higher than theirs: You had to promise a return to investors to raise money, but a bank didn't have to pay its checking-account customers any interest.

- 2. So banks got very good at making loans. They've done it for a long time, it's their traditional business, they know their customers and communities, and they employ a lot of people to find borrowers and evaluate their creditworthiness.

- 3. But banks are, now, weirdly bad at *holding* loans. Banks are heavily regulated, and regulators impose high capital requirements for risky loans, so their cost of funding is actually pretty high. Meanwhile anyone can launch a private credit fund these days and raise bajillions of dollars from investors. Banks' balance sheets are no longer obviously cheaper and more abundant than anyone else's.

And so in various ways banks are in the business of finding borrowers, evaluating their credit and extending loans to them, but ultimately a lot of those loans, or at least their credit risk, end up somewhere else. A regional bank will make loans and then sell them to a big private credit firm, or a big bank will make loans and then do a synthetic risk transfer, buying insurance against the credit risk from a big credit investor. And private credit moves into more and more arcane bits of banks' lending.

One arcane sort of bank lending is winning derivatives trades. That is: Big banks have trading businesses, which do derivatives trades with hedge funds, corporate clients, etc. A swap trade like "in one year, I will pay you \$1 million for every dollar that Nvidia's stock price goes down, and you will pay me \$1 million for every dollar that it goes up" is, primarily, a bet on Nvidia's stock price. But it is also a bet on your creditworthiness. If we did that trade a year ago, you'd owe me about \$94 million today. What if you didn't pay me? That would be bad, for me. I probably hedged the trade — I probably shorted Nvidia stock to hedge the swap — and so if you just didn't pay me the \$94 million you owed me I'd have a huge loss.

Effectively I have loaned you \$94 million, though we didn't know that a year ago. A year ago, in expectation, I loaned you roughly \$0: Either Nvidia would go up and you'd owe me money, or Nvidia would go down and I'd owe you money, but we didn't know which would happen, and on day one neither of us owed the other anything.

So when a bank does a trade like this with a hedge fund, the bank is in a sense lending the hedge fund an uncertain but potentially large amount of money. And regulators require banks to have capital against the risk that their customers won't pay them back, which is called "credit valuation adjustment" or "CVA." And so the usual situation occurs:

1. Banks are, obviously, the best people to *make* these loans, which are not even loans. Banks have trading desks that are in the business of doing derivatives with clients, and sales forces to get those clients, and big credit departments to evaluate whether the clients are good for the money. "I will lend you an uncertain amount of money based on how much Nvidia goes up in a year" is a trade that kind of has to go through a bank.
- 2. But banks are not in a great position to *hold* these loans, because regulators impose expensive capital requirements on them.
- 3. So there is a market for private credit investors to take the risk.

Here's an International Financing Review article about CVA risk transfers:

Citigroup, Deutsche Bank and Natixis are among several banks that have crafted bespoke hedges over the past year or so against so-called credit valuation adjustment risks, in which banks account for the possibility of losses stemming from exposures to derivatives counterparties. That comes amid a rise in the number of investors, from credit insurers to hedge funds to sovereign wealth funds, that are willing to get paid to take these risks off banks' books.

These transactions come in different flavours but most have the same goal: finding a hedge for some of banks' thorniest (and often least liquid) derivatives exposures, while also releasing some of the hefty sums of capital that regulators require banks to set aside against these positions. That, in turn, can free up banks' credit lines and increase their capacity to do more business with clients. ...

These transactions can take several forms depending on a bank's hedging needs and the firm's willingness to take on the exposure. Contingent CDS, in which the hedge is directly linked to a bank's underlying derivatives trade with a counterparty, are popular because they can offer a more precise way for a bank to manage these risks. If a bank's exposure to its derivatives counterparty increases as interest rates rise or fall, for instance, then the amount of CDS protection it has bought against the counterparty will also increase.

Other instruments that have become more common include financial guarantees, risk participation agreements and credit insurance, which can be designed to provide banks with protection against a percentage of their exposure, capped at a maximum. The dynamic nature of many of these arrangements makes them particularly appealing for banks.

You do wonder a little bit about the incentives here, about the risk of adverse selection. If you are a trader at a bank, your main job is to do more trades that are positive expected value to you. If some hedge fund comes to you looking to do large trades that are positive expected value to you, you are like "this is great, those dopes, let's do as much as they want." But of course a hedge fund that wants to do lots of large trades that are positive expected value to you is not necessarily a *great* credit risk: If it loses money on all those trades it might blow up. Your risk managers and credit department, and your regulators' CVA capital requirements, will constrain your ability to do all those fun trades you want to do. But if you can sell the credit risk to sovereign wealth funds, and keep doing the trades, then that's great for you (you get the trades) and maybe not so great for the sovereign wealth funds (they get the blow-up).

## State Street

Elsewhere in private credit:

State Street's asset management arm is looking to buy a stake in a private credit or infrastructure manager, as one of the world's largest passive fund managers tries to boost its presence in the fast-growing realm of alternative assets.

"We are shopping" for either a full acquisition or a minority stake combined with product partnerships, Yie-Hsin Hung, chief executive of State Street Global Advisors (SSGA), told the Financial Times.

The \$4.7tn money manager wants to do a deal because it is behind rivals in offering nonlisted investments, including secondary funds that buy up stakes in existing private funds. Alternatives account for less than 5 per cent of SSGA's assets under management.

"The area is so well established [and] given the size of our clients and their need to build and invest in a meaningful size, it I think just makes more sense for us to either partner or take a stake in a much more established firm where it's one plus one equals three," said Hung, who was hired about two years ago.

Man, if you have spent 20 minutes doing leveraged finance at a bank, now is the time for you to start your own private credit firm. We talked last month about reports that HPS Investment Partners is considering selling itself to BlackRock Inc.; one HPS adviser was quoted saying “if you’re caught in a tidal wave, your boat will go faster.” I wrote:

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

And we talked again yesterday about BlackRock’s desire to get into private credit (for the fees and the valuation). Every traditional asset manager is going around saying “well we’re desperate to buy a private credit firm, do you know of any?” Surely this much demand will call forth some supply.

### Copycat ETFs

One way to think about exchange-traded funds, in modern usage, is that they are pre-packaged trade ideas. Like in the olden days you might go to your broker with an idea, or she might come to you with an idea, and the idea would be something like:

“I should put a ton of money into this one stock,”

- “I should buy one hot disruptive stock and short the company it is disrupting,”
- “AI” or “robots” or “teens” or “ meme stocks” or whatever, some sort of hot theme that can be expressed with a few stocks,
- “gold” or “ Bitcoin” or some other sort of non-stock exposure,
- doing stuff to avoid taxes,
- various sorts of options trades,
- “I want to diversify across the entire market and not try to pick winners, because academic finance research argues that that is better for most people,”
- etc.

All sorts of things, really. But each idea is somehow *thematic*; each has some sort of punchy one-sentence summary that makes you sound smart when you say it. “I think artificial intelligence will be big so I am buying the companies that will benefit from it,” rather than just a disjointed list of stocks you like.

And now all of those ideas come in ETF form, because that is convenient. These days, if you are an individual investor and you have some investing idea, you probably don’t go to your broker with the idea, because you don’t have a broker; you have an app on your phone. But you can go to that app and find an ETF representing your idea. Or if you do have a broker, you can call her (or she can call you) with an idea, she can just put you into the ETF for that idea instead of constructing a trade for the idea herself.

In the olden days a lot of brokers had the same ideas, and called their clients to pitch them, because after all there are only so many good punchy retail-friendly investment theses, they are not *that* hard to think up, and you can’t patent them. And things are no different today, Bloomberg’s Vildana Hajric reports:

As competition becomes more cutthroat, investment firms across both sides of the Atlantic have been launching funds with the same tickers as their competitors in another jurisdiction. It doesn't stop there: often these copycat funds have comparable allocation strategies, from niche commodity trades to high-octane technology investments.

That's because all of the biggest and best ideas have already been taken, said Ben Johnson, head of client solutions at Morningstar. ...

An informal analysis by Bloomberg found that there are currently at least 59 pairs of impersonators — or funds that share similar characteristics and the exact same four-letter ticker base — cross-listed in Europe and the US by different issuers.

In the US alone, there are more than 3,700 funds, meaning that any new entrants are competing in an already crowded arena and within offerings that span any number of ideas and themes. Against that backdrop, a fund's ticker can be a major differentiator as retail investors, in particular, tend to favor catchy or easy-to-remember monikers.

And so there's a US ETF called MOO, with an agricultural theme, and a European one with a similar theme called MOOO. Because there are only so many ideas, and you can't patent them, and the catchiest ideas come with catchy tickers.

### Accountant surplus

We have talked a few times about a looming shortage of accountants, so I suppose I should point out some contrary evidence:

KPMG is laying off hundreds of employees in its U.S. auditing business as it works to make up for lower levels of voluntary turnover.

The Big Four accounting firm last week notified about 330 people, or nearly 4% of its roughly 9,000-person U.S. audit workforce, that they would be let go in the coming weeks, people familiar with the matter said. The cuts have focused on employees such as associates and managers, and included no partners, the people said. ...

PwC's U.S. unit recently laid off about 1,800 workers, some of which worked in audit, The Wall Street Journal reported.

Meanwhile, audit firms have struggled to find sufficient skilled accounting personnel, part of a deepening shortage in the profession. KPMG, which has said it isn't experiencing a shortage, last month supported allowing prospective accountants to bypass a fifth year of school to make the path to a state accounting license less expensive. Many states are exploring changes to certified public accountant licensing laws to provide an alternative.

"Today, we can recruit the talent we need, but the shortage is already impacting our profession, as well as businesses," Paul Knopp, chief executive of KPMG's U.S. unit, said in a LinkedIn post at the time.

I suppose the shortage story is something like “sure the Big Four audit firms can still hire accountants to audit companies’ financial statements, but there aren’t enough accountants to work at the companies and actually write the financial statements.” I guess the auditors that KPMG lays off can go work for the companies, though.

### Will Elon Musk divest his stock holdings to go into public service?

One popular but frankly odd theory of Elon Musk goes like this:

1. Elon Musk is the richest person in the world, based mostly on the value of his stake in Tesla Inc.
- 2. Musk would like to diversify out of his Tesla stock.
- 3. The simple way to do that — sell the stock and buy other stuff — has some problems. He would incur a large tax bill, for one thing. But also, selling Tesla stock would be a bad *signal*: Tesla’s stock price, in this theory, reflects not just the underlying value of Tesla’s business but also Musk’s fans’ meme-like devotion to him personally, and if they knew he was dumping Tesla then the value of his stock would evaporate.
- 4. Therefore, on this theory, the trick is for Musk to find a way to sell his Tesla stock alongside some sort of distraction, so that people will say not “Musk is dumping Tesla” but rather “Musk is doing some other weird cool thing, and understandably he needs to sell some Tesla stock to do it,” so the stock stays high.

You saw this theory a lot when Musk was in the process of buying Twitter Inc. in 2022: He sold a bunch of Tesla stock to pay for Twitter, diversifying his portfolio a bit, but the story was not “Musk is selling down his Tesla stake” but rather “here’s a new thing Musk is doing.” I don’t think the theory was very compelling then, because Twitter was not a very good diversifier for his portfolio (it seems to have lost a ton of value!), but it’s a theory. Or, earlier, Musk sold a bunch of Tesla stock but wrapped it up in a Twitter poll about tax policy to create a nice distraction.

I don’t *love* this theory or anything, but I understand it. It is a theory of the form “Elon Musk seems to do a lot of weird stuff, but here is a rational overlay on his weird stuff that would make it make sense.” I understand the urge to make things make sense. But not everything has to make sense.

Anyway at the Wall Street Journal Spencer Jakab writes about section 1043 of the US tax code, which allows employees of the executive branch of the US government to defer capital gains on property that they sell to meet conflict-of-interest requirements when they join the government. Jakab:

Elon Musk ... has been a major financial backer of Republican presidential candidate Donald Trump and has been floated as a government “efficiency czar.” He wrote on his social-media network, X, that “I look forward to serving America if the opportunity arises. No pay, no title, no recognition is needed.”

A 34-year-old law might make a transition pretty lucrative, though. With most of Musk’s estimated \$200 billion-plus fortune in shares of companies such as Tesla and SpaceX, and Musk still fighting for a controversial \$46 billion option award from Tesla, he could sell those stakes and defer capital-gains taxes —potentially forever—by putting them into government securities or diversified mutual funds.

Again I do not actually believe a theory like “Elon Musk has decided to back Donald Trump and volunteer to serve in his administration in order to sell his Tesla stake and invest the proceeds in a diversified portfolio without paying taxes or sending negative signals about the value of Tesla.” For one thing, I am not convinced that actually doing that would be a good financial trade for him, or that he would *want* to diversify out of his portfolio of Mars-ish companies. For another, I doubt anyone in a Trump administration would care about conflicts of interest, and Musk would clearly just keep his Tesla and SpaceX stakes while also overseeing government efficiency. Still it is a fun theory, reducing Musk’s recent political turn to a way to save on capital gains taxes.

Elsewhere here is some speculation that Musk would buy Trump Media & Technology Group, why not.

### Things happen

Goldman Plans to Promote Biggest Partner Class of Solomon Era. Palantir Reports Record Profit, Cites ‘Unwavering’ AI Demand. Nuclear-Power Companies Hit by U.S. Regulator’s Rejection of Amazon-Talen Deal. Boeing Bankers Grab Up to \$300 Million in Capital Raise Fees. Meet Musk’s Fixer, the Powerful Executive Reshaping Tesla. Super Micro Faces Potential Delisting, S&P 500 Removal Amid Auditor Woes. Mystery Surrounds Discovery of TSMC Tech Inside Huawei AI Chips. Contraband Whiskey and a Secret Royal Dinner: Wall Street Goes to Riyadh. KKR Gets Over Third of Fuji Soft After Tender Offer First Stage.

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- 1. Do you know about the Chartreuse shortage? My local liquor store did not, when I came in to buy three bottles of Chartreuse. But I told them, because I am nice, and because they asked why I was buying so much Chartreuse.
- 2. Well, \$940 million, given Nvidia’s stock split in June, but never mind, you know what I mean, \$1 million per point of current stock price.
- 3. To be clear, it would be pretty common in a trade like this, or many other derivatives trades, to have collateral and variation margin, so that as your obligation to me grew you’d give me more collateral, and I didn’t just show up with a \$94 million bill at the end of a year. But (1) for various reasons many derivatives trades are uncollateralized and (2) even collateralized trades have a lot of credit risk as, for instance, Archegos’s banks know. The IFR story notes: “Much of the focus is on long-dated uncollateralised exposures in which the bank’s derivatives counterparty doesn’t have an active CDS market. However, regulations also incentivise banks to hedge collateralised exposures to cover the risk of the bank not collecting enough margin before its counterparty defaults. These hedges tend to be more costly because banks don’t usually bake credit charges into the price of the underlying derivative contract in the same way they do with uncollateralised trades.”

- 4. That is, the derivative has some value — here you owe me about \$94 million, which is the value of the derivative to me — and then you have to adjust the value for the credit risk that someone won't pay you.
- 5. Not exactly the same ticker, but pretty close. Many other pairs share exactly the same ticker, one in the US and one in Europe.

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**Archer Daniels Midland Co**

## ADM calls off investor webcast after new confusion over its accounts' reliability

Company's share price fell almost 12% in early trade as it vowed to work 'diligently' to finalise financial statements



ADM chief executive Juan Luciano. The commodities group is one of a few companies that dominate the international trading and processing of grain and oilseeds © Joshua Roberts/Reuters

**Robert Wright** in London YESTERDAY



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Commodities trader Archer Daniels Midland cancelled its quarterly results call with investors on Tuesday after finding financial-reporting errors, the latest mishap for a company that put its finance director on leave earlier this year.

Chicago-based ADM fell as much as 11.5 per cent in early trade, the most since it [first announced](#) accounting problems at its nutrition unit and delayed the publication of financial results in January. The stock has lost 26 per cent since the January announcement and was last trading at \$50.65.

The company [said](#) it had called off a webcast scheduled for 9am Chicago time to discuss third-quarter results, which were released on Tuesday, so that it could work “diligently” to “finalise” its financial statements.

It stressed that the published figures for the three months to September 30 were preliminary and unaudited.

[ADM](#), one of a few companies that dominate the international trading and processing of grain and oilseeds, was plunged into crisis in January when it announced a probe into accounting practices and put finance chief Vikram Luthar, who has since resigned from the company, on administrative leave.

The company also cut its forecast for full-year adjusted earnings per share, a measure that excludes the effect of some debt types and lease obligations, from a range of between \$5.25 and \$6.25 to between \$4.50 and \$5.

Chief executive [Juan Luciano](#) said the integrity of ADM’s internal controls and financial reporting was “very important” and that the company was “committed to continued strengthening of our internal financial controls”.

Net earnings for the quarter fell to \$18mn, from \$821mn in the corresponding period last year, after the company wrote down about \$500mn in investments. The value of the writedowns jumped from \$54mn in the third quarter of 2023.

The charges were mainly due to a \$461mn write-off of the value of ADM’s holding in Wilmar International, a Singapore-listed food processor.

Luciano said that the carbohydrate solutions division — which makes starch, flour and other corn and wheat products — had achieved “strong results”. But ADM’s two other main segments, nutrition and ag services and oilseeds, had delivered “results below expectations”.

“We are taking the necessary actions to improve performance and drive continued value creation,” Luciano said.

The restatements relate to confusion relating to reporting of figures that were reported as sales between different segments of ADM (intersegment) that were in fact within an individual segment (intrasegment). The company said that it had found further misclassified sales when testing its new systems.

“These newly identified errors concern additional intersegment sales for each of its ag services and oilseeds, carbohydrate solutions and nutrition segments that included certain intrasegment sales and should have included exclusively intersegment sales,” the company said.

ADM said it was working with the US Securities and Exchange Commission on restatements to its 2023 results, as well as those for the first and second quarters of 2024.

ADM did not say when it would publish the restated figures, but stated that it was working to complete the process “as soon as reasonably practicable”.

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# Super Micro Faces Delisting, S&P 500 Removal Amid Auditor Woes

By Carmen Reinicke and Brody Ford

- Company is due to provide a business update after market close
- Stock is down more than 75% from March high as filings delayed

Bloomberg Law News 2024-11-06T09:44:03013860459-05:00

Super Micro Faces Delisting, S&P 500 Removal Amid Auditor Woes

By Carmen Reinicke and Brody Ford2024-11-05T13:54:20278-05:00

- Company is due to provide a business update after market close
- Stock is down more than 75% from March high as filings delayed

Super Micro Computer Inc. started the year as a hot artificial intelligence trade. But just eight months after shares hit a record high, investors are asking whether the server maker will be delisted by Nasdaq Inc. and booted from the S&P 500.

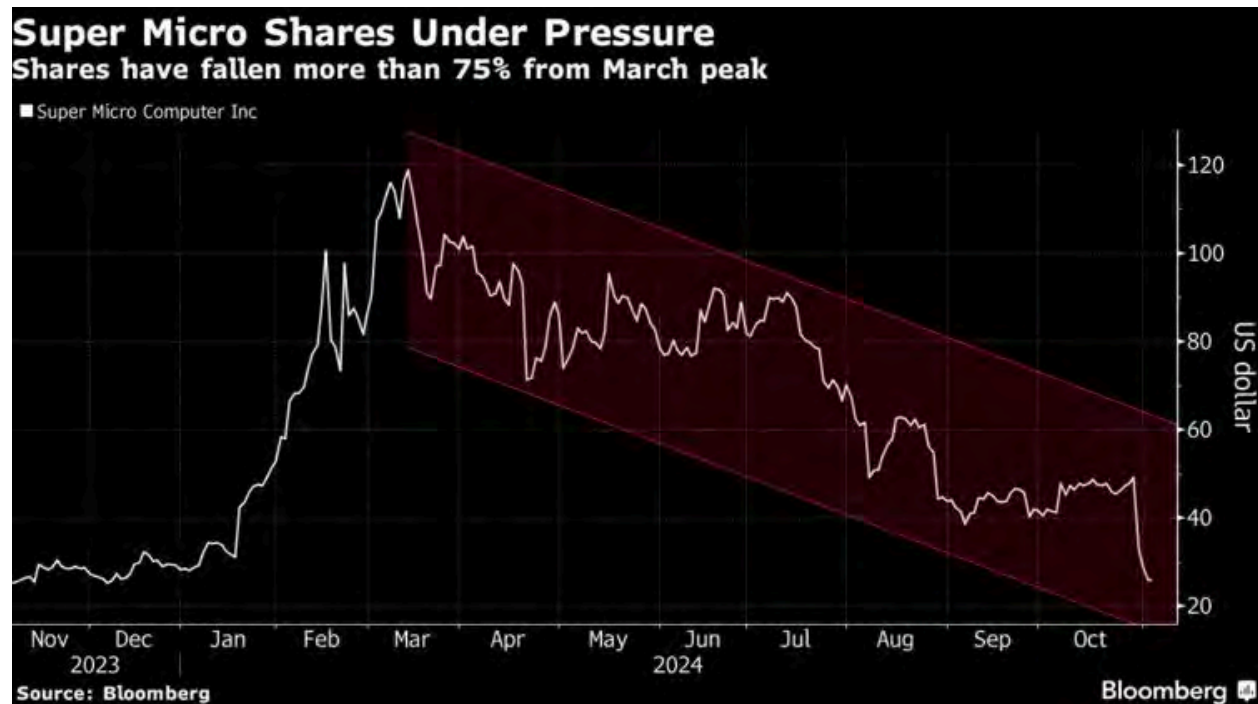
The troubled firm — which has seen shares plummet more than 75% since March — is due to give a business update on Tuesday after the close. Top of mind is what it says about meeting Nasdaq Inc.'s compliance obligations following the resignation of auditor Ernst & Young LLP last week. The auditor cited concerns about Super Micro's commitment to integrity and ethics — a blow that follows a US Department of Justice probe and a damaging short-seller report earlier this year.

The stock was up 1.2% midday in New York after reversing an earlier loss. Options data signal that traders see shares moving as much as 20% in either direction after the company's business update.

Super Micro's listing status was already looking shaky after it failed to file its annual 10-K report by an August deadline. Nasdaq rules give the company until mid-November to submit a plan to restore it to compliance, and if that plan is approved, it could get extra time — pushing the deadline to February 2025. But the resignation of Ernst & Young makes that more challenging.

"I think that they probably end up getting delisted just because of the timelines involved," Wedbush analyst **Matt Bryson** said in an interview. "How do they get their 10-K out in just a few months when they don't have an auditor and their last auditor resigned?"

Representatives for Super Micro, Nasdaq and S&P Global, which owns the S&P 500 Index, declined to comment.



A Nasdaq delisting would be the latest development in a tumultuous year. Super Micro shares were flying high at the start of 2024, with Wall Street enthusiastic about AI-fueled demand for its high-powered data center servers, and the company winning inclusion in the S&P 500. But investors have been bailing as issues pile up, with the 10-K filing delay followed by news that regulators are looking into an ex-employee's claims that the company sought to overstate its revenue.

At the time of Ernst & Young's resignation, Super Micro said it doesn't expect the issue to lead to restatements of previously issued financial reports, and that it has begun the process of identifying another auditor.

But some analysts are more wary. "We now believe there is meaningful risk that prior financial statements may have to be restated once a new public accounting firm is hired," Needham analysts led by **N Quinn Bolton** wrote last week, suspending coverage on Super Micro shares.

A Nasdaq delisting could also trigger removal from the S&P 500 — leading to forced selling of the shares by institutions, according to Bloomberg Intelligence analysts led by **Woo Jin Ho**. He added that about 24% of Super Micro's shares are held in passive funds, and about 8% are owned by S&P 500-related funds.

It wouldn't be the first time that Super Micro has been delisted. The company was delisted in 2019 after failing to meet deadlines to file a 10-K and several quarterly reports. It got approval to rejoin in 2020. The same year, Super Micro resolved an investigation by the US Securities and Exchange Commission into its accounting by paying a \$17.5 million penalty. Super Micro didn't admit to or deny the regulator's allegations as part of its settlement.

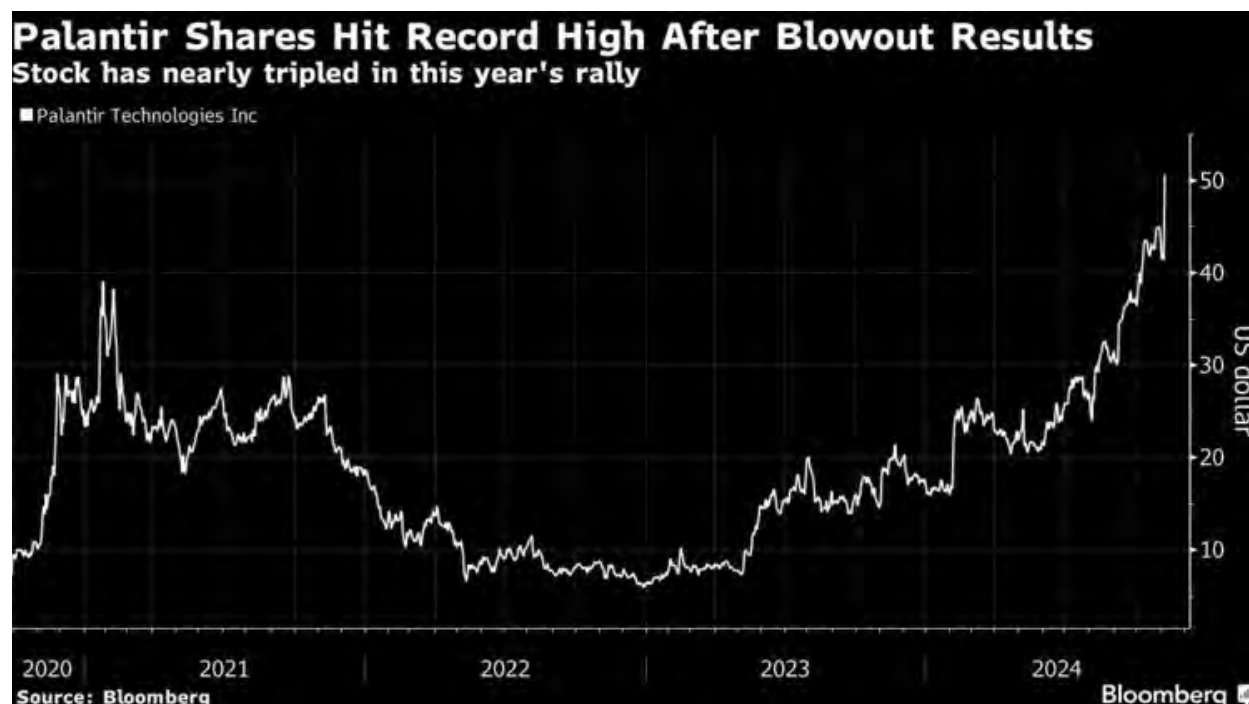


Wedbush analyst Bryson noted that the last time Super Micro was delisted, growth stalled for two years. Customers can be spooked by financial issues because it may suggest disruption in the company's ability to deliver products in a timely way, he added.

Bloomberg Intelligence's Jin Ho agrees. "While any impact on sales won't be immediate, risks for order cancellations will grow given the rising number of alternative rivals to its still-dominant position in AI servers for data centers," he wrote.

Dell Technologies Inc. could be a potential beneficiary, he added.

## Tech Chart of the Day



Palantir Technologies Inc. shares are up more than 20% Tuesday after the data-analysis software company reported third-quarter results that beat expectations on “unwavering” AI demand. The company also raised its forecast for operating income in the current period, with analysts noting strong demand for AI applications from enterprise clients.

## Top Tech Stories

- Amazon.com Inc. said it's committed to building a data center campus adjacent to a Pennsylvania nuclear plant after the top US energy regulator rejected a special deal to power the facility.
- Apple Inc. is exploring a push into smart glasses with an internal study of products currently on the market, setting the stage for the company to follow Meta Platforms Inc. into an increasingly popular category.
- Apple's major manufacturing partner Hon Hai Precision Industry Co. reported its slowest monthly sales growth since February, stoking concerns about demand momentum for both AI infrastructure and iPhones.
- Apple has proposed investing almost \$10 million to make additional goods in Indonesia, according to people familiar with the matter, as it seeks to have the country's ban on sales of its latest iPhone removed.
- OpenAI is advancing in its bid to transform the non-profit structure of the \$157 billion company into a for-profit business by having preliminary discussions with regulators.

## Earnings Due Tuesday

- Premarket
- Gartner
- GlobalFoundries

- Novanta
- Sequans
- Gogo
- Consolidated Comms
- Postmarket
- Microchip
- Super Micro Computer
- Qualys
- Bigbear.ai
- Vishay Precision
- Frontier
- Lumen Technologies
- Vtex

(Updates stock move, adds options data in second paragraph.)

--With assistance from **Subrat Patnaik**.

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**Super Micro Computer, Inc.****Super Micro says review found 'no evidence' of fraud after auditor resigned**

Server maker's shares fall further after release of lacklustre preliminary results



Super Micro Computer chief executive Charles Liang, right, with Nvidia CEO Jensen Huang © Annabelle Chih/Bloomberg

**Michael Acton** in San Francisco YESTERDAY



Super Micro Computer said on Tuesday that an independent probe into concerns flagged by former auditor EY had turned up no evidence of fraud or misconduct by its management or board, but its shares fell as it said it was unsure when it would file its annual report with regulators.

The server maker's stock, which had soared off the back of hype surrounding artificial intelligence, had [fallen by one-third](#) last week after EY said it was resigning as its auditor.

In [a filing on Tuesday](#) Super Micro said that an independent special committee given the task of conducting a review into EY's concerns had found "no evidence of fraud or misconduct on the part of management or the board of directors".

"The committee is recommending a series of remedial measures for the company to strengthen its internal governance and oversight functions," it added, saying the committee expected to deliver a full report on its three-month investigation in the coming days.

Super Micro added that it was still unsure of when it would be able to file its annual 10-K report with regulators, which had been due at the end of August. Its shares were down about 16 per cent in after-hours trading.

“We are actively in the process of engaging a new auditor,” chief executive officer Charles Liang told investors on an earnings call. “We are working with urgency to become current again with our financial reporting.”

Super Micro also released preliminary quarterly results on Tuesday that were slightly below expectations. It said it expected revenue for the quarter to the end of September of between \$5.9bn and \$6bn, at the low end of the company’s prior guidance and below consensus estimates of \$6.5bn.

It said it expected revenue of between \$5.5bn and \$6.1bn for the current quarter to the end of December, below Wall Street estimates for \$6.8bn.

Silicon Valley-based Super Micro, a key partner to \$3.4tn artificial intelligence chipmaker Nvidia, has been one of the top beneficiaries of booming investor enthusiasm for AI infrastructure, with its shares soaring more than 1,000 per cent between the start of 2023 and their peak in March of this year.

But it has fallen sharply since then. In September the Wall Street Journal reported that the US Department of Justice was investigating the company, after a [short seller report](#) alleged accounting manipulation.

EY was hired by Super Micro in the middle of last year, and it had been carrying out its first audit of the company. It said its resignation was “due to information that has recently come to our attention which has led us to no longer be able to rely on management’s and the audit committee’s representations”. Super Micro said at the time that it disagreed with EY’s decision but was taking its concerns seriously.

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Bloomberg Law News 2024-11-06T11:22:2763249374-05:00

## Binance Asks to Ax SEC Claims, Says Crypto Sales Not Securities

By Martina Barash 2024-11-05T15:36:34000-05:00

- Companies behind Binance.US dispute their need to register
- SEC didn't show sales were securities transactions, they say

The SEC failed to adequately plead claims that the Binance.US cryptocurrency exchange violated securities laws by failing to register as an exchange, broker, and clearing agency, according to the two companies that operate the platform.

Sales of digital assets on the secondary market, from one purchaser to another, don't meet the criteria for securities transactions, [BAM Trading Services Inc.](#) and BAM Management US Holdings Inc. said in a filing Monday in the US District Court for the District of Columbia. Instead, crypto tokens are commodities, and the BAM companies aren't required to register with the Securities and Exchange Commission, they said.

Judge Amy Berman Jackson previously [allowed](#) the three claims targeted here to proceed, while [saying](#) the SEC failed to sufficiently allege some claims against [Binance Holdings Ltd.](#), with which the companies are affiliated, and its founder, Changpeng Zhao.

The SEC filed a new [version](#) of its complaint with additional allegations, and the BAM entities asked that the failure-to-register claims against them should be dismissed, along with any other claims based on secondary sales of digital assets.

The crypto industry has been litigating whether digital assets—and transactions involving them—satisfy the test for investment contracts under the US Supreme Court's 1946 opinion [SEC v. W.J. Howey Co.](#) and are therefore securities.

"The SEC spilled substantial ink attempting to strengthen its allegations but still failed to sufficiently allege that any secondary sales of crypto assets on BAM were sold as investment contracts," the Binance affiliates said.

The SEC continues to rely on a “flawed theory,” rejected by Jackson, that “that the crypto asset itself is the security and remains a security” as it is bought and sold, they said.

“To sufficiently plead that secondary sales of crypto assets were part of an investment contract, the SEC must show an investment of money in a common enterprise,” they said. “It cannot.” The same is true for a requirement to “show a linkage to the efforts of others,” they said.

Crypto assets are commodities, regulated by the Commodity Futures Trading Commission, they argued. “The SEC’s misreading of *Howey* continues to improperly limit the CFTC’s jurisdiction and impede its Congressionally mandated role to regulate the commodities markets,” they said.

The SEC represents itself. Gibson, Dunn & Crutcher LLP represents Binance. Milbank LLP, Paul Hastings LLP, and Katten Muchin Rosenman LLP represent the BAM entities. Quinn Emanuel Urquhart & Sullivan LLP represents Zhao.

The case is [SEC v. Binance Holdings Ltd.](#) , D.D.C., No. 1:23-cv-01599, motion 11/4/24 .

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Bloomberg Law News 2024-11-06T11:19:38392821324-05:00

## 'A New American Renaissance:' Crypto Celebrates Trump's Return

By Anna Irrera and Emily Nicolle2024-11-06T07:39:37842-05:00

Crypto advocates took a victory lap on Wednesday as the vast amounts of money they poured into the US elections yielded huge dividends, from Donald Trump's reelection to down-ballot wins for politicians friendly to the sector.

Once a crypto skeptic, Trump corralled tens of millions of dollars in industry support for Republican candidates by promising to make America the Bitcoin superpower of the world. On the campaign trail this summer, he pledged to fire US Securities and Exchange Commission Chair Gary Gensler, create a government-owned Bitcoin reserve and ensure all future Bitcoin is mined on US soil.

Bitcoin jumped to a fresh record on Wednesday as Trump barreled towards reelection. Tokens from Ether to Uniswap also rallied.

Some of the sector's largest companies and wealthiest entrepreneurs, including Coinbase Global Inc., the Winklevoss twins and Ripple Labs Inc., poured unprecedented amounts of money into the race. Fairshake, a pro-crypto super PAC, spent over \$180 million on ensuring candidates who supported the industry would secure their place in the Senate and House of Representatives.

"We are on the brink of a new American Renaissance," said **Tyler Winklevoss**, co-founder of crypto exchange Gemini Trust Co., in a post on X on Wednesday.

Here's how some other crypto advocates and executives, from El Salvador President **Nayib Bukele** to Coinbase Chief Executive Officer **Brian Armstrong**, reacted to the election results and interpreted the market moves:

### Timo Lehes, co-founder at Swarm Markets:

"Crypto markets see Trump as much more favorable to the sector than a Harris administration might

have been. This comes principally down to the view of how regulators in the US treat crypto. If we look at the last four years of the Biden administration, then this tells you all you need to know about how crypto has been treated by the Democrats.

Of course we had the FTX disaster among others, but beyond that the targeting of the sector has been pointed. The Trump relief rally here is a euphoric response to the potential for this regulatory bullying to now end."

Read More: Crypto's Millions Yield Win as Moreno Takes Ohio Senate Race

## **Anatoly Crachilov, CEO of Nickel Digital:**

"Bitcoin's overnight price action reflects market expectations for constructive crypto policies under the incoming president and his technocratic team. This shift signals an end to regulation-by-enforcement, creating a new opportunity for the US to establish itself as a global leader in the digital asset space. [...] The focus now shifts to implementing the crypto-friendly policies promised on the campaign trail, a key factor for the market's current optimism.."

## **Seth Hertlein, global head of policy at Ledger:**

"It's been a historic year for crypto on the ballot. We are now seeing across political lines that the force of crypto is undeniable, particularly across pro-crypto congressional candidates."

## **Toby Lewis, co-founder of OrdinalsBot:**

"A Donald Trump victory was what the crypto markets were waiting for, and clearly this market reaction with a massive rally was expected. Plans for a Bitcoin standard, stated intention to fire Gary Gensler and a much more pro crypto policy in general should see a more welcome environment for crypto in the US. The Democrats in terms of crypto policy were frankly stuck in the past."

--With assistance from **Sidhartha Shukla**.



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# Meta Ruling Will Fuel Class Actions, Chamber Warns Justices

By **Jared Foretek**

Law360 (November 5, 2024, 5:39 PM EST) -- Business organizations are backing Meta's appeal of a Ninth Circuit ruling upholding damages class certification for a group of Meta advertisers claiming they were misled about Facebook's ad tools, with the industry outfits telling the U.S. Supreme Court that the Ninth Circuit is out of sync with other circuits on class questions.

In a new friend-of-the-court brief Monday, the U.S. Chamber of Commerce, the Computer & Communications Industry Association and the Software & Information Industry Association urged the high court to take up Meta's October certiorari petition, arguing that the Ninth Circuit has "watered down" Rule 23 restrictions on consumer-fraud class actions and failed to uphold requirements for a "rigorous analysis" before class certification is granted.

Meta is asking the justices to review the Ninth Circuit's **split-panel ruling** from March, in which a majority agreed to affirm a California federal judge's certification of an advertiser damages class that could include more than three million members. The plaintiffs claim Meta knowingly overpromised on the reach of some of its advertising tools by telling customers that "potential reach" figures represented people, not just accounts.

In August, the circuit court **rejected** Meta's request for an en banc rehearing, setting up the company's certiorari petition.

Now, the business associations are telling the court that the Ninth Circuit has gone too far in weakening the predominance rule for consumer fraud claims, which they say often fail because of their individualized nature. The predominance rule requires that the same evidence of harm and questions of law apply to members of the class and predominate over individualized issues.

"This case is a textbook example" of the Ninth Circuit's disconnect with other circuits, the groups say in their new brief. "Meta showed individualized Potential Reach estimates to each of the more than three million class members, and each class member placed its own individualized degree of weight on Meta's estimates. Deciding whether Meta's alleged misrepresentations were material to each class member and whether each class member relied on those alleged misrepresentations would thus require millions of particularized inquiries."

The "particularized inquiries," they say, "dwarf any common questions" of the class.

The circuit court held that when a defendant takes a "common course of conduct" toward class members, the predominance standard is often met. But according to the business groups, that makes for an all-too-easy bar for plaintiffs to reach.

Almost all consumer fraud plaintiffs can plead common conduct toward them "in at least some sense," the groups argue, but that isn't the only standard most proposed classes are held to elsewhere.

According to the Chamber, the CCIA and the SSIA, the "common-course-of-action" test was first developed for securities fraud cases. But in the typical securities fraud case, investors can say that they relied on "the integrity of the stock market's price," the groups write, clearing the way for them to meet their Rule 23 requirements through "the fraud-on-the-market theory" when it would otherwise be nearly impossible for a large group of investors to bring class claims.

"The court has erroneously taken a common-course-of-conduct test that was developed for securities-fraud cases and redeployed it in consumer-fraud cases," the groups write. "Because the test focuses solely on the defendant's conduct and disregards the individualized ways in which that conduct affects members of the class, its use in consumer-fraud cases will make class certification in those cases the norm."

Other circuits have already rejected the application of the standard to consumer fraud cases, the groups say, pointing to a decision from then-Second Circuit Judge Sonia Sotomayor in 2002's *Moore v. PaineWebber*, in which she wrote that "a common course of conduct is not enough to show predominance."

And the importation of the common-cause standard would reduce the predominance requirement to a "box-checking exercise" for consumer fraud cases, the groups argue.

"As this Court noted in [2011's *Wal-Mart Stores v. Dukes*], any 'competently crafted class complaint literally raises' common questions," they write. "Any competently crafted fraud complaint can likewise frame the defendant's course of conduct 'as common' on at least some level."

Attorneys for the plaintiffs did not immediately respond to Law360's request for comment.

The advertisers are represented by Geoffrey Graber, Andrew N. Friedman, Karina G. Puttieva, Madelyn Petersen and Eric A. Kafka of Cohen Milstein Sellers & Toll PLLC, and Charles Reichmann.

Meta is represented by Samir Deger-Sen, Nikita Kansra, Melanie M. Blunschi, Roman Martinez, Andrew B. Clubok, Susan E. Engel, Christine C. Smith and Margaret A. Upshaw of Latham & Watkins LLP.

The amici are represented by Erik R. Zimmerman, Jordan T. DeJaco and Matthew S. Queen of Robinson Bradshaw & Hinson PA.

The U.S. Chamber of Commerce is represented in-house by Jennifer B. Dickey and Jordan L. Von Bokern.

The Computer & Communications Industry Association is represented in-house by Stephanie Joyce.

The Software & Information Industry Association is represented in-house by Paul N. Lekas.

The district court case is *DZ Reserve et al. v. Meta Platforms Inc.*, case number 3:18-cv-04978, in the U.S. District Court for the Northern District of California. The Supreme Court case is *Meta Platforms, Inc., fka Facebook, Petitioner v. DZ Reserve, et al.*, case number 24-384, in the U.S. Supreme Court.

—Additional reporting by Bryan Koenig and Lauren Berg. Editing by Emily Kokoll.



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## Meta Owed No Coverage For Social Media MDL, Hartford Says

By **Ganesh Setty**

Law360 (November 5, 2024, 4:48 PM EST) -- Two Hartford units told a Delaware state court they should have no duty to defend Meta Platforms Inc., parent of Facebook and Instagram, against numerous lawsuits accusing the social media giant of deliberately designing its platforms to be addictive to adolescents and concealing its harmful effects on them.

Seeking **declaratory relief** Friday against Meta and related entities, Hartford Casualty Insurance Co. and Sentinel Insurance Co. Ltd. said underlying lawsuits specifically brought by governments and school districts don't allege damages "because of" bodily injury or personal and advertising injury as required under the Meta policies' coverage grant.

Instead, the public nuisance lawsuits seek damages for "general, non-derivative economic losses that are not based on allegations that plaintiffs treated (or paid for treatment of) injuries to any specific individual," Hartford maintained, echoing the **same arguments** insurers have successfully raised when seeking to avoid defending underlying opioid litigation.

Hartford further invoked exclusions barring coverage for expected or intended bodily injury, and for bodily or personal and advertising injury arising from "any" alleged violation of "any statute" limiting the distribution of information.

The latter exclusion, however, further carved out an exception for claims arising from the Telephone Consumer Protection Act and The Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, according to court filings.

The underlying lawsuits center on Meta's Facebook and Instagram subsidiaries, and have been consolidated in **California federal court**, where similar claims have also been lodged against Snap Inc., TikTok Inc. and YouTube LLC. Hartford said it's been defending Meta under a reservation of rights.

The lawsuits not only include those filed by individual plaintiffs, but also lawsuits brought by local governments, school districts and state attorneys general. Those latter suits have argued that widespread, excessive social media use by adolescents has created a public nuisance, increasing costs to provide proper mental health services at schools and further increasing the resources needed to investigate and prosecute crimes that have allegedly arisen from the use of social media platforms.

The Hartford units said they collectively insured The Face Book Inc., Meta's predecessor, under policies spanning between October 2004 and October 2007, and a separate policy to an Instagram predecessor entity running between December 2011 and December 2012.

Aside from the exclusions barring coverage for expected or intended bodily injury, Hartford cited an exclusion barring coverage for bodily injury or personal and advertising injury because of "the rendering of or failure to render any professional service." Professional services were defined in turn as "computer consulting, design or programming services, including website design."

Hartford also argued it should owe no coverage for any underlying lawsuits or claims that fall outside its insuring period.

Friday's declaratory action further names other insurers as defendants, saying that their interests in

the coverage dispute "will be prejudiced if this action is litigated in their absence."

Representatives of the parties did not immediately respond to a request for comment Tuesday.

Hartford is represented by James P. Ruggeri and Sara K. Hunkler of Ruggeri Parks Weinberg LLP and Thad J. Bracegirdle, Sarah T. Andrade and Emily L. Skaug of Bayard PA.

Counsel information for the other parties was not immediately available.

The case is Hartford Casualty Insurance Co. et al. v. Instagram LLC et al., case number N24C-11-010, in Delaware Superior Court.

--Additional reporting by Dorothy Atkins and Shane Dilworth. Editing by Bruce Goldman.

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# Bright Health Beats Investor Suit Over COVID-19 Costs

By **Emilie Ruscoe**

Law360 (November 5, 2024, 6:22 PM EST) -- The health insurer previously known as Bright Health Group Inc. no longer faces a proposed investor class action after a Brooklyn federal judge found that the company's initial public offering risk disclosures hadn't deliberately misled investors about its anticipated costs amid the COVID-19 pandemic.

In a Friday order, U.S. District Judge LaShann DeArcy Hall said that Bright Health investor Winston Van hadn't plausibly alleged that certain future risks to the company's business had already materialized when the company warned would-be investors about their potential impact in public filings made ahead of its June 2021 IPO.

"Plaintiff has not, and cannot, plausibly allege that [Bright Health] knew exactly how a combination of the [Affordable Care Act's extended open enrollment growth] and the COVID-19 Delta variant would impact its business," Judge Hall said, finding that as a result, the complaint didn't state a claim under the provisions of the federal Securities Act.

Bright Health, which rebranded to NeueHealth in January, was founded in 2015 and grew rapidly over six years before going public, Judge Hall said Friday, noting that the company served over 600,000 consumers at the time of its IPO.

The court pointed to specific statements in the company's public filings, including its warning that its growth put "significant demands" on the company and its cautioning that its risk adjustment programs were fallible, especially since available historical data might be limited or less than fully predictive.

The company also highlighted the uncertainty created by the pandemic, telling prospective investors that "to the extent the COVID-19 pandemic continues to adversely affect our business and financial results, it may also have the effect of heightening many of the other risks" the company faced.

The latest version of the investor complaint points to declining trading prices for the company's shares after it acknowledged, in November 2021 and March 2022, that its net losses in 2021 had been much higher than the company had projected they'd be.

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

Van and the class are represented by Francis P. McConville and David J. Schwartz of Labaton Keller Sucharow.

Bright Health and the other named defendants are represented by Joseph M. McLaughlin and George S. Wang of Simpson Thacher & Bartlett LLP.

The case is *Marquez v. Bright Health Group Inc. et al.*, case number 1:22-cv-00101, in the U.S. District Court for the Eastern District of New York.

—Additional reporting by Katryna Perera. Editing by Emily Kokoll.



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# Lululemon Brass Face Derivative Suit Over Inventory Issues

By **Emilie Ruscoe**

Law360 (November 5, 2024, 9:20 PM EST) -- Officers and directors of activewear retailer Lululemon Athletica Inc. have been hit with a shareholder derivative suit alleging they concealed challenges including inventory allocation that ultimately hurt the company's sales.

In a complaint filed Monday in Manhattan federal court, plaintiff Denish Bhavsar takes aim at the company's CEO, chief financial officer and 10 directors with claims they breached their fiduciary duties after the company touted "strong" financial results and "powerfully resonat[ing]" product offerings before later acknowledging allegedly disappointing 2023 revenue growth.

Bhavsar also points to July when the company announced it would pause sales of its just-launched Breezethrough yoga wear line. The decision to take the line off the market came after a media report cited analysts stating that the launch had been fumbled by inconsistent allocation.

"The individual defendants willfully or recklessly made and/or caused the company to make false and misleading statements that failed to disclose, inter alia, that the company was experiencing issues with its inventory allocation and color palette execution [and] as such, the company's launch of the Breezethrough leggings underperformed," Bhavsar says in the complaint filed Monday.

The investor also notes that the company faces a **proposed securities class action** over the same alleged misrepresentations about "inventory allocation issues and color palette execution issues."

In that matter, filed in August, Lululemon investor Prathik Patel claims that the company should be liable for securities fraud after trading prices for its shares slid following three disclosures over five months.

Both suits reference Lululemon's March announcement of results for its 2023 fiscal year, which included the company's statement that its final quarter of 2023 saw growth of only 9% in the Americas.

Market records show the March earnings report was followed by a \$76 decline in trading prices of Lululemon shares from nearly \$479 to just over \$403, a drop of nearly 16%.

The company's pause in Breezethrough sales was also followed by a 3% drop in Lululemon's share price, from about \$281 to about \$272, according to both suits.

Neither suit describes the specific style of the Breezethrough line. But images of the product show the leggings feature a V-shaped seam on the back, and media reports from July cite customer complaints that the seam in particular was unflattering.

The company's announcement that it would pause sales of the line states that Lululemon would "make any adjustments necessary to deliver the best possible product experience."

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

Bhavsar is represented by Timothy Brown, Saadia Hashmi, Elizabeth Donohoe and John Coyle of The Brown Law Firm PC.

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

The case is Bhavsar v. McDonald et al., case number 1:24-cv-08405, in the U.S. District Court for the Southern District of New York.

--Editing by Kristen Becker.

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# Hagens Berman Defends Bid To Ditch AWOL Apple Suit Client

By **Rachel Riley**

Law360 (November 5, 2024, 6:33 PM EST) -- A Washington federal judge expressed skepticism on Tuesday that Hagens Berman Sobol Shapiro LLP was within its rights to substitute a proposed class representative in an antitrust case against Amazon and Apple earlier this year when the lead plaintiff stopped communicating with the firm.

Hagens Berman is seeking the court's consent to drop plaintiff Steven Floyd as a client after he allegedly failed to respond to the firm's calls and emails for eight months and was replaced by other proposed class representatives. Apple.com Inc. and Amazon Inc., however, contend the case should be over by now if Floyd had expressed intentions to exit the suit to his attorneys before **disappearing** in January.

"I understand that it's Hagens Berman's position that you didn't hear from Floyd between Jan. 16 and August — but doesn't it matter what Floyd said in that last communication in January?" U.S. District Judge Kymberly K. Evanson asked the firm on Tuesday. "Is it your position that you were entitled to take Floyd's silence in that eight-month period to amend the complaint — add additional plaintiffs, etc. — without explicitly hearing from or talking to Mr. Floyd?"

Floyd was the sole plaintiff when the putative class action was **first filed 2022**, accusing the companies of illegally restricting competition by forging a pact that eliminated third-party Apple resellers on Amazon's platforms. The case challenges a 2018 deal under which Amazon allows only Apple-approved third-party vendors to sell iPhones and iPads on its online marketplace. The companies, meanwhile, **have argued** their "Global Tenets Agreement" is meant to protect consumers from falling prey to counterfeit electronics sellers and not stifle competition.

Ben M. Harrington of Hagens Berman said the firm was transparent with the court earlier this year when it sought to revise the suit to add **the new plaintiffs**, stating in a Feb. 29 motion that it had not heard from Floyd for more than a month but still wanted him to have the chance to rejoin the litigation if he wished to in the future. The court previously approved the addition of the consumers, so there's no reason to relitigate the issue, Harrington said.

"It just cannot be that when you have a situation where you have one representative who's not communicating, who's out of pocket, and you have new representatives who want to participate in the case, that you can't seek leave to add them — that they just have to stand by," Harrington said.

Apple has said **it opposes** Hagens Berman's bid for "unconditional withdrawal" as Floyd's counsel, suggesting the firm improperly used Floyd as a "placeholder plaintiff" to perpetuate the litigation.

Both Apple and Amazon contend the court and defense counsel need to know what was said during the firm's Jan. 16 exchange with Floyd before he went silent.

If Floyd told the firm he no longer wanted to participate in the litigation, Apple's counsel told Judge Evanson, the suit should have been dismissed and the statute of limitations would have barred the claims from the other two plaintiffs.

"If Floyd told them he didn't want to continue on January 16, this case should've ended," said Eric S. Hochstadt of Weil Gotshal & Manges LLP, representing Apple. "It was an individual lawsuit. That's all it was."

The companies have pointed to evidence that Floyd purchased iPhones from multiple cellular carriers, even after his suit was filed, undermining his core allegations that the two companies have a pact that illegally monopolizes smartphone and tablet sales.

While Hagens Berman contended on Tuesday its withdrawal motion is the type of straightforward request that's routinely granted by the courts when class action plaintiffs stop engaging with their attorneys, Judge Evanson pushed back. She noted she previously ordered Floyd to respond to Apple's **discovery demands** before exiting the suit.

"This sort of feels like an end run around that order," Judge Evanson said.

In the Aug. 16 order, Judge Evanson said Floyd would have to sit for a deposition and answer discovery questions related to his purchasing behavior before being allowed to leave the case.

Harrington responded that the court can still keep Floyd on the docket as an unrepresented plaintiff in the case and continue pursuing the discovery demands. Hagens Berman **does not oppose** Apple's recent bid for sanctions against Floyd for failing to respond to the company's requests, and has in fact said it shares the goal of compelling the document production.

The firm also argues that the two current named plaintiffs in the suit, Jolene Furdek and Jonathan Ryan, have timely claims regardless of Floyd's status as a plaintiff.

"We have an important antitrust case here," Harrington said. "We've got to move on to the merits."

The consumers are represented by Steve W. Berman, Barbara A. Mahoney, Ben M. Harrington and Benjamin J. Siegel of Hagens Berman Sobol Shapiro LLP.

Amazon is represented by John Goldmark and MaryAnn Almeida of Davis Wright Tremaine LLP and Jonathan E. Nuechterlein, Mark D. Hopson, Benjamin M. Mundel and Jacquelyn E. Fradette of Sidley Austin LLP.

Apple is represented by Mark S. Parris of Orrick Herrington & Sutcliffe LLP and Mark A. Perry, Eric S. Hochstadt, Brian G. Liegel and Morgan MacBride of Weil Gotshal & Manges LLP.

The case is Floyd et al. v. Amazon.com Inc. et al., number 2:22-cv-01599, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Ryan Boysen, Rachel Scharf and Greg Lamm. Editing by Linda Voorhis.



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# Susman Godfrey Opposes Fee Bid In \$147.5M Insurance Deal

By **Aaron Keller**

Law360 (November 5, 2024, 9:21 PM EST) -- Susman Godfrey LLP lawyers have objected to three firms' requests for \$36.9 million in attorney fees in a life insurance class action, saying they spent millions pressing similar New York and Pennsylvania claims being swept into an allegedly undervalued \$147.5 million global settlement in Connecticut.

According to a **motion** and **memorandum** filed in Connecticut federal court Monday, Susman Godfrey lawyers expended \$9.7 million in time and fronted \$2.5 million in costs on one Southern District of New York case targeting the Lincoln Life and Annuity Co. of New York, one Eastern District of Pennsylvania case against the First-Penn Pacific Life Insurance Co. and another Eastern District of Pennsylvania lawsuit against Lincoln National Life Insurance Co.

Those well-developed cases are poised to be truncated by a **proposed global settlement** in a factually related District of Connecticut lawsuit that other plaintiffs filed against Connecticut General Life Insurance Co. and Lincoln National, the Susman Godfrey filings argued.

The opposition documents at minimum seek a cut of the 25% fee suggested by the three firms handling the Connecticut matter commensurate with each firm's investment in all four matters writ large. They also seek to recoup the \$2.5 million in costs and \$50,000 service awards for the firm's lead plaintiffs.

"Susman Godfrey and its plaintiffs undertook massive efforts over the span of more than six years to advance its litigation, including having: obtained and reviewed over 740,000 pages of documents; took or defended more than 30 depositions; issued eighteen expert reports amounting to roughly 361,000 pages; briefed two class certification motions, one of which was granted and the other of which remained pending at the time of the settlement; and briefed one summary judgment motion with over 465 pages of exhibits before the settlement was reached," the firm wrote.

Citing an expert assessment, Susman Godfrey claims damages in its three cases could have topped \$1 billion.

Rather than face the New York and Pennsylvania cases, Susman Godfrey said Lincoln National entered the \$147.5 million proposed global settlement after mediation in Connecticut, rolling all similar claims into the Constitution State and kneecapping Susman Godfrey's clients.

The Connecticut deal occurred after the "deadline to amend the complaint and add parties had expired" but before class discovery, expert reports or subpoenas occurred, Susman Godfrey wrote.

The lead Connecticut plaintiff, Paulette T. Glover, also "suffered from a severe contractual privity defect as to Lincoln National," Susman Godfrey alleged.

"That is not the procedural posture of a case that would, on its own, exclusively result in having a defendant pay \$147.5 million," Susman Godfrey said, arguing that its cases were better poised to glean a substantial victory and that it should receive a significant cut of the extant settlement.

"The payment was explicitly made in part to resolve Susman Godfrey's litigation against Lincoln New York, First Penn-Pacific, and Lincoln New York, where there was no privity defect, where discovery was closed, and where one of those classes had been certified at the time of this settlement," the

firm noted.

Glover and co-plaintiff John T. Warehime alleged in Connecticut that Lincoln National purchased or administered Connecticut General life insurance policies. They claimed the insurers billed fees against the cash values of the policies in excess of what plan documents allowed.

Glover, Warehime and the proposed class in Connecticut are represented by attorneys from Stueve Siegel Hanson LLP, Schirger Feierabend LLC and Madsen Prestley & Parenteau LLC.

Those three firms' attorneys on Monday filed a **motion** seeking 25% of the \$147.5 million settlement fund, or about \$36.9 million, plus \$155,000 in expenses, touting their "unmatched expertise" handling similar cases nationwide.

The nascent deal is "one of the largest cash settlements achieved on claims for an insurance company's improper determination of cost of insurance rates" and "appears to be the largest cash settlement that either defendant has ever paid in a class action," the Connecticut counsel wrote in a **memorandum**.

They noted that many similar class action cases result in one-third fee awards.

Susman Godfrey's filings promise future documents opposing final approval of the proposed \$147.5 million settlement.

U.S. District Judge Michael P. Shea gave the deal an **initial nod** in early September despite Susman Godfrey's **early resistance** to the proposal.

An attorney handling the case for the New York and Pennsylvania parties declined to comment on the matter.

Attorneys for the Connecticut parties did not respond to inquiries on Tuesday.

Connecticut plaintiffs Glover and Warehime are represented by Norman E. Siegel, Lindsay Todd Perkins and Ethan M. Lange of Stueve Siegel Hanson LLP, John J. Schirger and Joseph M. Feierabend of Schirger Feierabend LLC and William G. Madsen of Madsen Prestley & Parenteau LLC.

Pennsylvania lead plaintiff Thomas Iwanski, Pennsylvania lead plaintiff TVPX ARS Inc. (as securities intermediary for Consolidated Wealth Management Ltd.) and New York lead plaintiff Vida Longevity Fund LP are represented by Steven G. Sklaver, Michael Adamson, Seth Ard, Ryan Kirkpatrick, Zach Savage and Nicholas C. Carullo of Susman Godfrey LLP and Craig A. Raabe of Izard Kindall & Raabe LLP.

The Connecticut case is Paulette Glover v. Connecticut General Life Insurance Co. et al., case number 3:16-cv-00827, in the U.S. District Court for the District of Connecticut.

The parallel New York case is Vida Longevity Fund LP v. Lincoln Life & Annuity Co. of New York, case number 1:19-cv-06004, in the U.S. District Court for the Southern District of New York.

The parallel Pennsylvania cases are TVPX ARS Inc. v. Lincoln National Life Insurance Co., case number 2:18-cv-02989, and Iwanski v. First Penn-Pacific Life Insurance Co., case number 2:18-cv-01573, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Dave Trumbore.



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# Target Inks Individual Deals Over 'Non-Drowsy' Flu Medicine

By **Emily Field**

Law360 (November 5, 2024, 5:11 PM EST) -- Target Corp. has reached individual settlements with three consumers who launched a proposed class action alleging its over-the-counter cold and flu medicine is misleadingly labeled as "non-drowsy" despite containing an ingredient known to cause sleepiness, according to a Minnesota federal judge's order.

The order, filed Friday, permanently dismissed their claims after plaintiffs Jennifer Stephens, James Bruno and Krystal Lopez told the court Thursday that they had reached a deal.

The consumers first filed their suit in June 2022, alleging that Target labeled its **Up & Up brand** of over-the-counter cold and flu medicines that contain dextromethorphan hydrobromide, or DM HBr, as being "non-drowsy" and "daytime" products, when drowsiness is actually one of the documented side effects of DM HBr.

"Plaintiffs and class members purchased the non-drowsy products with the expectation that the products would not cause drowsiness and that they were intended to be used during waking hours," the operative complaint states. "Because defendant sold products to consumers that cause drowsiness, plaintiffs and the class members were deprived of the benefit of their bargain."

Representatives for the parties didn't immediately respond to requests for comment Tuesday.

The plaintiffs are represented by Jonas B. Jacobson, Simon Franzini and Martin Brenner of Dovel & Lunder LLP; Robert K. Shelquist and Rebecca A. Peterson of Lockridge Grindal Nauen PLLP; Brittany Scott of Bursor & Fisher PA; Mark S. Reich and Courtney E. Maccarone of Levi & Korsinsky LLP; and Nick Suciu III and Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC.

Target is represented by Emily M. Weissenberger of Faegre Drinker Biddle & Reath LLP, Keiko L. Sugisaka of Maslon LLP and Michael F. Healy and Michael Kevin Underhill of Shook Hardy & Bacon LLP.

The case is Stephens et al. v. Target Corp., case number 0:22-cv-01576, in the U.S. District Court for the District of Minnesota.

--Editing by Andrew Cohen.

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## Some Hertz Del. Insurance Claims Tossed In False Arrest Saga

By **Jeff Montgomery**

Law360 (November 5, 2024, 4:57 PM EST) -- A Delaware state judge has branded as "unreasonable" and based on "contractual gymnastics" Hertz Corp. arguments for aggregating separate settlements to limit its retained liability payout duty before insurance picks up the balance of customer wrongful arrest suit settlements.

In a 27-page partial summary judgment ruling Monday, Superior Court Judge Sheldon K. Rennie rejected Hertz arguments that its insurers incorrectly required each of the company's individual settlements to hit maximum, self-insured general liability retention obligations before insurer payments began — a position that meant drastically limited coverage for Hertz.

In the balance is apportionment of a \$168 million mediated settlement covering 364 false arrest claimants over several years involving multiple, unsupportable jailings and guilty pleas and at least one individual who was arrested despite never having rented a Hertz car at all.

The insurers denied coverage based on what they argued is a Hertz requirement to pick up total self-insured retention amounts under their policies before coverage begins for each case. Insurer liability limits were redacted in many cases, but the opinion noted a \$10 million retention for some insurers and \$110 million for others, according to court documents and a July argument transcript.

According to the transcript, Ken Frenchman of Cohen Ziffer Frenchman & McKenna LLP, counsel to Hertz, told Judge Rennie during the July dismissal hearing that Hertz "would be out of their minds to buy a policy with a 10 million dollar retention that applies to false arrest claims on a per claim basis." He argued instead that Hertz bargained for a policy that "batched" the payouts for purposes of determining coverage triggers.

Because the personal injury claims settled for amounts that mostly fell below the self-insured retention limit, an opinion footnote said, Hertz cannot obtain coverage unless the claims are aggregated.

Judge Rennie observed that Hertz asserted that allegedly systemic issues with regard to Hertz's theft-prevention policies and other policies and practices constitute "a single occurrence from which all the underlying offenses arose, thereby subjecting Hertz to a single self-insured retention limit" after which insurers pay for each false arrest or malicious prosecution."

The judge found that Hertz ignored language in insurance agreements that define "occurrence" as a covered offense and relies on a second part of its agreement to instead claim that damages arising from the same "act, publication, or general conditions" as an "occurrence."

"With that contractual overlay, Hertz identifies its corporate malfeasance as the single occurrence from which the underlying claims arise," Judge Rennie wrote. "Hertz's interpretation is unreasonably broad and tortured."

According to the decision, the policies "expressly confine the range of potentially triggering events — with respect to personal and advertising injury — to the commission of covered offenses."

Hertz "has not shown that the allegedly defective policies and practices at Hertz constitute a covered offense, or comprise a part of a covered offense such that damages can be aggregated among the

claims," the opinion said.

Courts, the judge said separately, "will not torture contractual terms to impart ambiguity where ordinary meaning leaves no room for uncertainty."

The battle is rooted in litigation that began in May 21, 2020, when former car rental customers sued Hertz in the Court of Chancery alleging a systemic, nationwide practice by Hertz of false theft reports for purportedly missing or overdue vehicles, leading to arrests, jailings and prosecutions of customers.

A day later, Hertz and its affiliates sought Chapter 11 bankruptcy protection, with hundreds more proofs of claim filed in that proceeding. The claims alleged multiple failures by Hertz to document claims and filing of police reports before verifying customer nonpayment as well as destruction of customer rental information.

U.S. Bankruptcy Judge Mary F. Walrath on June 2, 2022 allowed more than 70 false arrest claimants to pursue damages in state court systems, while declining to allow discovery on claimant's right to notification.

Other cases were released, after individual court review, from bankruptcy's "automatic stay" litigation protection.

Counsel for Hertz and the insurers did not immediately respond to a request for comment.

Hertz is represented by Potter Anderson & Corroon LLP and Cohen Ziffer Frenchman & McKenna LLP.

ACE American Insurance Company and ACE Property & Casualty Insurance Company are represented by Smith Katzenstein & Jenkins LLP and O'Melveny & Myers LLP.

Alterra American Insurance Company is represented by Dilworth Paxson LLP and Kaufman Borgeest & Ryan LLP.

Everest National Insurance Company is represented by Bodell Bove LLC and Jackson & Campbell P.C.

Great American Insurance Company of New York and Great American Spirit Insurance Company are represented by Kennedys CMK LLP.

National Fire & Marine Insurance Company is represented by Phillips McLaughlin & Hall and Ropers Majeski PC.

National Union Fire Insurance Company is represented by Heyman Enerio Gatusso & Hirzel LLP and Alston & Bird LLP.

North American Elite Insurance Company and North American Specialty Insurance Company are represented by Cooch & Taylor P.A. and BatesCarey LLP.

QBE Insurance Corporation is represented by Dickie McCamey & Chilcote P.C. and Goldberg Segalla LLP.

Steadfast Insurance Company is represented by White and Williams LLP.

U.S. Specialty Insurance Company is represented by Phillips McLaughlin & Hall P.A. and Werner Ahari Mangel LLP.

Navigators Specialty Insurance Company is represented by Cooch & Taylor P.A. and Hangleby Aronchick Segal Pudlin & Schiller.

The case is Hertz Global Holdings Inc. and The Hertz Corporation v. Ace American Insurance Co., et al, case number N22C-05-130, in the Superior Court of the State of Delaware.

--Editing by Alex Hubbard.



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# Trump's Win Expected To Pare Back Gensler's SEC Agenda

By **Jessica Corso**

Law360 (November 6, 2024, 5:33 AM EST) -- The reelection of President Donald Trump will bring with it many big changes to the U.S. Securities and Exchange Commission, including a new chair who could set a more crypto- and business-friendly policy that would translate into a downtick in rulemaking and enforcement cases in comparison to outgoing President Joe Biden.

Among the many issues facing a new Trump administration are how to handle Wall Street regulation, including who to appoint to chair the SEC as well as which Biden-era policies to keep and which to scrap. Below is a discussion of some of the changes that could be coming to the nation's top securities regulator come January, when Trump is sworn in for a second term.

## In the Hot Seat

Trump has vowed to fire SEC Chair Gary Gensler on day one of his administration, but it may be harder for the president-elect to remove him from the Commission entirely, one leading securities law professor has said.

According to a July blog post by UCLA School of Law Professor Stephen Bainbridge, a policy written under the Reorganization Act of 1949 ensures that incoming presidents can appoint their own SEC chair. What is less clear is whether they would be able to remove a former chair from the agency's governing body entirely, or if that person could continue to serve out their term as a commissioner. In Gensler's case, his five-year term isn't up until 2026.

However, it has been customary for outgoing chairs to resign prior to a new president coming in, Bainbridge noted. Emily Garnett of Brownstein Hyatt Farber Schreck LLP said she believes that will be the case with Gensler.

"You could see a scenario where, if he wants the most political transition chaos, he would refuse to resign under Trump," Garnett, a former SEC enforcement attorney, said.

"But he strikes me as somebody that has a higher character than that, and probably wouldn't want to get into some dust up with the Trump administration and go through the trouble of making them remove him," she added.

The question of his replacement is just as fraught, with Robinhood's chief legal officer and Republican former SEC Commissioner Dan Gallagher being publicly floated as a possible agency head.

Another possibility is someone who is already employed by the SEC: Republican Commissioner Hester Peirce, who has been an outspoken opponent of many Gensler-backed rulemakings and lawsuits.

Peirce is "as libertarian and conservative as any of [Trump's] people," Columbia Law School professor John Coffee said.

"The only question is whether there is someone else who is close to Trump who wants the job and can promise to come in with a pre-swinging ax," Coffee said. "[Peirce] doesn't want the SEC to do anything new, but I think she doesn't plan to demand a dismantle of the place."

## A Pullback on Enforcement

In her role as commissioner, Peirce's frequent dissents may give a good indication of what a Republican enforcement agenda at the SEC might look like, Garnett said. So might the actions of former SEC Chair Jay Clayton, who was nominated by Trump last time he was in office.

"I can say, generally speaking, because I was at the Commission during the [last] Trump administration, if there were enforcement actions that seemed like they were stretching the rules or aggressive interpretations of the rules, we just didn't have the top-down political support" to bring them, Garnett said.

One area of enforcement where Peirce has argued against the agency's expanded authority is in its policing of the crypto space under Gensler's leadership.

She **objected** in March to the SEC's fine against crypto exchange ShapeShift for failing to register as a dealer, contending in a statement co-authored by fellow Republican Mark Uyeda that the agency has created an "untenable" situation for crypto industry by failing to clearly state which crypto tokens it believes are securities that need to be registered with the Commission.

Peirce and Uyeda also **took exception** to the SEC's use of its internal accounting controls provision to punish marketing and communications giant R.R. Donnelley & Sons for failing to properly respond to a cybersecurity breach. The commissioners said the SEC was abusing the provision by converting into "a Swiss Army Statute to compel issuers to adopt policies and procedures the commission believes prudent."

In September, Peirce and Uyeda **objected** to the issuance of a no-fine penalty against Qatalyst Partners LP after the firm self-reported recordkeeping violations tied to its representatives' use of text messaging and other so-called off-channel communications, arguing that the settlement demonstrated that "even well-intentioned firms could find themselves in the commission's enforcement queue time and again."

Scott Mascianica of Hilgers Graben PLLC, a former SEC enforcement attorney, said he believed that a Trump administration would be less aggressive on crypto enforcement and that there would probably be fewer sweeps like the recordkeeping one that Qatalyst was caught up in.

But he believed that the agency's core mission of policing fraud on the markets would be unchanged.

"It doesn't matter if it's a Democratic administration or Republican administration, if there's somebody engaging in a Ponzi scheme or an offering fraud that's stealing our grandmother's hard-earned income, that person's going to get charged," Mascianica said.

## A Shifting Rulemaking Agenda

There are over a dozen rules that have been proposed under Gensler's leadership that were still not finalized as of Wednesday morning, with no current plans on the SEC's agenda to vote on any of them.

Among those are equity market reforms championed by Gensler that **could upend** the world of app-based trading by potentially ending a practice known as payment for order flow, **as well as proposals** to crack down on the use of artificial intelligence by brokers and to place stricter rules on how investment advisers safeguard digital assets.

And there are recently-adopted rules facing courtroom challenges, like the ones governing corporate **climate disclosures** and a new definition of securities dealer that crypto opponents **say** threatens to pull the decentralized finance industry under the agency's purview.

When Trump takes office in January, he's unlikely to continue defending the climate regulation in the Eighth Circuit, and his SEC is also unlikely to pursue a rewrite of the private fund rules **that were vacated** by the Fifth Circuit in June, Leah Dempsey of Brownstein Hyatt said.

She said she also suspects that Trump, who has been vocally supportive of the crypto industry, will likely "put some guardrails around crypto in a more positive, proactive way to allow the industry to

operate."

"I would expect probably some crypto regulations, but ones that are not so burdensome that they're making it difficult to operate," she said.

University of Pennsylvania Law Professor Jill Fisch said that the Trump Administration could try to repeal the climate disclosure rule altogether rather than move forward with its in-court defense. They could also decide to stop enforcing the rule, which is currently not in effect as the SEC has **put it on ice** while it fights the Eighth Circuit suits.

The circuit court has not issued a ruling and may not need to under a Trump administration, Fisch said.

"I think they would go to the court, say the court doesn't have to decide [because] the issue is moot, we're going to repeal the rule," she said.

But even the business groups suing to overturn the climate disclosure rules and other rules are unlikely to want a completely hands-off SEC, Fisch said.

"The SEC is about regulating and protecting the capital markets and businesses have an interest in a reasonable level of capital market protection," she said.

"You don't want to destroy the capital markets, which have been so important to U.S. business success, in the name of deregulation."

--Editing by Nick Petruncio.

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# Trump Media Reports \$19M Quarterly Loss On Election Day

By **Tom Zanki**

Law360 (November 5, 2024, 10:13 PM EST) -- The parent of projected Republican presidential winner Donald Trump's social media platform reported a \$19.2 million quarterly loss in an Election Day filing Tuesday, the same day trading of its shares were halted three times because of volatility.

Trump Media and Technology Group Corp. disclosed a net loss of \$19.2 million for the quarter ended Sept. 30 and an operating loss of \$23.7 million for the same period, while the company generated \$1 million in revenue in addition to \$4.7 million in interest income.

Sarasota, Florida-based Trump Media said it spent \$12.1 million in legal fees in the third quarter, including costs related to an August acquisition of TV streaming technology, plus legal expenses stemming from Trump Media's merger earlier this year with a special-purpose acquisition company that took the platform public.

Trump Media has reported a history of losses since its inception as the platform struggles to generate advertising revenue on par with social media giants like X, formerly known as Twitter. Trump Media management said the third quarter demonstrated progress, saying the company rolled out new streaming technology and released native apps for Apple and Android systems.

"This has been an extraordinary quarter for the company, for Truth Social users, and for our legion of retail investors who support our mission to serve as a beachhead for free speech on the internet," Trump Media CEO Devin Nunes said in a statement.

Also Tuesday, trading of Trump Media was halted three times by Nasdaq, which has triggers to pause trading of a company's stock for five minutes if shares rapidly rise or fall in a short time.

Shares of Trump Media ultimately closed down 40 cents, falling 1.2%, to \$33.94 in heavy volume Tuesday under the symbol "DJT." Nearly 151.8 million shares of Trump Media changed hands Tuesday, more than five times the stock's average daily volume of 28.6 million shares. The U.S. Securities and Exchange Commission requires that all exchanges implement mechanisms to temporarily halt trading if share prices exceed certain limits in a given period.

Trading of Trump Media stock, which is widely interpreted as a proxy tied to Trump's political fortunes, has whipsawed all year.

Shares of Trump Media closed at \$51.51 on Tuesday, Oct. 29 — approaching their year-to-date high — before falling sharply to end the week. Trump Media shares are still up 94% year to date since they opened at \$17.45 to start January.

Trump Media's quarterly filing also shed light on its investor base, which consists of many smaller, retail traders who follow the former president.

The company said it had about 650,000 shareholders in the last quarter, only about 2,100 investors of which owned more than 5,000 shares, and fewer than 1,000 investors owned more than 10,000 shares. Yet Trump remains the company's largest shareholder by far with a 57.6% stake that is worth about \$4 billion based on current trading.

Trump Media's shares **began trading** in March after the company merged with Digital World

Acquisition Corp., a SPAC that formed in 2021 with the intent of acquiring a private business and taking it public.

Year to date, Trump Media has reported a \$363.2 million loss on \$2.6 million in revenue, according to Tuesday's SEC filing. Trump Media also said its balance sheet contained \$672.9 million in cash and short-term investments with no debt through the end of the third quarter.

Trump Media said the quarterly statement was reviewed by accounting firm Semple Marchal & Cooper LLP, which in May **replaced previous auditor** BF Borgers CPA PC. The SEC has since barred BF Borgers from auditing publicly traded companies after alleged fraud in its review of financial statements involving hundreds of clients.

--Editing by Janice Carter Brown.

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# GOP's Senate Win Hands Future Of The Judiciary To Trump

By **Courtney Bubl **

Law360 (November 6, 2024, 5:23 AM EST) -- Republicans were projected to take back the White House and Senate and possibly the House early Wednesday, putting the GOP in position to back Donald Trump's agenda and his slate of young, conservative judicial nominees.

West Virginia Gov. Jim Justice and businessman Bernie Moreno flipped seats in West Virginia and Ohio, respectively, and Sen. Deb Fischer, R-Neb., was able to hold onto her seat, according to projections from the networks and the Associated Press. The House was not called as of 5 a.m. Wednesday.

During his first term as president, Trump managed to win confirmation for 234 federal judges, including three U.S. Supreme Court justices. He is expected to again nominate judges with strong conservative credentials who can sit on the bench for years to come. In his first term, his appointees were 76% male and 84% white, according to the American Constitution Society.

The Republican win is expected to put a familiar face back in the powerful position of chair of the Senate Judiciary Committee. Sen. Chuck Grassley, R-Iowa, intends to reclaim the committee chair after the new Congress is sworn in Jan. 3, Grassley spokesperson Clare Slattery told Law360.

Republican conference rules dictate that senators can serve six cumulative years as committee chair. Grassley held the role from 2015 to 2019, across the Obama and Trump administrations.

"Assuming Republicans also take the White House, the top priority for the Judiciary Committee would be confirming young, qualified constitutionalist judges, and filling any vacancies that open up on the Supreme Court," Michael Zona, former communications director for Grassley, told Law360 ahead of the election. "After four years of Democratic control of the White House and Senate, there will surely be many retirements at the district and circuit court levels as well."

Grassley is a "machine" when it comes to processing nominations, including those for attorney general and FBI director, and his "oversight and investigations team is legendary," said Zona. "Grassley also has several bipartisan legislative priorities, including juvenile justice and child privacy and digital protections."

Mike Davis, who previously served as Grassley's chief counsel for nominations, told Law360, "Confirming judges, investigating law enforcement weaponization, and Big Tech antitrust will be top priorities for the Judiciary Committee next Congress."

Davis, who now is the founder and president of the Article III Project, a conservative legal group, added, "The judges and justices that President Trump confirmed in his first term are what saved us from Biden and Harris completely destroying the country."

Under Trump, Grassley was a key cog in the administration's mission to reshape the judiciary with mostly young and conservative picks. When Grassley was chair during the Trump years, the Senate **confirmed 85 federal judges**, including Justices Neil Gorsuch and Brett Kavanaugh on the Supreme Court.

During Grassley's tenure as chair, Republicans refused to consider Merrick Garland, then a judge on the District of Columbia Circuit, for a Supreme Court vacancy during the last year of the Obama

administration. Trump was subsequently able to fill that seat with Justice Gorsuch. Grassley also canceled and delayed votes on some circuit picks during **a standoff** with Sen. Jeff Flake, R-Ariz., over the Mueller investigation, and he held hearings for some judicial nominees during an election recess over the **objection of Democrats**.

A little over a year into the Trump administration, in March 2018, Grassley touted his committee's work **in an op-ed for Law360**, writing, "We have achieved unparalleled success in confirming outstanding judges to the federal bench." He blasted the "unprecedented obstruction from Senate Democrats," which led to him getting rid of "blue slips," or de facto vetoes from home state senators on circuit court nominees.

Grassley wrote that the Senate wasn't a "rubber stamp for the president's judicial nominees," noting that he personally called on Trump to withdraw two candidates because they weren't qualified.

Trump's return and the GOP sweep will set off a sprint for Democrats, who hope to confirm as many of President Joe Biden's judicial nominees as possible.

As of Tuesday, 47 federal judicial seats are vacant, and 20 more are occupied by judges who have announced plans to assume senior status.

Pending nominees to watch include Adeel Mangi for the Third Circuit and Magistrate Judge Sarah Netburn for the Southern District of New York, both of whom have received some opposition from Democrats.

As for special counsel Jack Smith, who oversaw two criminal investigations into Trump, said last month that he would fire him "within two seconds" if reelected.

Sen. Lindsey Graham, R-S.C., the current ranking member on the Senate Judiciary Committee, wrote on the social platform X early on Wednesday that Smith and his team prosecuting Trump should "look forward to a new chapter in your legal careers as these politically motivated charges against President Trump hit a wall."

"The Supreme Court substantially rejected what you were trying to do, and after tonight, it's clear the American people are tired of lawfare," Graham continued. "Bring these cases to an end."

--Editing by Kat Weaver.



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# An Early Look At Trump's Supreme Court Shortlist

By **Katie Buehler**

Law360 (November 6, 2024, 5:23 AM EST) -- With former President Donald Trump projected to win the 2024 presidential election and the Republicans' success in securing the U.S. Senate majority, Trump may now get the chance to appoint two more justices to the U.S. Supreme Court, cementing the court's conservative tilt for decades to come.

While votes were still being counted in key battleground states around 3 a.m. Wednesday, Trump was projected to obtain the required 270 Electoral College votes needed to win the White House. He called the election the "greatest political movement of all time" and declared victory in a speech at his campaign headquarters near his Mar-A-Lago property in Florida.

"It's going to reach a new level of importance because we're going to help our country heal," he said. "We have a country that needs help, and it needs help really badly."

Vice President Kamala Harris didn't make a public appearance Tuesday night or Wednesday morning. Her campaign co-chair Cedric Richmond told a crowd at Howard University in Washington, D.C., that she would address voters later on Wednesday.

"We still have votes to count, we still have states that have not been called yet," Richmond said shortly after midnight. "We will continue overnight to fight to make sure that every vote is counted."

Trump didn't campaign heavily on the Supreme Court, instead focusing on issues like immigration and the economy. But his presumed win Wednesday would give him the chance to appoint two additional justices to the high court if either Justices Clarence Thomas, 76, or Samuel Alito, 74, decide to retire in the next four years.

Neither Justices Alito nor Thomas have publicly announced plans to retire in the next four years, but they could strategically decide to step down to ensure like-minded justices succeed them.

During his first term, Trump appointed three justices — Justices Neil Gorsuch, Brett Kavanaugh and Amy Coney Barrett — who helped secure the court's 6-3 conservative supermajority, which in 2022 achieved the conservative legal movement's long held goal of overturning *Roe v. Wade* and **ending the constitutional right** to abortion. Justices Gorsuch, Kavanaugh and Barrett have also voted to **limit the power** of executive branch agencies and given presidents **near total immunity** from criminal prosecution for crimes allegedly committed while in office.

With two more appointees, Trump could single-handedly cement the Supreme Court's conservative supermajority for decades to come. Law360 took an early look at some of the judges whose names may top Trump's nominee shortlist.

The first three candidates all sit on the Fifth Circuit: U.S. Circuit Judges Stuart Kyle Duncan, Andrew S. Oldham and James C. Ho. The trio, who were all nominated to the circuit court by Trump during his first term, have been part of the driving force behind the Fifth Circuit's move ever further to the right.

Judge Duncan has served on the Fifth Circuit, which oversees Texas, Louisiana and Mississippi, since May 2018. Before his appointment to the federal bench, Judge Duncan served as an attorney in the Louisiana attorney general's office and as general counsel for the Becket Fund for Religious Liberty. He clerked for former Fifth Circuit Judge John M. Duhé Jr., and earned his law degree from the Louisiana State University Law Center.

His colleague, Judge Oldham, has served on the Fifth Circuit since July 2018. He previously served as general counsel for Texas Gov. Greg Abbott and as an attorney for the U.S. Department of Justice's Office of Legal Counsel during George W. Bush's presidency. He clerked for Justice Samuel Alito and former D.C. Circuit Judge David B. Sentelle, and earned his law degree from Harvard Law School.

Finally, Judge Ho, who has served on the appellate court bench since January 2018, is the first Asian-American to serve on the New Orleans-based court and a former Texas solicitor general. Before that, he was an attorney at Gibson Dunn & Crutcher LLP who represented Bush in the 2000 Supreme Court case *Bush v. Gore*, which halted a recount effort in Florida and secured the presidential election for Bush. He earned his law degree from the University of Chicago Law School.

Next on the list is Sixth Circuit Judge Amul Thapar, who was appointed to the court by Trump in 2017 and has quickly become one of the leading so-called feeder judges whose clerks appear more likely to later clerk at the Supreme Court. He previously served as a district judge for the Eastern District of Kentucky and as the district's U.S. attorney before that. Judge Thapar also practiced law privately at Williams & Connolly LLP. He clerked for former Southern District of Ohio Judge S. Arthur Spiegel and former Sixth Circuit Judge Nathaniel R. Jones, and earned his law degree from UC Berkeley's School of Law.

Another top feeder judge, D.C. Circuit Judge Gregory G. Katsas was appointed to the appellate court by Trump in 2017. Before his judicial appointment, Judge Katsas practiced law privately at Jones Day and served in several positions at the U.S. Department of Justice. He also served as Trump's deputy White House counsel in 2017. He clerked for Justice Thomas and former Third Circuit Judge Edward R. Becker, and earned his law degree from Harvard Law School.

Ninth Circuit Judge Lawrence VanDyke, who was appointed to the court by Trump in 2020, could also be on the president's shortlist if a Supreme Court vacancy arises. He is the former solicitor general for Nevada and Montana and has practiced law privately at Gibson Dunn. He also clerked for D.C. Circuit Judge Janice Rogers Brown, and earned his law degree from Harvard Law School.

Several other names have been suggested as potential Supreme Court nominees, including Southern District of Florida Judge Aileen M. Cannon, the judge who **dismissed Trump's classified documents** federal indictment, and Kristen Waggoner, CEO and general counsel at Alliance Defending Freedom, the legal advocacy group behind recent **religious freedom wins** handed down by the Supreme Court.

In past years, Trump has issued a short list of Supreme Court nominees, but he has not yet done so this time around.

--Editing by Kat Weaver.