

Supreme Court Hearing on Facebook's Alleged Nondisclosure Yields 'Freakish' Hypotheticals

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Jimmy Hoover



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Justice Samuel Alito Jr. hypothesized a manufacturing plant which warned that a future fire could pose a threat to its business. Would the business have to then disclose that such a fire had already occurred?

November 06, 2024 at 03:35 PM

🕒 5 minute read

United States Supreme Court



By Jimmy Hoover



The U.S. Supreme Court spent the morning after Election Day hypothesizing about meteor strikes and Molotov cocktails. No, the justices weren't talking about fallout from Donald Trump's victory.

The nation's top tribunal was instead discussing those "freakish" scenarios in an effort to determine the viability of a securities fraud lawsuit against Facebook over another presidential election eight years earlier. In particular, the lawsuit focuses on the precipitous \$100 billion stock drop which followed news reports that a political consulting firm had used Facebook data to support Trump in the 2016 presidential election.

Amalgamated Bank and other investors in Meta, Facebook's parent company, claim the social media giant submitted a false disclosure form to the U.S. Securities and Exchange Commission in 2016 when it cast misuse of user data as a hypothetical risk that could harm the company's bottom line.

In reality, the lawsuit alleges, that misuse had already occurred when harvested user data was sold to political consulting firm Cambridge Analytica to influence American elections. After news about the alleged data misuse became public, Facebook's stock fell by \$100 billion.

The case was revived below by the U.S. Court of Appeals for the Ninth Circuit.

Facebook's attorney, Kannon Shanmugam, said the Ninth Circuit's ruling creates a "sweeping regime of securities liability" anytime a company does not disclose when a future risk occurred in the past. He said that would create "serious concerns about overdisclosure."

"But just as a statement that the road may be flooded if it rains cannot be misleading simply because it rained yesterday, a typical risk disclosure cannot be misleading simply because the triggering event had occurred in the past," said Shanmugam, of Paul, Weiss, Rifkind, Wharton & Garrison.

On the other hand, the investors' attorney, Kevin Russell, suggested a company's statements about the potential risks to its business can often be misleading when they omit that such a risk has already taken place.

"You always have to ask, 'How would a reasonable person understand the implications of this sentence?'" said Russell, of Goldstein, Russell & Woofert.

All that Facebook had to disclose was something to the effect of "such improper disclosure or misuse of user 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."

Instead, the company failed to acknowledge "that there's been a recent misappropriation of 30 million users' private data that is a ticking time bomb that's going to cause a \$100 billion in damages to the company," Russell added.

A String of Hypotheticals

Several justices seemed unsure about the precise circumstances under which a company must disclose on their U.S. Securities and Exchange Commission Form 10-K filing that a future risk has occurred in the past.

Justice Samuel Alito Jr., for instance, hypothesized a manufacturing plant which warned that a future fire could pose a threat to its business. Would the business have to then disclose that such a fire had already occurred, he asked, even if it was the result of a one-off incident such as getting hit with "a piece of space junk that fell out of the sky?"

"What about the situation where the fire is caused by something that's utterly freakish?" Alito said. "Something fell, a meteor, a meteorite fell out of the sky or some crazy person, who was hearing voices, decided that that person was going to go throw a Molotov cocktail in the window of this plant."

Chief Justice John Roberts Jr. employed a more straightforward analogy.

"Your basic submission is that a probabilistic statement about something carries the inference that something has not occurred," Roberts said. "But, I mean, with respect to certainly some but maybe most, a probabilistic statement will do the exact opposite. For example, if you're leaving my house and I say, you might slip on the steps, you wouldn't say, well, that's never happened before."

Ultimately, several of the court's conservative appointees appeared sympathetic to Facebook's plight.

Justice Brett Kavanaugh said a court system would be creating a "fair notice" problem for public companies by requiring such past disclosures when the SEC's regulations don't explicitly require them.

"Why can't the SEC just write a reg?" Kavanaugh asked. "Why does the judiciary have to walk the plank on this when the SEC could do it?"

Assistant to the U.S. Solicitor General Kevin Barber, appearing on behalf of the federal government in support of the investors, said the SEC "did write the regulations that it needed to write here. ... This is a bread-and-butter half-truth case."

The court's three liberal justices seemed open to that proposition.

But Justice Neil Gorsuch shared Kavanaugh's concern that the burden on public companies, already facing a "highly reticulated system" (in Gorsuch's words), would be too great. Gorsuch, at several points during the hearing, seemed to suggest that other SEC regulations could step in to make a company disclose past events that continue to harm its bottom line.

The justices heard roughly two hours of oral arguments in the case, underscoring their difficulty with how to craft an opinion that would serve interests on both sides.

"Assume that I think the Ninth Circuit's rule goes too far and that I think your rule goes too far," Justice Amy Coney Barrett told Shanmugam, searching for a middle ground in the case.

A decision is expected by July. The case is *Facebook v. Amalgamated Bank*, No. 23-980.

Next Wednesday, the Supreme Court will hear a similar case involving chip and software company Nvidia, which was sued by investors after reporting low sales and an excess supply of one of its products, a device used in smartphones and computers called a graphics processing unit that increases the speed of rendering graphics.

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Law Firms Mentioned

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Supreme Court appears split in Facebook lawsuit tied to data breach

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U.S. Supreme Court

By Ann E. Marimow, The Washington Post

November 7, 2024, 10:00 am CST

Mark Zuckerberg, CEO of Meta, which owns Facebook, speaks during a Senate Judiciary Committee hearing in Washington, D.C., in January. (Matt McClain/The Washington Post)

The Supreme Court on Wednesday appeared closely divided over whether to allow shareholders to proceed with a lawsuit accusing Meta's Facebook of misleading investors about risks from a massive data privacy breach.

A group of Facebook investors sued the social media giant in 2018 after its stock price dropped following revelations that the Republican-aligned political consulting firm Cambridge Analytica had improperly obtained the personal information of 30 million Facebook users.

The Securities and Exchange Commission requires companies to disclose information about investment risks, and a 1934 federal law and related regulations prohibit companies from making misleading or false statements related to the purchase or sale of a stock.

Shareholders, led by Amalgamated Bank, said Facebook made misleading statements and omitted important information about a known risk to the personal data of Facebook's users and the control of their data—allegations the company disputes.

The data breach prompted several government investigations and lawsuits against Facebook and its entanglements with the United Kingdom-based Cambridge Analytica, which had ties to Donald Trump's 2016 presidential campaign. The Federal Trade Commission's probe led to a record \$5 billion civil penalty against Facebook. Last year, Facebook reached a \$725 million class-action settlement with users over the privacy breach.

At issue for the justices Wednesday was how much information public companies must disclose about potential investment risks, including past events.

In a lively argument, with hypotheticals involving the potential dangers posed by meteor strikes and space trash, at least three conservative justices seemed sympathetic to Facebook's arguments that it had not misled investors and that its disclosures were forward looking. The court's three liberal justices, in contrast, expressed support for the view of investors behind the lawsuit, who are backed in the case by the Biden administration.

Chief Justice John G. Roberts Jr. seemed concerned about the implications for public companies of adopting the position of the investors, calling it "a real expansion of the disclosure obligation." Justices Neil M. Gorsuch and Brett M. Kavanaugh said the Securities and Exchange Commission could be more explicit if it wanted to require companies to report relevant past events.

"Why can't the SEC just write a reg?" Kavanaugh asked. "Why does the judiciary have to walk the plank on this and answer the question when the SEC could do it?"

Gorsuch suggested that reasonable investors were well aware of the risk of data breaches at large companies, including by foreign governments.

"I think China probably has all of our FBI files," Gorsuch said. "I mean, data breaches are part of our lives these days."

Attorney Kevin K. Russell, representing the shareholders, disagreed. Unlike a hacking incident, Facebook in this instance allowed a developer to access user data. Based on what Facebook disclosed at the time, he said, "reasonable investors would have thought that it never happened and particularly on this scale."

"That's why users were so angry when they found out about this," he added.

Facebook lawyer Kannon K. Shanmugam emphasized that risk statements filed by companies are intended to be forward looking, putting investors on notice about something that might happen in the future. Allowing the lawsuit to go forward, he said, would "trigger serious concerns about over-disclosure and fraud by hindsight."

"Meta's warnings that business harm could result in the event of data misuse did not imply that Meta had never previously suffered such misuse," Shanmugam said, referring to the company that now owns Facebook, Instagram and WhatsApp.

Throughout Wednesday's argument, Justice Elena Kagan said investors want to know about a company's vulnerabilities to understand future risks. "There are a range of ways in which these forward-looking statements can be misleading as to things that have occurred in the past," she told Facebook's lawyer.

Justice Ketanji Brown Jackson agreed, adding that Facebook's position does not seem to account for past events leading to future harm. "What is misleading is the suggestion, when you make your statement completely futuristic, that no such future harm is going to occur," she said.

The high court's conservative majority in general has been skeptical of federal agency power. Last term the justices invalidated the use of in-house legal proceedings at the SEC to discipline those it believes have committed fraud. The Facebook case and a separate securities fraud lawsuit against the chipmaker Nvidia, which will be argued before the court next week, involve the rights of private investors to hold companies accountable in court.

Cambridge Analytica was launched in 2013 by the wealthy Mercer family and conservative strategist Stephen K. Bannon, who later became a top Trump adviser. The goal of creating the firm was to give conservatives an edge in the political data game. After the breach was revealed in 2018, Facebook's stock price experienced two significant drops totaling more than \$200 billion in market capitalization - and Cambridge Analytica collapsed.

Soon after the stock drop, Facebook shareholders filed a securities fraud action against Facebook and three executives, including Meta CEO Mark Zuckerberg.

A District Court judge initially dismissed the lawsuit, but a divided panel of the U.S. Court of Appeals for the 9th Circuit reversed that ruling.

At the 9th Circuit, Judge Margaret McKeown wrote the majority opinion finding that Facebook's statements in its SEC filings were misleading because, by February 2017, the company already knew that Cambridge Analytica had gained improper access to the data of tens of millions of Facebook users.

The problem, McKeown wrote, is that Facebook represented the risk of improper access or disclosure of user data as purely hypothetical when that risk had already happened. A reasonable investor reading the company's filing, she wrote, would have misunderstood the risk of a third party accessing and utilizing Facebook user data as merely conjectural.

Judge Patrick J. Bumatay dissented in part from that ruling, concluding that no reasonable investor would interpret statements concerning the prospect of future business harm from data misuse to suggest that no data misuse had ever occurred.

Securities law does not require companies "to disclose any and all material information," he wrote, adding that statements and omissions are actionable only if they create an impression that the state of affairs differs in a significant way from the actual situation. Facebook's disclosure warned, for instance, about potential harm to its reputation and business that could come to light if the public or the government learns about improper access to its data.

Naomi Nix contributed to this report.

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Meta Investor Suit Over Proper Disclosure Troubles Supreme Court (1)

By Kimberly Strawbridge Robinson

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 - Justices suggest SEC should clarify rule, not court

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Meta Investor Suit Over Proper Disclosure Troubles Supreme Court (1)

By Kimberly Strawbridge Robinson 2024-11-06T12:22:24000-05:00

- Facebook's stock plummeted after scandal
- Justices suggest SEC should clarify rule, not court

The US Supreme Court had difficulty deciding what companies must say about past events when warning investors about future risks, in a case dealing with fallout from an unauthorized misuse of Meta Platforms Inc.'s Facebook user data.

Several justices were concerned Wednesday that allowing the multi-billion-dollar investor suit against Facebook's parent to continue would dramatically expand business liability, and could eventually lead to over-disclosure.

It would be giving investors a "blank check," Chief Justice John Roberts said.

But Justice Neil Gorsuch said the entire court was concerned about companies purposely misleading investors through half-truths.

Investors sued over 2016 Facebook SEC filings treating the risk of unauthorized use of user data as a hypothetical when the company knew that political consulting firm Cambridge Analytica had already accessed information on 30 million users in 2015.

Facebook's stock price plunged and its market capitalization fell by \$100 billion after the public discovered the full scope of the scandal in 2018.

Justice Elena Kagan said the disclosures aren't complete lies, but are misleading.

"It's not a black and white thing," she said.

Ultimately, the court might decide to leave it up to the Securities and Exchange Commission to clarify its regulations.

Given the potential implications for both companies and investors, "why does the judiciary have to walk the plank on this?" Justice Brett Kavanaugh wondered.

Risk Disclosures

The question the justices agreed to consider is whether a company's risk disclosures are false or misleading when they don't say the risk has already occurred.

A federal trial court granted Facebook's motion to dismiss the proposed class action but the US Court of Appeals for the Ninth Circuit revived it. The company's statement that the risk of unauthorized data use "could" occur when it actually had was enough to prove falsity at the motion to dismiss stage, the Ninth Circuit said.

The justices appeared dissatisfied with both Facebook's categorical rule and the investors' more nuanced one.

Arguing for the tech giant, Paul, Weiss' Kannon Shanmugam agreed that there are times when a statement about future risks can imply that something didn't happen in the past. But that can only happen when the company has also expressly said something false about the past.

"If the statement had said Meta has never experienced an episode of data misuse involving its users, but if it did, it would do harm to Meta's business or reputation, of course, in that context, the statement would be false or misleading if there had been an episode in the past," Shanmugam said.

But a company's statement about future risks, on its own, doesn't imply anything about the past, he said.

That's saying context matters, Justice Amy Coney Barrett said. And that "makes it not easily susceptible to a categorical rule," she told Shanmugam.

Barrett and others kept coming back to a hypothetical from Kagan in which a company discloses a risk of fire but doesn't disclose that there had recently been a fire that destroyed 50% of the plant.

If "there's been such substantial damage to a plant that production capacity is operating at 50 percent," Kagan said that's "going to be of interest to the investor."

Gorsuch noted that "we're all concerned about the 50 percent."

As Justice Samuel Alito explained, the “intuition is that a statement that simply blandly says that there’s a possibility of a risk can, in context, be extremely misleading if there is a high probability of the risk materializing.”

Kevin Russell, arguing for the investors, called the misuse of 30 million users’ private data a “ticking time bomb.” And yet, the company “hadn’t said boo about this.”

Russell said the justices should reject the company’s “categorical” rule that these “statements are always agnostic about whether the risk has transpired in the past.”

Because the case comes to the court on a motion to dismiss, Russell said the question isn’t whether Facebook’s statements were agnostic to the past.

It’s instead “whether we have plausibly alleged that a reasonable jury can conclude that these statements falsely implied that the omitted event had not occurred,” he said.

Barrett suggested both rules went “too far” and that it was difficult for the court to “articulate what the line is.” She suggested that maybe the court shouldn’t be drawing the line itself.

Roberts, too, suggested that the SEC should do the line drawing.

In “such a complicated scenario of that sort, sometimes it’s ‘yes,’ sometimes it’s ‘no,’” Roberts said, it seems like the court should leave it up to the SEC “to exercise its expertise with respect to it.”

The case is Facebook Inc. v. Amalgamated Bank , U.S., No. 23-980, argued 11/6/24 .

(Updates with details from the transcript.)

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US Supreme Court mulls Facebook bid to escape securities fraud suit

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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 grappled on Wednesday over 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.

The justices heard arguments in Facebook's appeal of 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 on Nov. 13 - that could lead to rulings making it harder for private litigants to hold companies to account for alleged securities fraud.

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.

The Supreme Court has a 6-3 conservative majority. Some of the conservative justices seemed to indicate that reasonable investors would read statements in forward-looking risk-factor disclosures as outlining issues that may have occurred in the past.

"For example, if you're leaving my house and I say, 'You might slip on the steps,' you wouldn't say, 'Well, that's never happened before.' Your inference would be: that has happened and that's why I'm giving you the warning," Conservative Chief Justice John

Roberts told Kevin Russell, a lawyer for the shareholders.

But 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'

Conservative Justice Samuel Alito asked Shanmugam, "Isn't it the case that an evaluation of risks is always forward-looking?"

"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.

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 Russell 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."

President Joe Biden's administration supported the shareholders in the case.

U.S. District Judge Edward Davila dismissed the lawsuit but the San Francisco-based 9th U.S. Circuit Court of Appeals revived it. The Supreme Court's ruling 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. 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 issue.

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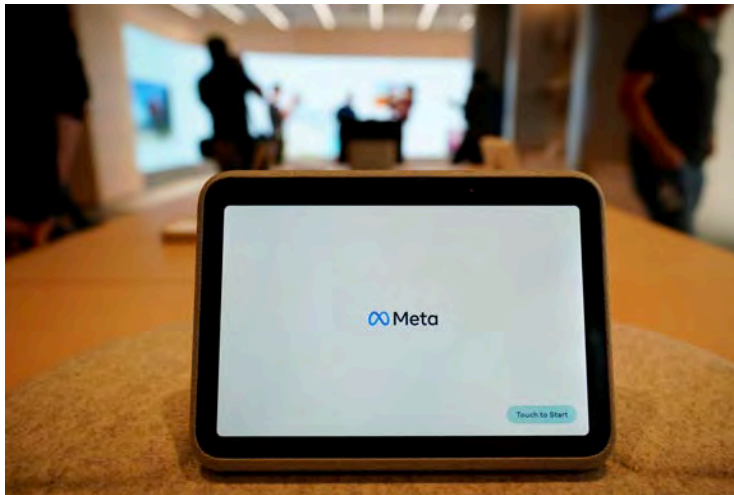
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Justices tangle with meteors and Molotov cocktails to sort Meta risk disclosure obligations

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The high court looked for a compromise between Meta and its shareholders but the requirements for risk disclosures appeared elusive after almost two hours of arguments.

Kelsey Reichmann / November 6, 2024



FILE - A Meta Portal Go is displayed during a preview of the Meta Store in Burlingame, Calif., on May 4, 2022. (AP Photo/Eric Risberg, File)

WASHINGTON (CN) — The Supreme Court tied itself in knots with hypotheticals ranging from warehouse fires to Molotov cocktails Wednesday trying to determine if Meta violated disclosure laws by not telling investors about the Cambridge Analytica scandal.

“I wonder whether we’re in the world of a meteorite or Justice Alito’s falling debris or whether we’re in the chief justice’s world of slip and fall on the front porch,” Justice Neil Gorsuch, a Donald Trump appointee, said.

Gorsuch’s question aimed at categorizing the social media giant’s decision not to disclose a user data breach that shareholders say led to a massive drop in the company’s stock. Investors sued Meta, formerly Facebook, in 2018 for securities fraud after the company told shareholders that data security risks could impact their investments, but the social media site didn’t disclose that user data had already been compromised in 2016.

Data analytics firm Cambridge Analytica harvested user data and sold it to Republicans for campaign use. Facebook uncovered the data breach and told Cambridge Analytica to delete users’ data, but the firm continued to sell user information.

Meta claims it didn't have to disclose the 2016 breach because risk disclosures address future harm. A federal court sided with the social giant but the Ninth Circuit reversed, holding that treating third-party data misuse as a hypothetical prospect was misleading even if the first breach hadn't yet resulted in follow-on business harm.

Meta asked the Supreme Court to reverse, arguing that the ruling encouraged fraud by hindsight. The social giant said a reasonable person wouldn't think disclosing that negative media coverage could affect the business implied that Meta had never faced bad coverage. Meta said context should be determinative of whether or not to disclose past harm.

The high court didn't seem wholly convinced. Several justices thought Meta was proposing a categorical test for disclosures.

"This inquiry is more contextual than your position allows for," Justice Elena Kagan, a Barack Obama appointee, said. "It's not a black-and-white thing."

Kagan used a hypothetical warehouse fire to parse Meta's position, asking what level of damage a plant would need to sustain for Meta to think a disclosure was warranted. Meta said that a fire crippling 100% of the plant's production would require disclosure, but if only 50% of production was harmed by the blaze there was no need for investors to know.

Justice Ketanji Brown Jackson, a Joe Biden appointee, said Meta's position was too futuristic, assuming a past event won't be repeated. She compared the dilemma to a relator telling a home buyer that crime may lead to higher insurance rates without disclosing a string of burglaries in the area.

"What I'm suggesting is it's misleading because the homeowner is making a determination of the risk of buying this property and paying a certain amount of homeowners insurance," Jackson said. "When you say your statement totally futuristically, as though the burglaries never happened, they're being misled into making that calculation."

Justice Samuel Alito, a George W. Bush appointee, said past events very often shed light on the risk of a recurrence. Picking up Kagan's fire hypothetical, Alito said whether a fire was caused by faulty wiring that still hadn't been fixed or by a piece of space junk that fell out of the sky would tell an investor about the probability of a future fire.

"I don't want to dwell on things that fall out of the sky, but what about the situation where the fire is caused by something that's utterly freakish?" Alito asked. "A meteorite fell out of the sky or some crazy person who was hearing voices decided that that person was going to go throw a Molotov cocktail in the window of this plant."

The shareholders urged the court to reject any bright-line test, arguing each case needs to be decided by the context of the events.

Chief Justice John Roberts, a George W. Bush appointee, said that argument would expand the disclosure obligation. He said that the disclosure itself suggested that an event might have occurred in the past. Roberts said that if he told someone leaving his house that they might slip on the steps, they'd assume someone might have slipped before.

"How are we supposed to parse whether it's slipping on my steps or what you say is actionable in this case?" Roberts asked the shareholders.

Gorsuch said Meta never implied that data breaches hadn't happened in the past, noting that reasonable investors know that can happen to a large company.

"I think China probably has all of our FBI files," Gorsuch said. "Data breaches are part of our lives these days."

Justice Amy Coney Barrett, a Trump appointee, tried to find a middle ground between Meta and the shareholder's arguments. She said data breaches for social media companies or E. coli outbreaks for food producers could both be associated with their respective businesses.

Barrett said the general statements about the risks a particular category of businesses faces could be separated from the more unusual risks that could make or break the business.

"I think some of the hypotheticals that you're getting show that not everybody shares that intuition, that materiality is the only thing at stake, that it can also be misleading," Barrett said. "Depending on how specific the risk is people probably have different intuitions that fall along a spectrum."

The shareholders told Barrett that the Cambridge Analytica breach fell into the second basket of more unusual risks.

"You're saying it falls more in the category of a factory half burning to the ground, something that we wouldn't necessarily expect because you would have trusted Meta not to hand it over," Barrett said.

Justice Brett Kavanaugh, a Trump appointee, said the shareholders' rule wasn't in the regulation, suggesting that the Securities and Exchange Commission could write the regulation if the government thought it was necessary.

"Why does the judiciary have to walk the plank on this and answer that question when the SEC could do it with all the uncertainty and all the hypotheticals that have arisen, which, in turn, at least as I see it, just speaking for myself, raises a lot of questions for companies about what they have to disclose and what they don't?"

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Justices skeptical about Facebook's data breach disclosure to investors

[Sb scotusblog.com/2024/11/justices-skeptical-about-facebooks-data-breach-disclosure-to-investors](https://www.scotusblog.com/2024/11/justices-skeptical-about-facebooks-data-breach-disclosure-to-investors/)

November 7, 2024

ARGUMENT ANALYSIS



By Ronald Mann

on Nov 7, 2024 at 12:12 pm



Facebook first learned that Cambridge Analytica had used a personality test app to harvest tens of thousands of users' data in 2015. (Katie Barlow)

The justices heard arguments Wednesday in *Facebook v. Amalgamated Bank*, their first securities case of the year. The case involves the 2015 Cambridge Analytica-Facebook data breach, and considers whether Facebook's disclosures to investors before the breach was public improperly downplayed the risks that data breaches posed to the company and its stock price.

Shareholders sued Facebook in 2018 after they learned that Cambridge Analytica had obtained the personal data of 30 million Facebook users. The shareholders contended that Facebook misled them about the risks to their investment.

Although some justices seemed more receptive to the argument of Kannon Shanmugam (representing Facebook), the dominant tone was skepticism. The headwinds started in the first minutes of the argument, with Justice Clarence Thomas offering an off-hand assessment that "a reasonable person" would assume from a statement like Facebook's that nothing bad of this sort ever had happened to it.

Shanmugam quickly faced similar perspectives from Justices Sonia Sotomayor and Ketanji Brown Jackson, who compared Facebook's disclosures to a homeowner suggesting that crime might be a risk to values in the future without mentioning a string of recent burglaries in the neighborhood. To the casual observer, there are not a lot of five-justice majorities that skip over those three justices.

That's not to say that it was all bad for Facebook. Chief Justice John Roberts and Justice Brett Kavanaugh were the most reluctant to accept this as enough to justify a class action against Facebook. For Roberts, Facebook's disclosure was more like a statement that you should be careful about walking down his front steps, because you might fall – a statement from which you might infer that somebody had fallen in the past. For him, the subjectivity of determining what a factfinder might infer from any particular disclosure made it “kind of a blank check” to “go to trial to decide” how to interpret the disclosure.

In the same vein, Kavanaugh thought it central that the Securities and Exchange Commission already has rules that require companies explicitly to disclose lots of adverse past events in various disclosures – and this is not on the list. For him, it makes no sense for “the judiciary ... to walk the plank on this ... when the SEC could do it.” As he put it, “[t]he SEC knows how to write regulations that require disclosure of past events. ... Why not let the SEC do this if they want to?”

Past experience suggests it is hard to imagine a unanimous Supreme Court affirming a decision from the U.S. Court of Appeals for the 9th Circuit expanding liability under the securities laws, so I certainly would not want to overread the argument. What I would say is this was not a compelling day for Meta. We'll have to wait for the opinions in the spring to see what they actually decide.

[Disclosure: Tom Goldstein, the publisher of SCOTUSblog, argued on behalf of the investors in the 9th Circuit but was not involved in the Supreme Court proceedings in the case.]
Posted in Featured, Merits Cases

Cases: Facebook, Inc. v. Amalgamated Bank

Recommended Citation: Ronald Mann, *Justices skeptical about Facebook's data breach disclosure to investors*, SCOTUSblog (Nov. 7, 2024, 12:12 PM), <https://www.scotusblog.com/2024/11/justices-skeptical-about-facebooks-data-breach-disclosure-to-investors/>

A Look Back at 'Goldman Sachs': How Price Impact Is Changing Securities Class Actions

 [law.com/litigationdaily/2024/11/07/a-look-back-at-goldman-sachs-how-price-impact-is-changing-securities-class-actions](https://www.law.com/litigationdaily/2024/11/07/a-look-back-at-goldman-sachs-how-price-impact-is-changing-securities-class-actions)

Ellen Bardash

It's been 14 months since the Second Circuit Court of Appeals laid the groundwork for defendants to raise price-impact defenses in securities litigation in *Arkansas Teacher Retirement System v. Goldman Sachs Group Inc.* In recent talks with securities litigators, I've asked how many cases they are seeing that cite the *Goldman Sachs* case.

The answer I've heard across the board is that when it comes to event-driven securities litigation that makes it to the class certification stage, just about everyone on the defense side cites *Goldman Sachs*.

The defense has become prevalent in cases where plaintiffs claim a company issued a statement, some sort of harmful event occurred, then the stock price fell further than it allegedly would have if the company hadn't downplayed the risks it discussed in that earlier statement.

The *Goldman Sachs* decision laid out the framework for determining whether there's a substantial enough link between statements alleged to falsely inflate stock prices and later statements correcting the earlier ones. The Supreme Court weighed in with its thoughts back in 2021 before sending the case back to the Second Circuit, which went on to decertify the class. Several district courts have since decertified classes based on the *Goldman* framework.

"Through the *Goldman* case, the Supreme Court directed that lower courts assess at class certification, number one, whether statements are too generic to have price impact and, number two, whether there's a mismatch between the allegedly misleading statement and the purported corrective disclosure," said **Sullivan & Cromwell** co-chair **Robert Giuffra**, who has represented Goldman Sachs in the case. "Courts have started to apply the *Goldman* framework in the context of class certification. And so it's becoming the new thing in securities litigation, at least in the context of event-driven litigation."

District Courts Weigh In

Since the Second Circuit's denial of class certification was released, at least three federal courts have done the same for securities class actions, two of which did so within days of one another at the end of September.

In March, U.S. District Judge J. Paul Oetken in the Southern District of New York decertified a class in a case against Canadian mining company Kirkland Lake Gold, finding some statements challenged in the case were generic and others didn't match up with corrective disclosures.

On Sept. 27, U.S. District Judge Trevor N. McFadden in Washington, D.C. determined that the defendants had successfully shown a tweet from a Bed Bath & Beyond investor couldn't be linked to that investor's subsequent stock dump and a drop in share value.

Three days later, another class was decertified in the Eastern District of Michigan, with Judge Thomas L. Ludington writing that expert testimony showed analysts hadn't ascribed a Rocket Companies Inc. stock drop to statements about how much the mortgage lender might be affected by rising interest rates.

"Defendants will rely on the *Goldman* framework if they have a basis for doing it," Giuffra said. "It's like anything else: if a defense is successful, other lawyers are going to try to apply it. These defenses tend to build on themselves."

Class Certification Still Often Granted

Kessler Topaz Meltzer & Check partner **Andrew Zivitz** said the number of price impact challenges spiked after the Supreme Court decision and further increased after the Second Circuit's ruling, but that the *Goldman* defense has been far from a class certification silver bullet. It's the latest way defendants have tried to get class certification denied, he said, but it's not the first to become a pattern.

"We expected, in light of that decision, that there would be more price impact challenges, but we also knew that the facts of [*Arkansas Teacher Retirement System*] were distinguishable given the genericness of the statements given in *ATRS*," Zivitz said. "I would say we're seeing more challenges, but not any sort of sea change of results."

For the most part, according to Zivitz, a *Goldman* defense being raised hasn't radically changed how plaintiffs counsel handles the class certification stage, and the large majority of price impact challenges are still being defeated.

What's Changing?

While a *Goldman* defense fits within the existing class certification phase and doesn't create an extra stage of litigation, attorneys have observed some shifts it's caused in the securities litigation process.

Likely the biggest shift on that front is the need for more experts to testify in support of each side's argument. Having those witnesses testify has at times resulted in holding hearings in a stage that's historically often been decided on papers alone.

"In litigating over price impact, lawyers on both sides are loading up on experts," Giuffra said. "It becomes a battle of the experts where the experts will come in and debate whether a particular statement had a price impact or not."

One perhaps unintentional consequence, according to Zivitz, is that price-related arguments that would normally be brought up later in a case are brought into the class certification conversation.

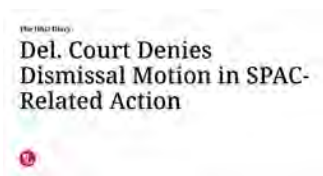
"[Defendants] effectively are required to challenge loss causation at the class certification stage," Zivitz said. "Our position is that that undermines the ability to challenge loss causation at summary judgment. Arguments that we've historically seen later in the case are now pushed up into the class certification stage."

Boies Schiller Flexner partner Nili Moghaddam, who called the Second Circuit's decision a hard-fought and just victory for securities class action defendants, said she's looking forward to seeing if *Goldman Sachs* might have an effect in the other direction: on materiality arguments at the motion to dismiss stage.

Del. Court Denies Dismissal Motion in SPAC-Related Action

K [dandodiary.com/2024/11/articles/director-and-officer-liability/del-court-denies-dismissal-motion-in-spac-related-action](https://www.dandodiary.com/2024/11/articles/director-and-officer-liability/del-court-denies-dismissal-motion-in-spac-related-action)

November 6, 2024



By Kevin LaCroix on November 6, 2024

Posted in Director and Officer Liability



In the wake of the SPAC frenzy, which peaked in 2021, investors have filed a significant number of SPAC-related lawsuits, including not only securities class action lawsuits, but also including Delaware direct action breach of fiduciary duty suits. The Delaware actions have so far in at least some cases proven to be successful. More recently, however, the Delaware courts have projected impatience and even fatigue with these kinds of suits, and in at least one recent case, granted the defendants' motion to dismiss. However, in a more recent case, the Delaware Chancery Court, although noting that the plaintiff's allegations are "not strong" and "close to the line between an adequate and an inadequate claim," denied the defendants' dismissal motion. There are several interesting features to court's opinion, as discussed below. The Delaware Chancery Court's October 18, 2024, opinion can be found [here](#).

Background

Mountain Crest Acquisition Corp. II (MCAD) was a special purpose acquisition company (SPAC). MCAD's sponsor was Mountain Crest Capital LLC. MCAD completed an IPO on January 8, 2021. On April 7, 2021, MCAD announced plans to merge with medical technology company Better Therapeutics, with the combined company to be known as Better Therapeutics. The merger closed on October 27, 2021. Prior to the merger 84% of the MCAD shares eligible for redemption elected to redeem their shares; only about 16% of the total eligible shares remained after the merger.

At the time the merger was completed, the stock was trading at \$10.97 per share. Three months after the merger, the stock price had declined to \$3.68. By the time the plaintiff filed his complaint on April 23, 2023, the stock was trading at \$1.28 per share.

In his class action complaint, the plaintiff filed a direct claim for breach of fiduciary duty against the directors and officers of MCAD. He also filed an unjust enrichment claim against the director and officer defendants and against the SPAC sponsor.

The plaintiff's claim related to alleged misrepresentations in the proxy statement the SPAC issued in connection with the proposed merger. The plaintiff alleged that though the proxy attributed a value of \$10 to each MCAD share, after accounting for the dilutive effect of redemptions, founder shares, and the merger transaction costs, MCAD had less than \$7.50 in net cash per share to invest in the merger. The proxy did not state MCAD's net cash per share. The defendants moved to dismiss the complaint.

The October 18, 2024, Opinion

On October 18, 2024, Vice Chancellor Sam Glasscock denied the defendants' motion to dismiss, saying the plaintiff's had adequately alleged a direct action breach of fiduciary duty claim against the defendants, although also emphasizing that the plaintiff's claims were "not strong" and that the plaintiff "barely" alleged reasonably conceivable claims when assessed under the entire fairness standard.

In deploying the entire fairness standard, Delaware's courts have emphasized that it is the most exacting standard of judicial review for corporate transactions. In this case, VC Glasscock noted the now well-established precedent that the incentive structure of SPACs creates inherent conflicts between the SPAC fiduciaries and the stockholders. Here, he said the controller defendants were incentivized to discourage redemptions of the SPAC shares in connection with the merger, "effectively competing with the public shareholders for the funds in the trust." Because of these conflicts, VC Glasscock found, the entire fairness standard applies.

The plaintiff argued that the proxy statement, which valued the SPAC's shares at \$10 per share, was misleading because the proxy failed to disclose that the net cash value the SPAC would have to invest in the merger was less than \$7.50 per share. VC Glasscock said that the failure to disclose net cash value per share is not, in itself, a breach of fiduciary duty, but that in this action, the proxy both misstates the investment value of \$10 per share and also fails to disclose that the actual amount of cash available for the merger was 25% less than disclosed. It is, VC Glasscock said, "reasonably conceivable" that a stockholder would find the cash per share figure material to their redemption decision.

The defendants tried to argue that the fact that 84% of investors chose to redeem their shares shows that the Proxy was not misleading or contained omissions. Glasscock conceded that this level of redemptions "suggests a lack of material omission," but he said

he could not at the pleading stage draw the defendant-friendly inference. At this pleading stage, the plaintiff's allegations "make it reasonably conceivable that there has been a breach of fiduciary duty in regard the Proxy.

Glasscock noted that this case "appears to be the first to deny a motion to dismiss solely on an affirmative statement of investment value in conflict with a failure to also disclose net cash." However, he also noted, and as the defendants conceded, nothing in the case law suggests that such a claim, adequately pled and considered along, could not survive a motion to dismiss." The allegations, Glasscock said, may ultimately not support a finding of unfairness, but the plaintiff has met his burden to survive a motion to dismiss.

VC Glasscock also said that the plaintiff had adequately pled a nonexculpated claim unjust enrichment claims against the defendants.

Discussion

These kinds of Delaware direct action breach of fiduciary duty cases have come to be known as "MultiPlan" claims, in reference to the first of these kinds of suits to survive a motion to dismiss, in a January 2022 ruling by Vice Chancellor Lori Will. The success of the MultiPlan case itself and several of its immediate successors meant that other cases like this were soon filed. The volume of these cases apparently raised alarm bells at the Delaware Chancery Court.

As discussed here, in a May 2024 ruling in the Hennessey Capital Acquisition IV case, VC Will (who wrote the opinion in the MultiPlan case) said the following about the upsurge in MultiPlan lawsuits: that "the success of a few cases begat a host of others. Though the SPAC market has contracted, SPAC lawsuits are ubiquitous in Delaware. Remarkably similar complaints accuse SPAC directors of breaching their fiduciary duties base on flaws in years-old proxy statements that became problematic only when the combined company underperformed." Even though applying the entire fairness standard, VC granted the motion to dismiss in the Hennessey case.

The apparent suggestion that perhaps the Hennessey opinion meant the end for these kinds of cases in Delaware has not been borne out. As VC Glasscock's opinion in this case shows, even a case in which the allegations are "not strong" may survive a motion to dismiss, particularly where the entire fairness standard has been applied.

In his own way, VC Glasscock did acknowledge the problem for the Delaware courts with the volume of the SPAC-related suits. Glasscock invoked an elaborate analogy to the digestive habits of anaconda snakes. These snakes, Glasscock observes, eat once a year. Open its belly, he said, and you will not see what it is eating, but what it has eaten in the past. So too with the progress of the SPAC litigation in the belly of the Chancery court. While the population of SPACs on the ground may have been reduced, "the bulge of the SPAC

carcasses continues to be digested in equity.” I am not sure it quite right to compare the Chancery Court to a snake, but the Glasscock’s image does suggest that the court is laboring to digest a big mass of litigation.

The one thing for sure is that VC Glasscock’s opinion in this case does show how difficult it is to obtain dismissal of an action under the entire fairness standard, particularly given that presumption at the pleading stage in favor of the plaintiffs’ allegations.

These cases will continue to work their way through the anaconda – I mean, the courts. These actions are not without meaning beyond their immediate context, particularly as there are some signs that the SPAC marketplace may be rejuvenating. The judicial developments, along with the SEC’s revised SPAC disclosure guidelines, arguably provide useful guidance to the current crop of SPACs – although the meaning of the Delaware courts’ decisions could be less directly applicable to some of the current crop of SPACs, many of which are incorporated in the Cayman Islands, rather than in Delaware.

In Zillow appeal, 9th Circuit could chill shareholder class certification

 [reuters.com/legal/government/column-zillow-appeal-9th-circuit-could-chill-shareholder-class-certification-2024-11-06](https://www.reuters.com/legal/government/column-zillow-appeal-9th-circuit-could-chill-shareholder-class-certification-2024-11-06)

Alison Frankel

A 'sale' sign advertises a home in Alexandria, Virginia July 22, 2010. REUTERS/Molly Riley
Purchase Licensing Rights , opens new tab

Nov 6 (Reuters) - Shareholder lawyers, you're going to want to keep an eye on this case.

The 9th U.S. Circuit Court of Appeals agreed , opens new tab last month to revisit a Seattle federal judge's decision , opens new tab to certify a class of Zillow shareholders who accuse the real estate listing company of lying to them about its now-shuttered program of buying, renovating and reselling houses.

This mid-case appeal, if it goes as Zillow hopes, could make it substantially more difficult for investors to win class certification from federal trial judges in California and other states in the 9th Circuit.

Zillow's lawyers from Skadden, Arps, Slate, Meagher & Flom and Perkins Coie pitched the case , opens new tab as a chance for the 9th Circuit — the second-most important appellate court for shareholder class actions — to clarify the impact of the U.S. Supreme Court's ruling , opens new tab in 2021's Goldman Sachs Group v. Arkansas Teacher Retirement System.

Right now, according to Zillow (ZG.O) , opens new tab, there is a gap between courts in the 9th and 2nd Circuits on the proper application of the Supreme Court's Goldman precedent. In the 2nd Circuit, according to Zillow, the appellate court's final decertification , opens new tab of a class of Goldman Sachs investors claiming the bank lied about its conflicts policies means that shareholders must show a direct match between a company's alleged misrepresentation and the so-called corrective disclosure that revealed the lie.

As Zillow sees it, the 2nd Circuit now requires that damaging back-end revelations must "expressly and specifically" refute the company's alleged front-end misrepresentation.

But because the 9th Circuit has not yet offered guidance on the Supreme Court's Goldman ruling (or, for that matter, on the 2nd Circuit's subsequent interpretation of the Supreme Court's precedent), trial courts in the 9th Circuit are not heeding the justices' instruction that courts must consider whether there's a mismatch between the alleged corporate lie and its correction.

Here's the thing, though.

The Goldman Sachs case, at both the Supreme Court and on remand to the 2nd Circuit, involved a mismatch between the bank's generic statements about Goldman's business principles and a very specific revelation that during the 2007 financial crisis, the bank allowed an important hedge fund client to design a complex derivative security to reap big profits at the expense of other Goldman customers.

And, as you surely recall, when the Supreme Court warned trial courts in its 2021 Goldman ruling to be wary of certifying shareholder classes with mismatched misrepresentations and revelations, the justices were focused on the generic nature of Goldman's alleged lies.

In essence, the court was expressing skepticism that generic misrepresentations really impact market prices — and doubt that any price impact from the disclosure of specific bad news can be linked back to allegedly false but anodyne corporate representations.

The Zillow class action does not involve generic alleged misrepresentations like those at issue in the Goldman case.

Instead, plaintiffs' lawyers at Hagens Berman Sobol Shapiro and Kessler Topaz Meltzer & Check allege that the company deceived investors when it said its home pricing algorithms gave Zillow a competitive advantage in buying and flipping houses and, later, that its growing inventory was a sign of customer demand.

Shareholders claim that a series of news and analyst reports revealed in the fall of 2021 that Zillow was in fact overpaying for houses and underpaying home renovation contractors, leaving the company with unsellable inventory. (Zillow subsequently shut down the house-flipping project.)

When Zillow's share price fell in the wake of those reports in the fall of 2021, shareholders argued, the declines proved that the market had relied upon Zillow's allegedly false statements, which told a different story about the prices it was paying, the renovations it was conducting and the inventory it was carrying.

So Goldman precedent, as far as Zillow shareholders are concerned, doesn't have a whole lot of relevance. Indeed, U.S. District Judge Thomas Zilly of Seattle hardly mentioned the Goldman case when he certified Zillow investors as a class in August 2023.

The judge rejected Zillow's arguments about a mismatch between the allegedly false statements and contradictory news and analyst reports, quoting a recent 9th Circuit opinion that said a corrective disclosure "need not 'precisely mirror' the misrepresentation."

Shareholder lawyers made that point in their brief [here](#), opens new tab opposing interlocutory appeal, accusing Zillow of twisting Goldman precedent from both the Supreme Court and the 2nd Circuit.

“They incorrectly claim — despite clear holdings in the Goldman cases to the contrary — that plaintiffs must establish that all of the alleged corrective statements expressly and specifically negated the misstatements,” shareholders wrote. “Because the Goldman cases settle that defendants’ assertion is incorrect, the issue of law that defendants identify is settled against them.”

In response [\[link\]](#), opens new tab, Zillow argued that, if anything, shareholders’ fact-specific arguments about precedent from the Goldman cases underscores the need for the 9th Circuit to instruct trial judges on how to apply the precedent.

“Plaintiff’s interpretation is just that — plaintiff’s interpretation,” Zillow wrote. The existence of conflicting interpretations, with no 9th Circuit authority to say which is correct, demonstrates that an unsettled and fundamental issue of law exists in the 9th Circuit.”

Judges William Fletcher and Johnnie Rawlinson apparently agreed since they granted Zillow’s motion last month. Zilly, the trial judge, stayed the underlying case last week until the appeal is resolved.

Zillow did not respond to a query on the interlocutory appeal. Shareholder lawyer Steve Berman of Hagens Berman declined to comment.

For the securities bar, this case could be hugely important. If the 9th Circuit rules that the Supreme Court’s Goldman precedent allows defendants to rebut the presumption of market reliance by arguing that corrective disclosure did not specifically refute alleged misstatements, life is going to get a lot harder for shareholder lawyers.

Read more:

Goldman Sachs appellate ruling is boon for securities class action defendants
Securities class action defendants counting on SCOTUS’ Goldman ruling
Jumpstart your morning with the latest legal news delivered straight to your inbox from The Daily Docket newsletter. Sign up here.

Reporting By Alison Frankel

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Alison Frankel
Thomson Reuters

Trade Desk, Jeff Green Beat Bid to Block Delaware-to-Nevada Move

By Mike Leonard 2024-11-06T16:24:22000-05:00

- Judge rejects claim that move requires two-thirds holder vote
- But authorizes fast-tracked appeal ahead of Nov. 14 meeting

[Trade Desk Inc.](#) and billionaire CEO [Jeff Green](#) prevailed in court Wednesday against an attempt to stop the tech company's reincorporation from Delaware to Nevada, which imposes looser restrictions on insider self-dealing.

A Delaware judge declined to block an upcoming investor vote on the relocation, rejecting claims that Trade Desk is set to violate charter sections requiring a two-thirds vote for certain types of governance changes. The supermajority provisions expressly cover only charter amendments, not other types of corporate actions that may have the same effect, the judge said.

Although the shareholder leading the lawsuit said he's trying to elevate "substance over form," decades of legal precedents offer transaction architects clear guidelines for accomplishing that result, according to [the 47-page ruling](#) by Vice Chancellor [Paul A. Fioravanti Jr.](#)

"These cases have drawn clear lines," Fioravanti said. "The court's goal here is to give effect to the drafters' decisions in selecting which words to use—and which words to not use."

The judge did, however, authorize an expedited appeal, citing the fast-approaching meeting date of Nov. 14.

The proposed class action is the latest in a series of showdowns in Delaware's Chancery Court over plans by influential insiders to flee for Nevada—which is trying to lure companies with its "no liability" reputation—or Texas, which just set up its own competing business tribunal.

Delaware's judges have spent the year fielding a barrage of attacks from [Elon Musk](#) and corporate defense advocates who say the pendulum there has swung too far toward minority investors.

Wednesday's opinion comes just a week after Fioravanti presided over an Oct. 30 hearing the same day [Delaware's top court weighed](#) a case involving TripAdvisor Inc.'s move earlier this year to Nevada. A different Delaware judge in February allowed TripAdvisor's relocation, but held open the possibility of money damages.

The TripAdvisor hearing centered mostly on the practical problems with assigning a dollar value to the benefits provided by Delaware's robust corporate laws, a focus that appeared to give an edge to the company and its controlling stockholder, [Greg Maffei](#).

The Trade Desk lawsuit, [filed Oct. 4](#), said the company and Green were misleading investors about the approval required for effectively amending several charter provisions. The suggestion that Green could make the changes nearly on his own—through his 49% voting power—would dissuade stockholders from weighing in, the suit said.

Fioravanti disagreed, saying sophisticated deal architects are expected to draft transactions with formal legal precedents in mind. There were key terms and phrases they could have used to apply the two-thirds vote requirement more broadly, the judge said.

"The court ascribes intent to that omission," he wrote, saying legal formalities "play a critical role in the interpretation of certificates and corporate law writ large."

The shareholder, Stephen Gunderson, is represented by Bernstein Litowitz Berger & Grossmann LLP, Friedman Oster & Tejtell PLLC, Equity Litigation Group LLP, and Kaskela Law LLC. Green and the company are represented by Wilson Sonsini Goodrich & Rosati PC and Latham & Watkins LLP.

The case is [Gunderson v. Trade Desk Inc.](#), Del. Ch., No. 2024-1029, 11/6/24.

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UiPath Avoids Some, Not All, Securities Fraud Claims Tied to IPO

By Bernie Pazanowski

- Claims about invoices, business model, risk factors tossed
- Statements about competition with Microsoft held actionable

Bloomberg Law News 2024-11-07T09:45:58038698751-05:00

UiPath Avoids Some, Not All, Securities Fraud Claims Tied to IPO

By Bernie Pazanowski 2024-11-06T11:44:36000-05:00

- Claims about invoices, business model, risk factors tossed
- Statements about competition with Microsoft held actionable

UiPath Inc. and two of its officers didn't commit securities fraud when they made statements about the company's invoice calculations, business model, and risk factors during the run up to its initial public offering, a federal court said.

But the company that provides robotic process automation must face a class action claim that it lied during the class period from April 21, 2021 to Sept. 7, 2022 about its competition with Microsoft Corp., Judge Denise L. Cote said Monday for the US District Court for the Southern District of New York.

UiPath grew quickly from its founding in 2005 and had its IPO on April 21, 2021, Cote said.

But the company was having a problem managing its growth, lead plaintiff Paul Severt said.

Severt alleged that the defendants used a misleading metric to brighten UiPath's financial outlook; claimed that the business model the company used to get new customers was successful, when it wasn't; understated the competitive threat Microsoft posed to the company; and issued risk disclosures that were misleading because they framed events that had already occurred as hypotheticals.

UiPath's statements about its financial outlook weren't actionable fraud because the company made ample disclosures about both the nature of the metric and its limitations, Cote said. For example, she said, the metric was defined as a measurement only of amounts invoiced annually and the 2021 registration statement warned that the metric "does not reflect any actual or anticipated reductions in invoiced value" due to "service cancellations."

The statements made about UiPath's business model weren't actionable, because Severt presented them out of context, Cote said. For example, he said that a statement in the prospectus that, "Historically, once our platform is deployed, our customers have significantly expanded their use of our platform," was misleading because a confidential witness said that customers had already stopped renewing their contracts by the time of the IPO.

None of the witness' statements "quantify the extent to which customers had either reduced their business or stopped doing business with UiPath," Cote said. The "vague assertions do not plausibly plead that the prospectus statement was misleading," she said.

Though some of the statements about Microsoft's competition weren't actionable, others were, Cote said. Statements by UiPath's chief financial officer that the company didn't see much competition from Microsoft or other entrants into the market conflicted with witness testimony about UiPath's customer churn and how the company didn't typically win customers when competing against Microsoft, she said.

Severt didn't sufficiently plead that the risk factors outlined in the prospectus were misleading, Cote said. UiPath also didn't fail to disclose any adverse events that had already occurred, she said.

A similar suit was filed against UiPath in January 2024.

Scott & Scott Attorneys at Law LLP represents the plaintiff. Davis Polk & Wardwell LLP represents UiPath.

The case is *In re UiPath, Inc. Sec. Litig.*, 2024 BL 397178, S.D.N.Y., No. 23cv7908 (DLC), 11/4/24.

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Bloomberg Law News 2024-11-07T11:26:25982713246-05:00

Chegg Agrees to Settle Investor Growth Claims for \$55 Million

By Martina Barash 2024-11-07T07:26:49000-05:00

Chegg Inc. has agreed to pay investors \$55 million to settle claims that it falsely touted the sustainability of its online tutoring growth, the shareholders said in a request for court approval.

The deal to end the proposed class action, which alleges the textbook rental and tutoring company downplayed the role of the remote learning environment and cheating, is fair and reasonable, the investors told the US District Court for the Northern District of California Wednesday.

- “Chegg is a learning platform and not a cheating platform,” the company said after Judge P. Casey Pitts [denied](#) its request for dismissal in March
- The settlement “is an excellent result after taking into account Chegg’s declining operations, precarious financial condition, extremely limited resources,” and available directors’ and officers’ insurance, the investors said in their bid for preliminary approval
- The settlement amount is nearly four times the 2023 median for securities class action accords, they said

Motley Rice LLC and Saxena White PA are lead counsel for the investors. Cooley LLP represents Chegg.

The case is [Leventhal v. Chegg, Inc.](#) , N.D. Cal., No. 5:21-cv-09953, motion 11/6/24 .

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Musk Gets No-Fraud Jury Verdict Upheld in Suit Over Tesla Tweets

By Martina Barash

- Investors sued over tweets about taking EV maker private
- Materiality to investors, Musk's intent at issue on appeal

Bloomberg Law News 2024-11-07T09:43:37776771895-05:00

Musk Gets No-Fraud Jury Verdict Upheld in Suit Over Tesla Tweets

By Martina Barash 2024-11-06T15:23:34000-05:00

- Investors sued over tweets about taking EV maker private
- Materiality to investors, Musk's intent at issue on appeal

Tesla Inc. investors Wednesday lost an appeal seeking a new trial over CEO Elon Musk's 2018 tweets about taking the company private.

The US Court of Appeals for the Ninth Circuit affirmed a jury verdict finding that the posts—including one stating, "Funding secured"—fell short of securities fraud. A second tweet read, "Investor support is confirmed. Only reason why this is not certain is that it's contingent on a shareholder vote."

"We conclude that there was no instructional error warranting a new trial," the appeals court said in an unsigned, unpublished opinion issued on the heels of the Oct. 25 oral argument.

Judges Richard R. Clifton, Gabriel P. Sanchez, and Jennifer Sung heard the case. They considered a situation where the trial court had already decided that the statements were untrue and that Musk had acted recklessly. Judge Edward M. Chen of the US District Court for the Northern District of California told the jury it could "assume" Musk acted with "at least reckless disregard" for the truth but "must still decide whether Mr. Musk acted knowingly."

With that instruction, a San Francisco federal court jury found in favor of Musk in February, 2023. Chen later denied a bid for a new trial, calling the investors' objection to the jury instruction "nonsensical," explaining that whether Musk acted knowingly was highly relevant.

On appeal, the investors challenged that jury instruction as giving the investors a higher burden than they should have faced to prove their case.

A second issue left for the jury—which the investors said should have been decided by the trial judge—was whether the tweets were material to investors. Chen, in denying a new trial, said the difference between falsity and materiality was made clear to the jurors.

The matter of whether Musk knew what he was saying was untrue “was implicated at another stage of the case: apportionment,” the panel said. “If it found liability, the jury would have to apportion liability for damages by deciding whether any defendant knowingly violated the law.”

“When considered as a whole, the instructions here informed the jury of the proper legal standard,” the court said. And if there was any error, it was harmless because of what the attorneys said in arguments to the jury and the lack of questions from the jurors, the judges said.

The panel didn’t reach the issue of materiality.

Levi & Korsinsky LLP represented lead plaintiff Glen Littleton. Quinn Emanuel Urquhart & Sullivan LLP represented Tesla, Musk, and other company officials.

The case is Littleton v. Musk , 9th Cir., No. 23-16010, unpublished 11/6/24 .

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Tesla investors lose bid for new US trial over Musk's 2018 tweets

 [reuters.com/legal/tesla-investors-lose-bid-new-us-trial-over-musks-2018-tweets-2024-11-06](https://www.reuters.com/legal/tesla-investors-lose-bid-new-us-trial-over-musks-2018-tweets-2024-11-06)

Nate Raymond

Tesla, X (formerly known as Twitter) and SpaceX's CEO Elon Musk attends the AI Safety Summit at Bletchley Park in Bletchley, Britain on November 1, 2023. Leon Neal/Pool via REUTERS/File Photo Purchase Licensing Rights , opens new tab

Nov 6 (Reuters) - A U.S. appeals court on Wednesday upheld a jury's verdict clearing Tesla (TSLA.O) , opens new tab CEO Elon Musk and his company of liability over allegations they misled investors when the billionaire posted on social media in 2018 that he had "funding secured" to take the electric car company private.

The San Francisco-based 9th U.S. Circuit Court of Appeals rejected , opens new tab arguments by lawyers for Tesla investors that the instructions jurors received on the law from the judge presiding over the case before they delivered their verdict in February 2023 were flawed, warranting a new trial.

Lawyers for Tesla shareholders argued the jury instructions were confusing and impermissibly heightened their burden of proof by requiring them to establish Musk knowingly made false statements when he wrote his posts on Twitter, the platform now known as X following Musk's \$44 billion acquisition of it in 2022.

They said U.S. District Judge Edward Chen gave that flawed instruction even though before the trial he had held Musk's tweets were inaccurate and that he acted recklessly, making it unnecessary for the shareholders in the class action lawsuit to prove Musk acted knowingly.

But Wednesday's three-judge panel disagreed, saying that while Musk had been found to have, at a minimum, tweeted recklessly, the question of whether he acted knowingly was still relevant if jurors needed to decide how to apportion damages between the defendants in the case, including Tesla directors.

Ellyde Thompson, a lawyer for Musk and Tesla, welcomed the decision. A lawyer for the plaintiffs did not respond to requests for comment.

The case was filed in 2018 and concerned posts on Twitter that had also led to a \$40 million securities fraud settlement later that year between Musk, Tesla and the U.S. Securities and Exchange Commission.

The SEC probe and investors' lawsuit stemmed from a tweet Musk posted on Aug. 7, 2018, saying he was considering taking Tesla private at \$420 per share, a premium of about 23% to the prior day's close, and had "funding secured."

Later that day, he tweeted: "Investor support is confirmed."

Tesla's stock price soared after the tweets and then fell again after Aug. 17, 2018, as it became clear the buyout would not happen. The shareholders' lawyers accused Tesla and Musk of misleading investors, costing them billions of dollars.

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Reporting by Nate Raymond in Boston; Editing by Diane Craft

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

Bloomberg Law News 2024-11-07T11:42:17741420542-05:00

Vanguard Reaches \$40 Million Settlement to End Investor Tax Suit

By John Woolley 2024-11-07T10:45:10000-05:00

- Vanguard continues to deny liability after fund restructure
- Investors say they faced \$9,000 to \$36,000 surprise tax bills

Vanguard finalized its \$40 million settlement with investors who say the firm breached its fiduciary duty when it restructured its mutual funds in such a way that caused them to pay surprise capital gains taxes.

The settlement, [filed](#) in the US District Court for the Eastern District of Pennsylvania on Wednesday, will benefit a class of US investors who held shares in the Vanguard Target Retirement series of mutual funds and received capital gains distributions from them in 2021. Vanguard continues to deny wrongdoing or liability.

Investors [sued](#) Vanguard Chester Funds in 2022 after the group changed a key component of its retirement-oriented mutual funds, lowering the minimum investment amount needed to access its institutional funds from \$100 million to \$5 million

The restructure caused an “elephant stampede” out of Vanguard’s retail funds and forced asset sell-offs to meet the redemption requests, the lawsuit said. Those who stayed in the retail funds faced surprise tax bills between \$9,000 and \$36,000, according to the investors

Judge John F. Murphy [certified](#) the investors’ proposed class one year ago, rejecting Vanguard’s “creative” argument that the investors lacked standing because “it might have done the aggrieved investors a favor by accelerating their tax liabilities,” making the alleged harms speculative.

Rather, the plaintiffs plausibly alleged that most investors, who didn’t plan to sell any share of Vanguard’s Target Date Funds until they retired, would have paid less in capital gains taxes when they liquidated at a later date, the court said.

Oral arguments were scheduled to be held in October before the settlement [was reached](#) through

private mediation. The deal is subject to Murphy's approval.

The Rosen Law Firm PA represents the class. Debevoise & Plimpton LLP and Welsh & Recker PC represent Vanguard.

The case is [In re Vanguard Chester Funds Litig.](#) , E.D. Pa., No. 2:22-cv-00955, stipulation settlement 11/6/24 .

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Wisconsin joins \$1.37 billion settlement with Kroger over opioid crisis

 legalnewsline.com/stories/665743858-wisconsin-joins-1-37-billion-settlement-with-kroger-over-opioid-crisis

November 6, 2024

State AG



Attorney General Josh Kaul | Attorney General Josh Kaul Office

Attorney General Josh Kaul, in collaboration with a bipartisan coalition of thirty state attorneys general, has announced a settlement agreement with Kroger valued at \$1.37 billion. This settlement addresses the grocery chain's involvement in the opioid crisis. Wisconsin is set to receive up to \$21.8 million for efforts aimed at mitigating opioid-related issues, with payments expected to commence early next year. This contribution forms part of a broader national effort that has seen Wisconsin secure over \$780 million from settlements involving distributors, manufacturers, pharmacies, and consultants related to prescription opiates.

"We've made major progress in getting accountability from companies that contributed to the opioid epidemic," stated Attorney General Josh Kaul. "With more resources available, more can be done to combat this epidemic."

As part of the settlement, Kroger has committed to implementing injunctive relief measures. These measures will require its pharmacies to monitor, report, and share data concerning suspicious activities related to opioid prescriptions.

Kroger operates over 100 grocery stores across Wisconsin under various names including Harris Teeter, Dillons, Fred Meyer, Smith's Food and Drug, Ralphs, King Soopers, Fry's, QFC, City Market, Jay C, Pay Less, Baker's, Gerbes, Pick 'n Save, Metro Market, and Mariano's.

The details of the settlement between Kroger and the state of Wisconsin are available for public review.

Critical Mass With Law.com's Amanda Bronstad: Jurors Hand First Defense Verdict to Infant Formula Manufacturers, Decongestant Litigation Dire After Judge Dismisses Claims

[law.com/2024/11/06/critical-mass-with-law-coms-amanda-bronstad-jurors-hand-first-defense-verdict-to-infant-formula-manufacturers-decongestant-litigation-dire-after-judge-dismisses-claims](https://www.law.com/2024/11/06/critical-mass-with-law-coms-amanda-bronstad-jurors-hand-first-defense-verdict-to-infant-formula-manufacturers-decongestant-litigation-dire-after-judge-dismisses-claims)

Amanda Bronstad



Welcome to **Law.com Class Actions: Critical Mass**, a weekly briefing for class action and mass tort attorneys.

This week: **Abbott** and **Mead Johnson**, each hit with prior damages verdicts, scored their first defense win in the cow's milk-based infant formula litigation. A federal judge's dismissal order significantly weakened cases over decongestants like **NyQuil Severe Cold & Flu** and **Sudafed PE**. Find out who got appointed to lead antitrust class actions against **sugar producers**.

I'm **Amanda Bronstad**. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on LinkedIn or X: [@abronstadlaw](#).



James F. Hurst partner with Kirkland & Ellis. Courtesy photo

Formula Manufacturers 'A Little More Sympathetic'?

In a game-changing win for **Abbott** and Mead Johnson, a Missouri jury handed both infant formula manufacturers a defense verdict on Oct. 31.

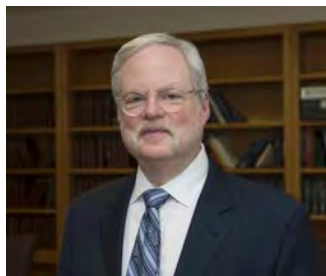
After five weeks of trial, jurors deliberated for about three hours before siding against plaintiff Elizabeth Whitfield, whose son, Kaine Whitfield, was diagnosed with necrotizing enterocolitis, or **NEC**, 16 days after birth. The verdict was the third involving cow's milk-based infant formula given to premature babies in hospitals, but the first that didn't award damages. Two prior juries in Illinois and Missouri this year hit Mead Johnson with \$60 million, and Abbott with \$495 million.

Rebecca Fitzpatrick (**Kirkland & Ellis**) and Sierra Elizabeth (**Kirkland & Ellis**) delivered closings for Abbott, and Phyllis Jones (**Covington**) for Mead Johnson. Another defendant, **St. Louis Children's Hospital**, was represented by Teresa Bartosiak (**Bartosiak Makepeace**).

Whitfield's attorney, Timothy Cronin (**Simon Law Firm**) had asked the jury for \$6 billion in punitive damages. A statement from **Keller Postman**, whose partner Amelia Frenkel had been on the plaintiffs' trial team, blamed the defense verdict in part on the "bad faith" of Abbott attorney James Hurst (**Kirkland & Ellis**), which was the subject of an Oct. 24 sanctions order, but had "already impacted the jury" and "affected the fairness of the proceedings."

But Tom Waskom (**Hunton Andrews**), who is following the trial, noted one aspect about the case that also may have made a difference to jurors:

"Having multiple defendants, including one defendant whose product was only used once, made this a more difficult case for the plaintiff. Having the hospital there probably made the defense side seem a little bit more sympathetic than maybe a single faceless corporation would have been because you'll have actual healthcare providers in there defending the use of this product."



U.S. District Judge Brian M. Cogan of the Eastern District of New York. Photo: Monika Kozak/ALM

Decongestant Lawyers Want a 'Complete Dismissal'

A federal judge dismissed threshold consumer claims in the multidistrict litigation over decongestants, such as **Sudafed PE** and **NyQuil Severe Cold & Flu**, that an FDA advisory committee found last year didn't work.

Here's my story on the Oct. 29 order by **U.S. District Judge Brian Cogan** in New York. He found that federal law – specifically, the **Federal Food, Drug, and Cosmetic Act**, which allows the **U.S. Food and Drug Administration** to regulate medications — preempted claims that the decongestants were mislabeled. He also struck separate racketeering allegations because the plaintiffs lacked standing as indirect consumers.

The ruling, which addressed a bellwether complaint based on New York law, leaves the fate of more than 100 lawsuits uncertain. Plaintiffs' lawyers planned to file a master complaint following the ruling, and Cogan has scheduled a Nov. 21 status conference.

Jay Lefkowitz (**Kirkland & Ellis**), for **Haleon**, who, along with **Procter & Gamble** attorney Andrew Soukup (**Covington**), were spotlighted as **Litigators of the Week** for their dismissal arguments, told **ALM's Ross Todd**:

"Because the defendants won dismissal of the streamlined complaint, that holding now applies to all the MDL cases and a complete dismissal order should be entered. It is certainly possible plaintiffs will appeal Judge Cogan's decision, and if they do, our joint defense team will be prepared to defend the ruling and our clients at the Second Circuit."



Kimberly Justice, with Freed Kanner London & Millen.

Who Got the Work?

Seven attorneys were appointed to lead the antitrust multidistrict litigation against sugar producers. In an Oct. 30 order, **U.S. District Judge Jerry Blackwell**, in Minnesota, named to a plaintiffs' steering committee: Daniel Gustafson (**Gustafson Gluek**), Stacey Slaughter (**Robins Kaplan**), Peter Barile (**Lowey Dannenberg**), Heidi Silton (**Lockridge Grindal**), Kimberly Justice (**Freed Kanner**), Elizabeth Fegan (**FeganScott**) and Michael Roberts (**Roberts Law Firm**). He also named Lawrence Buterman (**Latham & Watkins**), attorney for **United Sugar Producers & Refiners Cooperative**, as lead defense counsel.

Here's what else is happening:

Phillies Forklift: **Live Nation**, the **Philadelphia Phillies** and a staging company agreed to pay \$18 million to settle claims on behalf of a band photographer who was crushed by a forklift following a **Green Day** concert at **Citizens Bank Park**, where the baseball team plays. The accident occurred in 2021 as the photographer was leaving and an unmanned forklift rolled toward him, crushing him against a concrete metal post. Kevin O'Brien (**Stampone O'Brien**) represented the photographer, Jake Chamseddine. Defense lawyers were Robert Foster (**Reger Rizzo**) for the Phillies, Kenneth Fair (**Naulty Scaricamazza**) for Live Nation and Jonathan Cross (**Marshall Dennehey**) for staging company **Tri-State Stage Labor** and the forklift driver.

CooperSurgical Case: In the first substantive ruling in the litigation against fertility clinic **CooperSurgical**, a Los Angeles judge refused to dismiss a lawsuit alleging its defective culture media caused dozens of couples to lose their embryos. On Oct. 8, **Los Angeles Superior Court Judge Mark Young** allowed claims of product liability and failure to recall to move forward. Four days earlier, the **U.S. Judicial Panel on Multidistrict Litigation** had denied coordinating 29 similar actions in federal courts in California, New Mexico and Oregon.

Marriott 2.0: **Marriott** was before a federal appeals court for a second time to dismantle certification of a class of hotel guests impacted by its 2018 data breach. **U.S. District Judge John Preston Bailey** granted class certification last year in the multidistrict litigation against Marriott. "We're back here because the district court once again certified classes that consist entirely of people who agreed they would not pursue class relief," Marriott attorney Matthew Hellman (**Jenner & Block**) told the **U.S. Court of Appeals for the Fourth Circuit** at Nov. 1 oral arguments. Samuel Issacharoff (**NYU Law**) argued for the plaintiffs. Last year, the Fourth Circuit reversed a 2022 certification order by the prior judge, remanding on whether he should have first considered whether class action waivers in a Starwood Preferred Guest Program Terms & Conditions prevented the class claims.

Thanks for reading Critical Mass! I'll be back next week.

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US court reluctant to blow up Boy Scouts' \$2.46 billion sex abuse settlement

 [reuters.com/legal/litigation/us-court-reluctant-blow-up-boy-scouts-246-billion-sex-abuse-settlement-2024-11-06](https://www.reuters.com/legal/litigation/us-court-reluctant-blow-up-boy-scouts-246-billion-sex-abuse-settlement-2024-11-06)

Dietrich Knauth

Nov 6 (Reuters) - A U.S. appeals court panel on Wednesday appeared unlikely to overturn the Boy Scouts of America's \$2.46 billion settlement of sex abuse claims, suggesting it would be impractical to upend the deal long after the youth organization emerged from bankruptcy.

A three-judge panel of the 3rd U.S. Circuit Court of Appeals in Philadelphia heard oral arguments in appeals of a 2022 bankruptcy court ruling approving the deal, which resolved the claims of 82,500 men who alleged that they were sexually abused by troop leaders as children.

The settlement has been challenged by 144 sex abuse survivors and a minority of the youth organization's insurers. The abuse survivors have argued that they should be allowed to sue organizations, like local Boy Scouts councils and churches, that ran scouting programs where abuse occurred. Those organizations received immunity from lawsuits in exchange for contributions to the Boy Scouts' bankruptcy settlement, despite not filing for bankruptcy themselves.

Delia Lujan Wolff, an attorney for 75 survivors, argued that since the U.S. Supreme Court clearly ruled against that type of release of liability for non-debtors in an appeal of OxyContin maker Purdue Pharma's bankruptcy, the Boy Scouts shouldn't be able to protect organizations that ran scouting programs where abuse occurred, like the Catholic Archdiocese of Agaña in Guam.

Lujan Wolff argued that the Boy Scouts settlement could be unwound, because only a small amount of the settlement funds had been paid.

"Nobody can bargain away my clients' claims without their consent, not even other survivors," Lujan Wolff said.

The judges' probed the practical impact of re-opening the Boy Scouts bankruptcy and sending it back to the drawing board.

"All the money gets returned and now there will be suits left and right against the institutions, the local chapters," U.S. Circuit Judge Marjorie Rendell said. "It's going to implode, is it not?"

Attorneys for the Boy Scouts of America, as well as insurers and abuse survivors who support the deal, said that upending the settlement would have devastating emotional and financial consequences.

The Boy Scouts organization said that it would have to demand money back from abuse claimants who had only just begun receiving settlement money decades after being abused. It would also be unable to recover assets – like real estate contributed by its local councils – that had been sold to fund the settlement.

Evan Smola, an attorney representing abuse survivors who support the deal, said that overturning the settlement would cause "devastation" for tens of thousands of claimants who "tore away the scar tissue and faced their abuse head on" during the bankruptcy proceedings.

Abuse survivors submitted detailed descriptions of their abuse during the bankruptcy, sometimes being questioned for hours so that bankruptcy professionals could "dissect their abuse" and evaluate what they should be paid, Smola said.

Supporters of the settlement said the Supreme Court's Purdue ruling did not apply to already-approved cases, like the Boy Scouts bankruptcy. They said the court could also uphold the deal under a judicial doctrine of "equitable mootness," which prevents the unwinding of bankruptcy settlements when it would be unfair to do so.

The Boy Scouts filed for bankruptcy in February 2020 after several U.S. states enacted laws allowing accusers to sue over decades-old abuse allegations.

The case is: In re: Boy Scouts of America, U.S. Court of Appeals for the Third Circuit, No. 23-1664.

Read more:

US Supreme Court lets \$2.46 billion Boy Scouts sex abuse settlement proceed
US Supreme Court Purdue ruling makes mass litigation tougher to resolve in bankruptcy
Bankruptcy cases to watch after US Supreme Court Purdue Pharma ruling
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Reporting by Dietrich Knauth in New York

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

Bloomberg Law News 2024-11-07T12:27:34228522395-05:00

Teva Gets Mixed Ruling in Bid to Nix Inhaler Antitrust Suit

By Katie Arcieri 2024-11-07T12:16:48000-05:00

- Judge gives Teva win on plaintiffs' reverse payment claim
- Plaintiffs have antitrust standing on other issues, court says

Teva Pharmaceutical Industries Ltd. failed to fully escape claims that the company blocked generic competition in the asthma inhaler market, after a federal judge denied in part its motion for judgment on the pleadings.

Judge Nathaniel M. Gorton of the US District Court for the District of Massachusetts in a Wednesday [order](#) granted judgment for Teva on reverse payment claims but said the plaintiffs' allegations of antitrust standing were sufficient.

He also rejected Teva's bid to stay the case, which accuses the company of prolonging a monopoly over its brand name "QVAR" line of asthma inhalers by paying Amneal Pharmaceuticals to delay its generic version of QVAR. Teva acquired the rights to QVAR in 2006.

"There remains a genuine dispute of material fact as to whether a generic manufacturer could design a generic QVAR inhaler product around defendants' upheld patents," Gorton said.

The case is among a string of litigation alleging that drug patent owners used reverse payment deals with generic drugmakers to stave off competition from lower-cost drugs. The Federal Trade Commission has increasingly scrutinized such [deals](#), saying they end up costing consumers and taxpayers billions of dollars in higher drug prices. Under such agreements, the brand name patent holder settles a challenge to its patent with an allegedly infringing generic drugmaker.

Gorton in May denied Teva's motion to [dismiss](#) antitrust claims, saying the plaintiff health and welfare funds of labor unions sufficiently pleaded a monopolization scheme, as well as facts to support an illegal reverse payment with Amneal.

Teva then moved for [judgment](#) on the pleadings, saying the plaintiffs' complaint was implausible because it never made a payment to Amneal and decided not to sue the company, citing an FTC

order that barred it from enforcing its QVAR patents against Amneal.

Gorton said the the plaintiffs' "conjecture regarding an alleged reverse payment scheme is rendered implausible" in the face of Teva's valid documentary evidence.

He rejected the plaintiffs' notion that because there wasn't any other explanation for the failure to sue, there must have been a reverse payment scheme.

"At the motion to dismiss stage, the Court was left to presume that Amneal's unexplained failure to launch the generic alternative to QVAR plausibly resulted from a reverse payment," Gorton said. "Based on defendants' responsive pleading, however, mere conjecture is not enough."

The plaintiffs are represented by firms including Berman Tabacco, Sperling & Slater LLC and Hagens Berman Sobol Shapiro LLP. Teva is represented by Kirkland & Ellis LLP.

The case is [Iron Workers Dist. Council of New England Health v. Teva Pharm. Indus. Ltd.](#) , D. Mass., No. 23-11131, 11/6/24 .

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Danone Sheds False-Ad Suit Over Microplastics in 'Natural' Water

B [bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X6UNKQG8000000](https://www.bloomberglaw.com/product/blaw/bloomberglawnews/class-action/X6UNKQG8000000)

Class Action

Picture of the facade of the Evian mineral water factory in Evian-les-Bains, eastern France.

Photographer: Miguel Medina/AFP via Getty Images

- Claims centered on bottle's microplastics, 'natural' label
- Court says 'natural' describes water source, per regulation

Danone Waters of America LLC convinced a federal judge to dismiss a proposed class action alleging the company falsely advertises its Evian spring water as “natural” despite the bottles leaching microplastics into the water.

The US Food and Drug Administration's regulation governing the term “spring water” doesn't impose a requirement related to microplastics, the US District Court for the Northern District of Illinois said Tuesday.

“The problem with Plaintiffs' argument is that the terms ‘natural’ and ‘spring water’ cannot be separated,” Judge Thomas M. Durkin said. The regulation “uses the word ‘natural’ seven times, and each instance is used to describe the source of the ‘spring water,’” he added.

Consumer protection claims attempting to impose a requirement that the word “natural” be used differently from identifying the water's source “goes beyond the regulatory requirements” and is preempted, Durkin said.

The ruling follows similar decisions that have dismissed consumer fraud claims based on microplastics in bottled water products.

But Durkin noted that his reasoning differed from that of his predecessors.

“The other courts based their findings on the general proposition that the federal ‘bottled water’ regulations (including the definition of ‘spring water’) do not mention microplastics,” Durkin said.

But whether the regulation imposes a requirement related to microplastics to determine whether “natural” deception claims are preempted is irrelevant, because any claim imposing a requirement beyond using “natural” to identify the water source is preempted, he said.

The consumers were represented by the Law Offices of Todd M. Friedman PC. Danone was represented by DLA Piper LLP.

The case is Daly v. Danone Waters of Am., LLC , 2024 BL 397655, N.D. Ill., No. 1:24-cv-02424, 11/5/24 .

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California Attorney General Scores Another Win in Plastics Fight

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Litigation

Rob Bonta, attorney general of California, during an interview in San Francisco, California, US, on Thursday, March 7, 2024.

Photographer: Loren Elliott/Bloomberg

- Preliminary injunction motion denied a second time
- Plastics group didn't show success on the merits, court says

The Plastics Industry Association lost its latest attempt to avoid California's plastics recycling deception probe.

Judge Amit P. Mehta denied the group's renewed motion for preliminary injunction and temporary restraining order against California Attorney General Rob Bonta (D), according to a memorandum opinion and order filed Wednesday in the US District Court for the District of Columbia. The association failed to show likely success on the merits of its claims and in linking Bonta to the court's jurisdiction, the order says.

The decision marks another win for Bonta. This is the second time Mehta has denied the association's attempt to escape the attorney general's investigative subpoena for materials related to what Bonta called a "decades-long campaign of deception surrounding the recyclability of plastic."

Bonta also recently sued ExxonMobil Corp. for the same alleged public deception around plastics recycling.

The Plastics Industry Association's amended complaint and motion largely restated arguments from its first attempt, aside from employing a few new strategies to link Bonta to Washington's jurisdiction, Mehta said. Changes included a claim that Bonta served the association a document in person in Washington, D.C., via a hired process server.

But the court's reasoning for denying the group's first motion still applies, Mehta said. The fact of personal service "doesn't change the result," and the association still hasn't demonstrated that the subpoenaed records retain First Amendment privilege, he said.

The records at issue were housed at the Hagley Library in Delaware until recently.

"By making those records available to researchers and others without meaningful restrictions, Plastics has not preserved the privilege it now asserts," Mehta said.

Bonta last month withdrew a similar investigative subpoena for another plastics group, the American Chemistry Council. He asked the court Oct. 8 to dismiss both groups' motions for preliminary injunction and temporary restraining order.

Keller Heckman LLP and Cooper & Kirk PLLC represent the Plastics Industry Association.

The case is Plastics Indus. Ass'n v. Bonta , D.D.C., No. 1:24-cv-01542, 11/6/24 .

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California Gearing Up, Again, to Serve as Trump's Legal Adversary

 [law.com/nationallawjournal/2024/11/06/california-gearing-up-again-to-serve-as-trumps-legal-adversary](https://www.law.com/nationallawjournal/2024/11/06/california-gearing-up-again-to-serve-as-trumps-legal-adversary)

Cheryl Miller

With Kamala Harris' defeat in Tuesday's presidential election, California's Democratic leaders quickly pivoted to defense Wednesday, promising residents of the politically blue Golden State that they will defend an array of progressive policies and regulations from the reach of a second Donald Trump administration.

"California will seek to work with the incoming president—but let there be no mistake, we intend to stand with states across our nation to defend our Constitution and uphold the rule of law," Gov. Gavin Newsom said in a prepared statement issued as Harris delivered her concession speech in Washington, D.C.

"Federalism is the cornerstone of our democracy," Newsom's statement said. "It's the United STATES of America."

The governor's defensive tone is a familiar one.

Newsom took office in 2019 when Trump in his first presidential term took aim at California's immigration policies and environmental regulations. Newsom and then-Attorney General Xavier Becerra emerged as the Republican president's chief legal adversaries, launching or joining in some 100 legal actions challenging Trump's authority on an array of issues.

Becerra, now in his final weeks as U.S. secretary of health and human services, was succeeded by fellow Democrat Rob Bonta at the California Department of Justice. But the top prosecutor's message has remained the same.

Bonta told the Los Angeles Times in May that his lawyers were already reviewing Project 2025, a Heritage Foundation-created policy blueprint for a second Trump administration, in preparation for renewed legal battles.

"We can't be caught flat-footed," Bonta said then. The attorney general also told Politico on Tuesday night that his lawyers already "have gone down to the detail of what court do we file in."

Bonta has scheduled a press conference Thursday in San Francisco to outline his plans.

Both Newsom and Bonta have political aspirations that will shape their decisions. Newsom has been active on the national stage in possible preparation for a 2028 presidential campaign. Bonta has said he's considering a run for governor in 2026.

Here's a look at some of the policy areas that may be ripe for legal conflict between California and the Trump White House.

Immigration. In his first term, Trump took aim—largely unsuccessfully—at California laws restricting law enforcement's cooperation with federal immigration officials. Becerra's office also led a group of Democratic attorneys general defending the Obama-era Deferred Action for Childhood Arrivals, or DACA, policy.

Chief Justice Tani Cantil-Sakauye in 2017 also sent a highly publicized, sharply worded letter to U.S. Attorney General Jeff Sessions, asking him to stop federal agents from "stalking" undocumented immigrants in state courthouses.

Since then, state lawmakers have continued to pass legislation aimed at helping California's approximately 1.8 million undocumented residents obtain healthcare and housing. Trump, in contrast, has vowed mass deportations.

Abortion. While Trump has said he does not support a national ban on abortions, the U.S. Supreme Court that shifted right ideologically due to his first-term appointments has allowed states to impose heavy restrictions.

California, in turn, enacted a law shielding from liability residents who help women obtain abortion services. Bonta and other Democratic attorneys general have also supported efforts to make the abortion drug mifepristone widely available.

Workplace laws. California has historically taken a worker friendly approach when enacting employment legislation, one that contrasts with Trump's calls for less regulation.

Benjamin Ebbink, a Fisher & Phillips partner, said most recently passed workplace bills in California don't appear particularly susceptible to challenges by Trump. One exception might be a new law prohibiting employers from requiring workers to attend meetings on political and religious topics. National Labor Relations Board general counsel Jennifer Abruzzo has opined that such meetings violate federal law.

"That opinion will change under the Trump administration when he appoints a new general counsel," Ebbink said. "I suppose that could come up in the anticipated litigation. But again, I think that litigation will or would proceed with legal arguments regardless of" who is president, he added.

In another area of employment law, Bonta and other attorneys general may challenge any attempt by Trump to roll back a Biden administration rule, already the subject of lawsuits, expanding certain workers' eligibility for overtime pay.

ERISA at 50: a golden anniversary update for litigators

 [reuters.com/legal/legalindustry/erisa-50-golden-anniversary-update-litigators-2024-11-05](https://www.reuters.com/legal/legalindustry/erisa-50-golden-anniversary-update-litigators-2024-11-05)

Matthew Whitehorn, Stephanie Vogel

Lawyers walk with their briefcases towards the federal court house in San Diego, California June 22, 2015. REUTERS/Mike Blake/File Photo Purchase Licensing Rights , opens new tab

November 05, 2024 - As the Employee Retirement Income Security Act of 1974, as amended (more commonly known as "ERISA"), celebrates its 50th anniversary, this moment provides a valuable opportunity for litigators to revisit its evolution and current challenges.

ERISA's inception in 1974 followed the infamous failure of the Studebaker pension plan in 1963, which left many workers without promised retirement benefits. Senator Jacob Javits (R-NY), one of ERISA's architects, was primarily concerned with establishing fiduciary protections to prevent such calamities. The statute, designed to safeguard employee benefit plans, provides a regulatory framework and lifeline for workers and their beneficiaries, ensuring their retirement and other health and welfare benefits are legally protected.

Recent key topics for ERISA litigators

Chevron doctrine SCOTUS decision: The Supreme Court's decision overturning the Chevron Doctrine in *Loper-Bright Enterprises v. Raimondo*, 603 U.S. __ (2024), is likely to have an impact on ERISA litigation, as much of the guidance that ERISA practitioners rely on is created by federal agencies — via regulations, notices, announcements, etc.

While the Chevron deference affects many areas of law, its impact on ERISA has been profound. Chevron's deference gave federal agencies, such as the Department of Labor (DOL), broad discretion in interpreting ERISA provisions that may have required clarification.

In the past, litigators needed to consider how regulatory interpretations could shift under different White House administrations, affecting compliance and enforcement actions. It appears that under *Loper-Bright*, the courts will now be the final interpreter of ambiguities in federal statutes rather than the agencies.

Fiduciary breach cases: Fiduciary duties remain a cornerstone of ERISA litigation. Alleged breaches of these duties continue to generate lawsuits, particularly in managing retirement plans. Litigators must remain vigilant in understanding the fiduciary standards under ERISA's objective "prudent expert" rule, which imposes the highest standard of care in plan administration.

Excessive fee cases: This area of litigation is particularly active, with plaintiffs' firms increasingly targeting plan sponsor companies over alleged "excessive" fees in 401(k) and other retirement plans. A typical starting point for these cases is a review of a plan's Form 5500, a public document that discloses plan financials. Attorneys defending these claims must be prepared to refute claims of mismanagement or overpayment to service providers.

Johnson & Johnson class action case — self-funded group health plan— *Lewandowski v. Johnson & Johnson et al*, DNJ, case No. 3:24-CV-00671: Lewandowski exemplifies the trend of focusing on large corporate plans with significant assets under management, which often attract claims of excessive fees and poor investment decisions.

In this case, the class action allegations are for a fiduciary breach for failure to exercise prudence, resulting in the overpayment for prescription drugs that reduced the funds available to pay benefits. It is commonly thought to be the first major case making this type of claim against a self-funded health insurance plan.

The defense has filed a motion to dismiss pointing out that plaintiff lacks standing for the fiduciary duty claims and that she received all of the benefits she was entitled to receive through the plan.

Use of forfeitures cases: Forfeitures, most commonly the reversion of unvested employer contributions upon an employee's separation from service in a qualified retirement plan, are a complicated aspect of retirement plan administration, especially in today's world with a transient workforce.

Retirement plan forfeiture provisions are increasingly under scrutiny. Litigators should pay attention to what plan documents dictate regarding the use of forfeitures and how plan administrators handle these funds to ensure compliance with plan terms and ERISA's fiduciary standards.

The significant majority of recent forfeiture cases revolve around a similar set of facts: (i) participants are charged for at least a portion of plan expenses; (ii) the retirement plan documents provide that forfeitures may be used by the employer to either reduce plan expenses or offset employer contributions; and (iii) the employer uses the forfeiture account balance to offset employer contributions rather than plan expenses.

The class of plaintiffs (plan participants and beneficiaries) then alleges that either a prohibited transaction and/or a breach of fiduciary duty occurred when the employer chose, at its discretion, to use the contributions to offset employer contributions rather than plan expenses, which would have benefited the plan participants.

In *Hutchins v. HP Inc.*, No. 23-CV-05875-BLF, 2024 WL 3049456 (N.D. Cal. June 17, 2024), the plaintiff claimed the plan fiduciaries breached their duties by using forfeited funds to reduce employer matching contributions instead of paying plan expenses. The court rejected the fiduciary breach claims, explaining that the plaintiff's theory would require fiduciaries always to use forfeitures for expenses, even though the plan explicitly allowed them to choose either option.

The *Hutchins* court noted that the first court to address these claims denied a motion to dismiss using a "conclusory" analysis. As the *Hutchins* ruling observed, plaintiffs in these cases are pursuing relatively novel legal theories, and it remains to be seen whether district courts will develop consistent trends in handling these claims at the dismissal stage.

Fiduciary rule and ESG considerations: The DOL's fiduciary rule and its interaction with environmental, social, and governance (ESG) investing principles are critical issues in the current regulatory climate. ESG considerations present a potential avenue for future litigation, as plan fiduciaries are scrutinized for their investment decisions under ERISA's prudent expert standard.

To prevent the risk of litigation, plan sponsor fiduciaries should review the proxy voting policies of the plan's portfolio fund/managers and determine whether they align with the plan's investment policies. If those funds and/or managers have "pro-ESG" policies, fiduciaries will want to articulate why they believe that approach is prudent and document it (typically in committee minutes).

In *Spence v. American Airlines, Inc., et al.*, No.4:23-cv-00552 N.D. Tex. June 20, 2024, the plaintiff alleged two theories of liability under ERISA, claiming the defendants mismanaged the American Airlines 401(k) Plan for Pilots. The plaintiff argued that the defendants imprudently invested in underperforming ESG funds, which lagged similar funds in the broader market. They also asserted a "Challenged Manager Theory," asserting that the defendants breached their fiduciary duty by including funds managed by investment managers who pursued non-financial and non-pecuniary ESG policy goals through proxy voting and shareholder activism.

The court ruled that "a reasonable factfinder could conclude that American Airlines functionally serves as an ERISA fiduciary based on the actual discretionary control exercised by American Airlines, not merely the authority outlined in plan documents." As a result, the case is proceeding to trial against American Airlines and its employee benefits committee.

American Airlines has maintained that its investment manager selection process is prudent, that it monitors the managers selected, its process is similar to that used by other plans of its kind and has ultimately been financially beneficial for participants. American Airlines

defended its position by referencing the fact that it engaged a known independent consultant, the funds selected performed well and that its contracts with investment managers required voting proxies in the best interest of participants.

Mortality tables and pension plans: Recent litigation has also centered on plan sponsors using outdated mortality tables, which can significantly affect the valuation of pension benefits. Litigators must be prepared to engage with actuarial science and challenge or defend the methodologies used in calculating plan liabilities.

State law preemption and jury trials: One of the more commonly litigated issues in the ERISA world is its broad preemption of state law claims, including punitive and compensatory damages. Because the exemptions for insurance, banking, and securities law remain a gray area, state law preemption is often litigated to determine whether preemption applies. Moreover, ERISA's lack of a right to jury trials, limited discovery, and the "abuse of discretion" standard in benefit determinations continue to shape how ERISA cases are litigated.

Stay of the DOL fiduciary advice rule: The DOL's fiduciary advice rule that, most significantly, placed guardrails on a fiduciary's role in the rollover of retirement plan assets to IRAs and its related prohibited transaction exemptions were stayed on a national basis, not related to the Loper-Bright decision. *FACC v. DOL*, 2024 WL 3554879 (ED Tx. 2024); *American Counsel of Life Insurers v. DOL*, 2024 WL 3572297 (ND Tx. 2024).

The 50th anniversary of ERISA provides a timely reminder of the statute's complexity and enduring significance. Litigators must remain agile in navigating the evolving fiduciary standards, regulatory interpretations, and the intersection of federal and state laws. As excessive fee cases, fiduciary breach claims, and class actions continue to rise; defense attorneys must be prepared to engage in these challenges, offering proactive and strategic counsel to their clients.

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Corporate Prosecutions 'Less Likely' Under Next Trump DOJ, Observers Say

 [law.com/newyorklawjournal/2024/11/06/corporate-prosecutions-less-likely-under-next-trump-doj-observers-say](https://www.law.com/newyorklawjournal/2024/11/06/corporate-prosecutions-less-likely-under-next-trump-doj-observers-say)

Emily Saul

The next Department of Justice under President-elect Donald Trump is less likely to focus on corporate prosecutions, observers speculated on Wednesday as the legal community absorbed the election results.

"The Trump Justice Department was, and more than likely will be, barring geopolitics, probably less aggressive and less inclined to proceed with criminal sanctions against companies," said one veteran white-collar practitioner in New York who asked that their name not be used.

"At this stage that's what I would say," he added.

Another observer recalled that, during Trump's first term, Justice was "generally perceived as being unenthused about financial prosecutions."

Longtime criminal defense attorneys and former federal prosecutors agreed that the next Trump DOJ would likely focus less on white-collar cases against entities and instead follow a "law and order" model of pursuing street crime. Most asked to have their names withheld in order to speak freely.

"Until we know who the candidates are it's difficult to get granular," the attorney said of future Justice appointments. "It really is going to depend on who gets the seats. And with [Trump's] control of the Senate, he's going to get his nominees passed."

J. Bruce Maffeo, senior counsel at Cozen O'Connor, predicted the new administration would take "a less aggressive approach" on cryptocurrency enforcement, given the president-elect's public comments.

"The crypto industry is likely to see a different level of attention, given the incumbent's publicly stated views," he said. "That's an area that has received significant attention by both the SEC and the DOJ in recent years."

A former federal prosecutor who asked that his name be withheld said he suspected environmental crimes units involving climate change litigation would be halted.

"I don't think that will be atop the agenda," he said. "And I don't imagine those units, should they continue to exist, will receive much funding."

The former prosecutor noted that he expected any cases in which main justice was involved in oversight of local law enforcement would ebb as well.

"To the extent there are DOJ cases involving police consent degrees, I don't think those will last very long," he said.

The Southern District of New York has brought various high-profile cases in recent years regarding political corruption—most recently New York City Mayor Eric Adams and former New Jersey Sen. Robert Menendez (D).

"I think no one really knows the answer as to what will happen to politically connected or politically prominent targets of investigations," another observer said. "It's anybody's guess."

Maffeo said he suspected the "day-to-day work of the office will likely be unaffected, whether it's drugs, violent crime, or the like."

"The closer question," he stated, "is the focus the new administration will play on politically sensitive investigations involving perceived allies of the incumbent president."

Trump regained the presidency after two impeachment proceedings, conviction by a Manhattan jury on 34 felony counts, and having been found liable by a federal jury for sexual assault and defamation.

While observers all agreed he would swiftly squash the two pending federal prosecutions against him, opinions were mixed as to what would happen in his New York state case.

A Manhattan jury found the incumbent guilty in May on 34 felony charges of falsifying business records as part of an effort to suppress negative information about himself from the American electorate during the 2016 presidential election.

Acting Supreme Court Justice Juan Merchan is expected to issue a ruling next week as to whether that verdict stands under a U.S. Supreme Court decision this summer broadening presidential immunity as it pertains to official acts.

Should the verdict remain intact, sentencing is scheduled for Nov. 26.

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Nov. 6, 2024, 10:02 AM PST

Matt Levine's Money Stuff: The Trump Trades Worked

By Matt Levine

Opinion

Bloomberg Law News 2024-11-07T10:03:1185073458-05:00

Matt Levine's Money Stuff: The Trump Trades Worked

By Matt Levine 2024-11-06T13:02:10077-05:00

Hmm

I wrote what I think eight years ago, and I think it holds up pretty well. We live in a society of rules, of fundamental principles of freedom and due process and limited government, but that is all contingent:

Those principles can't automatically enact themselves; they only work if the human actors in the system choose to follow them and to demand that others follow them. They persist because the people constrained by them *believe* themselves to be constrained by them. The Constitution, separation of powers, religious liberty, freedom of the press, an independent judiciary, the rule of law, equality of all citizens: There is a complacent sense in America that these things are independent self-operative checks on power. But they aren't. They are checks on power only as far as they command the collective loyalty of those in power; they require a governing class that cares about law and government and American tradition, rather than personal power and revenge. Their magic is fragile, and can disappear if people who don't believe in it gain power.

Maybe it's fine though.

The Elon Musk connection this time is also interesting. I think of Musk as the great legal realist of our time, a guy who is unusually strong-willed and clever about seeing rules he doesn't like and saying "well what can they really do about it?" I was driven somewhat insane by his efforts to get out of his merger agreement with Twitter because he didn't feel like doing it anymore. His reported drug use would seem to violate federal policies about SpaceX's government contracts, but what are they gonna do, cancel the contracts? Tesla Inc. gave him a pay package that, a judge ruled, violated Delaware law, so he moved Tesla to Texas to get a more congenial law. Most people do not get to choose which laws apply to them, but Musk is evidence that, with enough money and willpower, maybe you can. And now he has a more congenial president.

DJT

What is the Trump Media and Technology Group trade? Trump Media, which is usually called by its ticker, DJT, is the social media and streaming video company with Donald Trump's name on it; he owns about 52.9% of the stock. Its main product is Truth Social, Trump's social media site. With incredible timing, DJT announced third-quarter earnings yesterday; it lost \$19.2 million on \$1 million of revenue. That revenue is down 6% year-over-year and also, I mean, the social media site owned and used by the voluble winning candidate in a US presidential election managed to make \$1 million of advertising revenue in the summer leading up to that election? Recently Elon Musk has been paying \$1 million *per day* to individual pseudorandom voters to advertise for Trump, but somehow Truth Social only sold \$1 million of ads between July 1 and Sept. 30.

Anyway DJT's market capitalization was about \$7.4 billion at yesterday's close, and it's up this morning. What makes it worth more than \$7 billion? I can think at least five possible answers:

1. Pure meme stock. DJT goes up based on Donald Trump's power and newsworthiness, and those are up, so the stock is up. DJT's stock was a bet that Trump would be elected president, and he was elected president, so now the bet pays off. And this can continue indefinitely, so that "Donald Trump is the president" will be enough for \$7 billion or so of market capitalization for the foreseeable future. This is not a very financially sophisticated theory but, this far into the meme stock era, it strikes me as totally plausible.

- 2. Business case. Right now DJT's business is tiny, but Donald Trump is about to be president and will have ways to steer business to DJT. For one thing, he can keep posting his thoughts on Truth Social, and those thoughts will be newsworthy, so Truth Social will attract a lot of users and advertisers. "In fact, I have just set up a Truth Social account just to make sure we don't miss anything," an institutional sales trader told Bloomberg News. If everyone needs to be on Truth Social to do their jobs or keep up with the news, surely it can sell a lot more than \$1 million of ads per quarter. I don't think we've ever had a situation where the president of the United States makes official pronouncements on a platform where he also sells ads.

- 3. Merger case. If you are a very rich person or government and you want something from Donald Trump, one way to get it might be to give Trump a lot of money. One plausible-seeming way to give him a lot of money would be to acquire DJT in a merger. I linked yesterday to a Charlie Gasparino story about speculation that Elon Musk — who is rich, backs Trump, and owns a social media company — could buy Trump Media. One flaw in this case — from the perspective of public shareholders of DJT — is what I think of as the Paramount

problem: Donald Trump owns 52.9% of DJT, but he owns 100% of the shares with the “giving Donald Trump money” property. You could just buy *his* shares, rather than all the shares.

- 4. A vaguer “give Trump money” case. Actually acquiring DJT in a merger, or buying Trump’s stake from him, might raise eyebrows and would also cost billions of dollars. But people with lots of money (but not many billions of dollars) who want something from Trump could go in for a lighter version of this trade: Buy a 1% stake in DJT, disclose it, say “see I’m a co-investor in DJT,” and indirectly push up the price and make Trump richer. This sort of loops around to the meme-stock case: The idea is something close to “people who like Trump and want to be on his good side will buy the stock, so the stock will go up.”
- 5. Reverse merger case. A reader suggested a better idea than Musk buying DJT: Why not use DJT’s public listing to take X public again? Musk bought Twitter Inc. in 2022, took it private and renamed it X; it then seems to have lost value as its advertising business softened. But a *public* X would probably be worth more, because of its meme-stock, Musk-fan potential. I wrote last year: “If Twitter is a private company and you own almost all of the equity, you are mainly exposed to its cash flows, not the meme potential of its stock. If you take it public and sell a bunch of stock to your ardent fans, the business results matter less, and your ability to attract attention matters more.” That was a case for an initial public offering, but another thing Musk could do would be to merge X with DJT (with him, Trump, and their co-investors splitting the ownership in some negotiated way). The combined public X/DJT would trade on Musk’s *and* Trump’s meme-stock powers and would be pretty much unstoppable.

Lots of options. By the way, Ben Thompson writes today about Musk and the election:

What is fascinating is how this fundamentally transforms any attempt to evaluate the Twitter acquisition. From a business perspective it’s a massive failure, and might always be: Musk paid too much for Twitter as it was, and in the intervening years the flight of advertisers from the platform has made it worth even less. From a Musk Inc. perspective, however, X played a pivotal role in ensuring that the incoming administration will do whatever Musk needs at the exact moment that SpaceX is gaining the capabilities to actually make a trip to Mars, if only the FAA in particular will give him the freedom to do so. That alone is almost certainly worth \$44 billion to Musk!

So, yes, arguably another case of one part of the Musk Mars Conglomerate helping out the other parts. I think it’s also a good case for overpaying for DJT?

Elsewhere in memes, here’s a roundup of Trump trades that includes stocks (up), Bitcoin (up), the Mexican peso (down), the yuan (down), Treasury bonds (down), but also this:

Trading for a Chinese software company, whose name, “Chuan Da Zhi Sheng,” can be literally translated as “Trump Big Wisdom Win,” was halted after its Shenzhen-listed shares rose 10%. Meanwhile, a China-based thermo-flask manufacturer with a name that phonetically sounds similar in Mandarin to “Harris” declined more than 7% before recovering some losses.

Makes as much sense as anything else.

Crypto

I guess a counterargument to what I said at the top is, if you like the rule of law, and you work in crypto, you have some reasonable complaints about the last four years. To some extent I sympathize with the US Securities and Exchange Commission, which under Chair Gary Gensler has brought a lot of cases against crypto companies: Many crypto tokens are pretty clearly “securities” under established US law, so the SEC can insist that they follow existing rules about registration and disclosure of securities sales and about registration of securities brokers and exchanges. And there’s a lot of *bad stuff* in crypto — crypto token issuers who are fleecing investors and not building anything, and also occasionally unregulated crypto exchanges who are misusing their customers’ money — so it makes sense for the SEC to want to enforce the investor protection rules of the securities laws.

Still it sure looks to me, and everyone, like the SEC’s goal is not to protect crypto investors but to prevent crypto investment. The big crypto exchange that was in the news most recently for misusing customer money was of course FTX, which the SEC did sue, *after* it went bankrupt. Meanwhile the SEC is pursuing Coinbase Global Inc. for operating an illegal securities exchange, but Coinbase (1) is a US public company with good disclosure and audited financial statements, (2) seems to basically be trying to comply with the law as best it can, conditional on being a crypto exchange, and (3) *doesn’t* seem to be doing risky stuff with the customer money.

Coinbase, that is, is pretty much the exact sort of crypto exchange that US regulators should want — a US-based, publicly listed, audited, compliance-focused, not-particularly-leveraged one — if US regulators wanted any crypto exchanges. Oh you could quibble; you could imagine some list of improvements that Coinbase could make to protect customers more. You could imagine an SEC that made a list like that, took it to Coinbase, and tried to negotiate for an approved, regulator-blessed exchange. The current SEC, under Gensler, just wants to shut it down.

Or recently the SEC sued a couple of brokerage firms, including eToro USA LLC and Cumberland DRW LLC, for brokering crypto trades for customers without a securities license. The SEC’s theory is that these brokers let their customers trade crypto tokens that count as securities, so they should have registered with the SEC as securities brokers, and they didn’t, so they violated the law. But this theory is plainly wrong: eToro and DRW *are* registered with the SEC as securities brokers, or rather, they have entities that are SEC-registered broker-dealers. eToro is a retail stockbroker! But they do their crypto trades out of different, unregistered entities, because the SEC *won’t let them do crypto trades in their registered broker-dealers*. From Cumberland DRW’s statement last month:

The SEC asserts these transactions required us to register as a broker-dealer. While we strongly disagree, we took that step and acquired a registered broker-dealer in 2019. Only then — despite Chairman Gensler’s call to “just come in and register” — were we told we could only use our broker-dealer to trade BTC or ETH (both commodities and not under the jurisdiction of the SEC).

More generally, a lot of people in crypto would like clear US rules about what sorts of registration, disclosure and investor protections are required in crypto. The current SEC position seems to be roughly “the rules are clear perfectly, you can’t trade crypto.” This strikes me as (1) a plausible interpretation of the law and (2) not a *crazy* policy position, but I can see why crypto traders find it frustrating.

And now obviously Donald Trump has promised to be more crypto-friendly, and his SEC can’t possibly be *less* crypto-friendly than the current one, so the crypto industry is thrilled. The Information reports:

Investment bankers from top Wall Street firms including JPMorgan, Goldman Sachs and Morgan Stanley have been meeting with crypto executives, according to industry participants, hoping to get a foot in the door for lucrative initial public offerings that crypto companies might pursue after the election.

The new enthusiasm reflects optimism that improving market and regulatory conditions after a Donald Trump victory in the U.S. presidential election could clear a way for companies like Kraken, Fireblocks and Chainalysis to go public. Bankers’ interest in meetings is also a shift from much of the past two years, when many investment banks saw crypto companies as too risky to do business with, advisers say.

I have two questions here. One is: What will crypto regulation look like under Donald Trump? There are two main possibilities:

1. Someone — Congress, the SEC, the Commodity Futures Trading Commission, some new crypto regulator, Donald Trump by executive order, etc. — writes new disclosure and investor protection rules tailored to crypto, with public notice and comment and some input from the crypto industry. And the result is that there is a path to registration for crypto token issuers, exchanges and brokers, and that path *does* protect investors and give them useful disclosure, and being a US-registered project/exchange/broker is helpful for raising capital. Basically the US government does to crypto what it did to the stock market in the 1930s: Impose requirements that are somewhat costly and restrictive, but that increase investor confidence in the market and so allow it to grow and become more institutional.

- 2. Nobody will do that, but the SEC will stop trying to enforce securities laws against crypto, and everyone will be able to do whatever they want? That is sort of the simplest outcome: It is hard for the SEC or CFTC or Congress to write new rules for crypto, but pretty easy for the SEC to just stop bringing cases. And while a lot of people in crypto probably do want clear rules for market-confidence and/or incumbent-protection reasons, others don’t. Because, uh, part of the case for crypto sometimes is “this is a way to raise money from investors for dubious projects without any regulation”? Here it is worth noting that Donald Trump himself has some involvement with a crypto project called World Liberty Financial that is, uh, I mean, it’s not *Coinbase*, you know?

The other question is: What will crypto do with its new freedom? It is possible to overstate how bad Gensler’s SEC has been for crypto. Right now I think it’s fair to say:

1. Bitcoin is fine. Bitcoin is not regulated by the SEC, you can trade it in lots of retail brokerage accounts, the SEC doesn't object to Coinbase trading it, there are Bitcoin exchange-traded funds (over the SEC's objection) and derivatives, there are rules for institutional custody, it's all pretty integrated into the mainstream financial system.

- 2. Stablecoins are where a lot of the action is in crypto, in terms of using crypto as payments infrastructure, and the SEC has not really done much to stop stablecoins, in part because it's harder to argue that they are securities. A different SEC might make it easier to pay interest on stablecoins, and a friendlier crypto regulatory environment might be better for stablecoin development, but stablecoins do kind of work under the current rules.
- 3. Meme coins are also fine under the current rules, for the most part: If you're not making any promises about building the decentralized future of whatever, but just issuing a token like "this token is named after a dog," the SEC can't really argue that it's a security, so they can't stop you.

Instead, what the Gensler SEC particularly prevents is tokens of the form "we are building a new decentralized infrastructure for _____, and we are raising money for it by selling tokens that allow users to participate in _____," where you fill in the blank with like "file storage" or "WiFi" or "derivatives trading" or "political prediction markets" or whatever. And here the tokens are arguably investment securities, and the SEC cracks down on them. But these are arguably the *good* projects, where the innovation is happening: Building the future of _____ is arguably more useful than trading coins named after dogs.

But you hear less about those projects than you used to: The idea that crypto would build the decentralized future of work or the internet or whatever was more popular a few years ago; now when people talk about real-world use cases for crypto they tend to default to "stablecoins for payments." And when they talk about world-changing technological paradigm shifts they tend to talk about artificial intelligence, not crypto.

Possibly that's because all the crypto stuff was vaporware and people have moved on to the next, more actually promising thing! Or possibly it's because the SEC stifled crypto innovation and now, freed from those bonds, crypto actually *will* build the future of the web. I suppose now we'll find out.

CME

Speaking of crypto exchanges. One thing that the SEC does not like about crypto exchanges is that they tend to combine the roles of (1) a customer-facing broker, (2) an exchange that matches trades and (3) a clearinghouse that moves tokens to settle trades. In traditional finance, and thus in the structure of the securities laws, these functions are done by different entities; crypto exchanges tend to combine all of them. There is a lot to be said for the crypto model, in terms of giving customers easy and open access to exchanges, but to be fair FTX would probably have been in better shape if there was a separate clearinghouse for its trades.

Anyway traditional markets are moving a bit in the crypto direction. The Financial Times reports:

Customers of CME Group have strongly criticised the US futures exchange after it was given the green light to become one of their main competitors.

Banks and small brokers have sharply criticised the Chicago group after it won approval last week to also act as a futures broker — blurring the traditional dividing line between operating an exchange and being a member of it. ...

CME is the world's largest derivatives exchange, handling an average of 28.3mn contracts a day during the third quarter on futures tied to interest rates, Treasuries, energy and equities.

Its new licence will allow it to offer trading directly to investors and ask for the margin that is the insurance for futures trading. It also means the exchange can bypass banks and brokers, which normally do the job as part of their membership of the exchange.

"Only a monopolist would brazenly attempt to disintermediate its clients," said Lou Scotto, chief executive of FMX, part of billionaire Howard Lutnick's interdealer broker BGC Group, which recently launched interest rate futures in direct — and fierce — competition with CME.

It doesn't seem like the CME is actually moving to the crypto model. ("We remain committed to the FCM model and believe in the time-tested risk management benefits it continues to provide," said CME Chief Executive Officer Terry Duffy, referring to the futures commission merchants who normally provide customers with access to the exchange.) But it is keeping its options open: Perhaps it *would* be more convenient for the CME to just have a website where retail customers could trade futures, and to collect margin from them directly rather than making them go through a broker. Perhaps crypto really has pointed the way to the future of, uh, centralized finance.

Farmer's markets

We talked yesterday about possible algorithmic collusion among farmers at farmer's markets, in the form of a Cornell project that uses point-of-sale data to aggregate prices and tell farmers how much they should charge. I was being somewhat tongue-in-cheek describing this as "algorithmic collusion": Some variations on this — services that collect pricing data from many sellers and share it with those sellers so they can set prices — do raise antitrust concerns, and we have discussed a Justice Department lawsuit against RealPage, which does it for rental apartments, but it is hard to see anyone getting mad at the farmers.

Or so I thought, but then I got an amazing email from a reader:

I wanted to bring your attention to the Ottawa Farmers' Market, which was investigated for anticompetitive practices by Canadian authorities a few years ago. At that time I was a farmer selling strawberries in this market. Each day before the market opened all vendors would gather for a mandatory "price meeting" and collude on prices for each type of produce that was available that week. Adherence to these prices was even codified in the market bylaws! I found a loophole by sourcing unique container sizes so I could set my own prices and undercut the competition. Everyone else had 1 qt and 4L baskets of strawberries but I found non-standard 2.5L baskets and sold them for half the price of the 4L baskets.

Now I'm a data scientist at [a large tech company] where I design ad auctions to align advertiser incentives with business goals of the platform.

Perfect story, perfect kicker. I hope a tech company recruiter was shopping at the farmer's market and saw this reader's non-standard strawberry baskets and thought "now this is the person we need designing our ad auctions."

Things happen

Betting Markets, Vindicated by Trump Win, Set to 'Run the World.' AI Startup Perplexity to Triple Valuation to \$9 Billion in New Funding Round. China Hack Enabled Vast Spying on U.S. Officials, Likely Ensnaing Thousands of Contacts. Super Micro says review found 'no evidence' of fraud after auditor resigned. ADM Discloses More Accounting Issues, Cuts Profit Outlook. "We are here by an accident of birth, but it provides a nice mix of perspectives."

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- 1. From the earnings release: "As of October 15, 2024, the Company had approximately 650,000 shareholders with a unique profile overwhelmingly comprising retail investors—only roughly 2,100 investors owned more than 5,000 shares, and fewer than 1,000 investors owned more than 10,000 shares." And in fact there's a pretty stark lack of institutional investors in the holders list. So, pretty set up to be a meme stock.
- 2. Also there are probably other ways to steer business to DJT, for the president: Have the US government pay to advertise on Truth Social? Pressure the National Football League to broadcast games on DJT's video platform?
- 3. From Bloomberg News: "'Vigilantes are in full control. Panic is starting to set in, the coiling we expected is happening,' said NatAlliance Securities' Andrew Brenner."

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What's Next for Crypto Litigators With a Trump Administration

 [law.com/therecorder/2024/11/06/whats-next-for-crypto-litigators-with-a-trump-administration](https://www.law.com/therecorder/2024/11/06/whats-next-for-crypto-litigators-with-a-trump-administration)

Michael A. Mora

Attorneys are preparing for a new era in cryptocurrency litigation following the election Wednesday of Donald Trump as the next president.

And that includes Teresa Goody Guillén, a partner at Baker & Hostetler in its Washington, D.C., and San Francisco offices and co-leader of the Am Law 100 firm's blockchain technologies and digital assets team. She said a lot of litigation work has focused on U.S. Securities and Exchange Commission defense, but with Trump, who has launched his own tokens and vowed to fire Chair Gary Gensler, there will likely be a shift to private litigation.

Teresa Goody Guillén of Baker & Hostetler. Courtesy photo

"The election shakes up the legal market but overall, there won't be a decrease in work for litigators because as you have more players and money coming into the industry, there are more things that can go wrong, more companies that want to launch and more happy purchasers as well as more unhappy purchasers," Goody Guillén said. "This industry is expected to thrive now. The election just changes as to what legal services are needed."

Goody Guillén said that the private litigation will be brought by people who own digital assets, are alleged to have been wronged and are no longer relying on the SEC's assertions, for instance, that token sales are securities to recover their losses. However, Goody Guillén said, some of the SEC's recent brand of regulatory action is not going away.

"Allegations of fraud and enforcement by the government will be likely coming from other regulators rather than the SEC who do not have the requirement that the underlying asset be a security," Goody Guillén said. "Whether it is the Department of Justice or Commodity Futures Trading Commission, litigators are expected to see a change there."

On the campaign trail, Trump has spoken glowingly about crypto, even floating the idea of creating a federal bitcoin reserve, and is among the candidates who have collectively received \$245 million from the industry in election financing.

Brian Klein, a partner at Waymaker, expects to be honing his litigation strategy between now and the Jan. 20 presidential inauguration.

"Everyone is going to spend some time thinking through what this might mean for both current court cases and pending investigations," said Klein, who has been recognized as one of the nation's top crypto trial lawyers. "There are three months before Trump takes

power and before he starts to fill in the people he wants to lead these agencies. But I expect less regulatory action than private litigation."

Bruce Maffeo, senior counsel at Cozen O'Connor in New York, predicted the new administration would take "a less aggressive approach" on crypto enforcement, given the president-elect's public comments.

"The crypto industry is likely to see a different level of attention, given the incumbent's publicly stated views," he said. "That's an area that has received significant attention by both the SEC and the DOJ in recent years."

David A. Shargel, a partner at Bracewell in New York, said Gensler's tenure, in which he brought cases against heavy hitters in the crypto industry and set precedents in SEC proceedings and in state and federal courts, could still have an impact well into the Trump administration.

"The SEC recognizes that the plaintiff's bar is a complement to its enforcement authority and it could mean that a decrease in the regulatory enforcement leads to an uptick in private litigation to fill that void," Shargel said. "With a likely Republican-controlled Congress, the door is open for Trump to push through new rules and regulations that provide more clarity than the body of case law so far."

George Georgiades, general counsel at Borderless.xyz, a stablecoin payments network, said the election results should "clear the way for fulfilling campaign promises for pro-crypto government policies and regulatory clarity instead of regulation by enforcement."

Georgiades, who has represented clients in the digital asset space domestically and internationally in areas such as private and public capital formation, added, "Now is the time for the U.S. to assert leadership in blockchain innovation and governance."

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Bloomberg Law News 2024-11-07T13:10:19305258233-05:00

SEC Crypto Enforcement Slated for Major Rollback Under Trump (1)

By Lydia Beyoud and Nicola M. White2024-11-07T08:12:10593-05:00

- Trump has pledged to fire Gensler on the first day in office
- Next SEC chair is expected to push forward new regulations

The crypto industry poured millions of dollars into the presidential and congressional races, but its most salient election victory is likely to be the departure of US Securities and Exchange Commission Chair Gary Gensler.

The former Goldman Sachs banker has led the strongest regulatory crackdown on the digital-asset industry, bringing dozens of cases against crypto companies and traders large and small, including financial behemoths Coinbase Global Inc. and proprietary trading firm DRW Holdings LLC.



Gary Gensler

Photographer: Jeenah Moon/Bloomberg

President Donald Trump's decisive victory all but ensures a pullback on crypto-related enforcement once he takes office. In July, Trump pledged to fire Gensler on the first day of his second administration while headlining a Bitcoin conference in Nashville.

The SEC has often touted its success in court in obtaining judgments that align with its view that decades-old securities laws apply to the upstart digital asset class. It's also notched some major fines against some of the biggest names in the industry. The agency won a massive, \$4.5 billion fine and disgorgement from Terraform Labs, a stablecoin issuer, and founder Do Kwan in April. The agency hasn't yet released its annual enforcement report for fiscal 2024 actions, but in the prior year, the agency brought 46 such cases, a more than 50% increase from the year prior, according to a [report](#) by consulting firm Cornerstone Research.

"Some crypto cases have been legit fraud cases and I hope those continue and I hope we get more of them," said J.W. Verret, professor at George Mason University's Antonin Scalia Law School in Arlington, Virginia. "A lot of crypto cases have been registration only, foot fault cases when registration is impossible."

The next SEC chair is expected to push forward new regulations that will modify existing securities laws or enable digital asset companies to become compliant with rules that Gensler has long admonished them for flouting. That will also serve to rein in enforcement.

Bipartisan crypto legislation that supports that goal is now a stronger prospect with the Senate now in solid Republican control.

"We expect that both the Trump administration's and new Congress' approach to crypto regulation to be much more constructive," said Jack Inglis, chief executive officer of the Alternative Investment Management Association, a London-based trade group representing hedge funds and private equity firms.

That means policies "recognizing the need to embed crypto in the broader financial services framework while taking account of the technological differences with traditional finance leading to a more bespoke approach in many areas," he said.

The SEC Goes After Crypto		
A list of the agency's original charges against high-profile crypto companies		
	Year	Charges
Binance	2023	Including operating as unregistered exchanges, broker-dealer and clearing agencies, misrepresenting trading controls
Coinbase	2023	Operating as an unregistered exchange, broker and clearing agency
Ripple	2020	Conducting \$1.3 billion unregistered securities offering
Kraken	2023	Operating as an unregistered exchange, broker, dealer and clearing agency. Kraken settled separate charges related to staking.
Consensys	2024	Unregistered offers and sales of securities through MetaMask staking service
Cumberland DRW	2024	Operating as an unregistered dealer in crypto asset market
Source: SEC filings		
Note: Some of the charges against the crypto companies have been dropped or modified in legal proceedings.		
		Bloomberg

Bloomberg

The SEC’s enforcement cases against crypto companies have centered on whether their products fit within the decades-old definition of a security, as laid out in the US Supreme Court’s opinion *SEC v. W.J. Howey Co.* That hasn’t been a good approach, according to **William McLucas**, a former SEC enforcement director, now a partner at WilmerHale. McLucas spoke during a securities enforcement conference in Washington on Wednesday.

“That can’t be the solution because whether you like crypto or you don’t like crypto it’s not going away,” McLucas said. “The enforcement cases that have been brought are what they are, but they keep bringing them, and we keep seeing crypto products,” he said.

The change in political power favors a stronger win for Coinbase in court, according to Elliot Stein, a senior litigation analyst for Bloomberg Intelligence. Should the case reach the US Supreme Court, it

could result in the narrowing of the Howey test.

“We gave Coinbase a 60% chance of winning on the merits, yet now believe it’s 80% likely to prevail, as we expect a more crypto-friendly SEC in Trump’s second term,” Stein wrote in a note Thursday.

Digital assets were a focus of 18% of all the tips, complaints and enforcement referrals at the agency in fiscal year 2024, the regulator’s Inspector General said in a recent [report](#). The agency’s Office of Investor Education and Advocacy received nearly 6,000 such complaints during that same period, more than double any other type of complaint, the IG said.

Gensler Departure

Despite Trump’s vow to boot Gensler from office immediately, it may boil down to whether the SEC chair resigns by inauguration day. Some of Gensler’s fiercest critics in financial services are already calling for his immediate resignation.

“Last night the people voted for this country to take a new direction, and Chairman Gensler should respect that vote by stepping down from his position immediately,” said Chris Iacovella, president and chief executive officer of the American Securities Association, which represents regional brokers and other financial services firms.

If Gensler follows Washington tradition and departs, it would leave the agency split 2-2 along party lines until a new chair can be confirmed. That would stymie further aggressive enforcement, particularly with Hester Peirce, dubbed “Crypto Mom” still a commissioner.

One crypto industry executive, who requested to speak on background to speak frankly, said they anticipate Gensler may still want to file cases against companies like Uniswap and OpenSea that have already received “Wells notices” — an enforcement process formally notifying a company they’re under SEC investigation.

But other enforcement cases could be slow-rolled. Agency staff, aware that an incoming SEC chair, particularly one who back’s Trump’s vow to shrink the size of the federal government, might look unkindly on employees taking aggressive actions in the months leading up to a change in leadership and policy, the industry executive said.

The SEC declined to comment.

(Adds comment from Bloomberg Intelligence in the 12th paragraph.)

--With assistance from **Olga Kharif**.

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SEC Poised for Slow Regulatory Unraveling Under Trump: Explained

By Andrew Ramonas and David Hood

Explainer

Bloomberg Law News 2024-11-07T09:43:15380284099-05:00

SEC Poised for Slow Regulatory Unraveling Under Trump: Explained

By Andrew Ramonas and David Hood 2024-11-07T05:00:01000-05:00

Republicans are poised to dismantle corporate greenhouse gas emissions reporting requirements and other priorities of President Joe Biden's SEC, after Donald Trump takes office next year.

Trump's Securities and Exchange Commission is expected to start undoing the climate rules as soon as January, less than a year after their March release under Democratic Chair Gary Gensler. The regulations have yet to take effect; the agency paused them in April after companies, Republican state attorneys general, and others sued.

A Republican-led SEC also will have the ability to begin work to scrap registration and short-sale rules for hedge funds, as well as other regulations. The National Association of Private Fund Managers and other industry trade groups sued the SEC over the hedge fund rules after the agency issued them under Gensler. The cases are pending.

The process of unraveling SEC regulations, however, can take years. And court battles could be slow to wind down, especially in situations where outside parties like Democratic state attorneys general have intervened to defend SEC rules.

Here's what would be involved should the Trump administration attempt to scrap SEC regulations:

1. Can an SEC chair dismantle agency regulations alone?

A new SEC chair, acting or permanent, only will have the power to initiate efforts to unwind the regulations. Any official rule changes would require the support of a majority of the agency's commissioners and take months or years to finalize.

The commission chair can order agency staff to prepare a proposal that would weaken or eliminate the rules. The SEC's commissioners then would need to vote to issue the proposal and would be required to solicit public feedback on the plan before they could vote to formally change the regulations. For the climate rules, the SEC took two years to turn a proposal into final regulations.

The SEC would be evenly split between Democrats Caroline Crenshaw and Jaime Lizárraga and Republicans Hester Peirce or Mark Uyeda, if Gensler departs. Trump would need to nominate a new Republican member to the SEC to advance any rule updates opposed by its Democrats.

Gensler relied on support from Crenshaw and Lizárraga to adopt the climate regulations and advance other rulemaking priorities over opposition from Peirce and Uyeda.

2. Is the agency's chair able to stop it from enforcing rules?

Yes, the chair can instruct SEC staff not to pursue cases enforcing various regulations issued under Gensler.

Gensler ordered staff in 2021 to consider whether to recommend changes to proxy advisory firm restrictions adopted in 2020 under Trump SEC Chair Jay Clayton. The agency said it wouldn't bring enforcement actions under the 2020 regulations while it considered updates. The SEC ultimately rolled back the rules in 2022, drawing lawsuits.

3. Can the SEC's chair undo regulations by not defending them in court?

The SEC chair can direct the agency's lawyers to settle suits over its rules. But the SEC likely would need to rewrite or scrap regulations in order to convince challengers to drop their cases, keeping litigation alive for months or years as the agency goes through its rulemaking process.

The SEC would need to overcome major hurdles to resolve the litigation over its climate rules, in particular. The agency would have to reach settlements with the US Chamber of Commerce, 25 Republican attorneys general, and others who filed nine lawsuits pending in the US Court of Appeals for the Eighth Circuit. The agency also would have to contend with 19 Democratic attorneys general, who joined the litigation in April to defend the climate rules.

The Eighth Circuit is looking to hold oral arguments in the litigation in the coming months.

4. Can Congress toss SEC regulations?

Republicans could use the Congressional Review Act to kill rules. That option—often called the “blunt tool” of Congress—eliminates rules and prevents agencies from proposing “substantially similar” regulations. That means the SEC wouldn't be able to simply repropose the rules under a different administration.

Sen. Tim Scott (R-S.C.) and Rep. Bill Huizenga (R-Mich.) introduced a CRA resolution to scrap the climate rules shortly after the SEC finalized the regulation in March. The effort had a lot of hype, but fizzled out without a vote in the House or Senate.

Scott is next in line to lead the Senate Banking Committee and could revive the effort. However, lawmakers missed a cutoff to fast-track a CRA resolution through Congress with a simple majority vote and would need 60 votes in the Senate to clear a filibuster.

Republicans also could stop the agency from enforcing rules by attaching a rider to legislation funding the agency. The current appropriations bill expires in late March. There's precedent for that path: Appropriations bills for years have included a provision that prevents the SEC from implementing requirements for companies to disclose their political spending, despite Democratic support for the reporting.

To Learn More:

- SEC Faces Rising Litigation Risk Over Rules, Watchdog Says (1)
- SEC's Gensler Sees ESG Plans Thwarted as Biden's Term Nears End
- House GOP Unveils Bill to Strike SEC Climate Disclosure Rule (3)
- SEC Freezes Climate Rules After Challengers Pushed for Pause (1)
- SEC Won't Enforce Trump-era Restrictions on ISS, Glass Lewis (2)

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Trump Has Tools to Fire Powerful Financial Regulator in Term Two

By Paige Smith and Katanga Johnson

- High court paved way for a US president to fire head of CFPB
- Chopra's influence extends to landmark bank-capital proposal

Bloomberg Law News 2024-11-07T09:44:38197813892-05:00

Trump Has Tools to Fire Powerful Financial Regulator in Term Two

By Paige Smith and Katanga Johnson2024-11-06T13:08:36772-05:00

- High court paved way for a US president to fire head of CFPB
- Chopra's influence extends to landmark bank-capital proposal

Rohit Chopra's crackdowns on illegal car repossessions, home foreclosures and bank overdraft fees made him a hero to consumer groups and a foe of lenders.

But his future as head of the Consumer Financial Protection Bureau is jeopardized now that Republican Donald Trump is returning to the White House. In his second term, the president-elect will have the power to fire Chopra, if he doesn't resign first, after a US Supreme Court ruling in 2020 made the CFPB director an at-will employee and susceptible to termination for any reason.

"We expect Chopra to be out of his seat almost immediately after the inauguration," said **Isaac Boltansky**, the Washington-based director of policy research at the trading firm and investment bank BTIG LLC.



Rohit Chopra, director of the Consumer Financial Protection Bureau

Photographer: Samuel Corum/Bloomberg

Since its formation after the 2008 financial crisis, the CFPB's regulations and very existence have been challenged repeatedly in the courts. Removing Chopra would be a resounding victory for businesses that have tried to weaken independent regulators: reining in an aggressive approach to consumer finance and eliminating a strong voice on critical banking regulation.

As a member of the Federal Deposit Insurance Corp.'s board, Chopra raised concerns earlier this year about a plan to dial back US regulators' landmark bank-capital proposal. He privately described the significant reduction in capital requirements as closer to a giveaway to Wall Street banks, Bloomberg reported in September.

Firing Chopra would give the Trump administration a "two-for-one" win because it increases influence over two agencies, said Brian Knight, a senior research fellow and director of innovation and governance at the Mercatus Center at George Mason University.

A representative for the CFPB didn't provide comment.

Removing the heads of most financial regulators if they don't want to exit isn't so simple if the agencies are set up with boards or commissions. If Gary Gensler, chair of the Securities and Exchange Commission, were to decide to stick around until his term ends in 2026, this could lead to a protracted legal challenge to the Supreme Court over whether Trump can simply demote Gensler from his leadership role and make him a simple commissioner, or fire him outright.

In the latter case, the Trump administration may have to first provide proof of "for cause" grounds for removal, which can include malfeasance and neglect of duty.

The CFPB, Federal Housing Finance Agency and the Office of the Comptroller of the Currency are helmed by single directors who aren't protected. The high court's 2020 decision made it easy to remove the CFPB and FHFA chiefs. By statute, the head of the OCC can be "removed by the president, upon reasons to be communicated by him to the Senate."

Read More: Fed's Relaxed Bank-Capital Plan Faces Bipartisan FDIC Pushback

Chopra, appointed by President Joe Biden to a five-year term, hasn't shied away from taking on the largest banks and financial services companies, including Goldman Sachs Group Inc., Wells Fargo & Co. and JPMorgan Chase & Co.

The CFPB survived a legal threat earlier this year, when the high court upheld its funding structure. But a number of Biden-era CFPB regulations are in limbo. The courts are still deliberating a rule that would cap credit-card late fees at \$8, and the fintech industry recently sued over buy now, pay later regulation. The agency's "open banking" rule, which would require financial firms to provide free access to customer data, faces a legal challenge from bank lobbying groups.

"They actually had, like, a 50-page lawsuit ready within hours of us being finished," Chopra said at a conference last month in Las Vegas. "I haven't read their lawsuit, and I don't think they've read the rule."

JPMorgan Chief Executive Officer Jamie Dimon fired back at Chopra the next morning, demonstrating the banking sector's frustration with a regulator that some say has taken an overly aggressive approach to enforcement.

"Rohit is a very smart guy who has one major flaw, which I've told him personally, is that you use your brains to justify what you already think," Dimon said.

Read More: CFPB Faces Lawsuit From US Bank Groups Over New Data Rule

--With assistance from Lydia Beyoud.

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Bloomberg Law News 2024-11-07T13:11:30513950802-05:00

Trump Administration Seen as Likely to Dismantle ESG Rules (1)

By Tim Quinson2024-11-07T12:05:36693-05:00

- BI's Du Boff expects rollback of climate-disclosure regulation
- US proxy and pension requirements also seen under threat

President-elect Donald Trump will likely move to dismantle ESG-related regulations in the US when he takes office in January.

That would mean blocking Securities and Exchange Commission rules for corporate and fund disclosures, and Labor Department requirements on pension funds, according to **Rob Du Boff**, a senior analyst at Bloomberg Intelligence. The new administration also is expected to put limits on ESG-related shareholder proposals filed during proxy season, he said.

“The bottom line is the Trump administration is anxious to undermine these ESG-related initiatives,” Du Boff said.

- To see the full note from Bloomberg Intelligence, [click here](#).

The SEC, under Chair Gary Gensler, already was under pressure from Republican politicians and corporate lobbying groups to water down the agency’s rulemaking around environmental, social and governance initiatives.

For example, the SEC voted earlier this year to impose climate-disclosure requirements that are [significantly softer](#) than those it proposed in March 2022. The change occurred after the agency received thousands of comment letters and numerous litigation threats over the plan.

The climate-related plan still hasn’t been implemented because of legal challenges. And Du Boff said he expects the pause on the climate-disclosure rule to be “extended indefinitely.”

At the same time, California’s climate-disclosure plan “remains in play after a judge declined to strike

the rule on First Amendment concerns,” he said.

Read more: California Emissions Disclosure Law Survives First Legal Hurdle

Then there’s the SEC move to crack down on misleading ESG labels for investment funds.

The draft rules for ESG fund labels aren’t likely to be finalized under the specter of the Congressional Review Act, Du Boff said. Still, he expects a Republican-led SEC to continue to “hit ESG funds that step out of line.”

Trump also will likely move to overhaul the shareholder-proposal process, which has been at the center of recent anti-ESG efforts by the GOP, Du Boff said. The number of proposals is up 47% this year from the 2021 proxy season, largely due to more lenient SEC staff guidance under the Biden administration.

Trump-appointed SEC leadership will clamp down on the types of ESG-related resolutions that can be put forward for shareholder votes, Du Boff said. There will almost certainly be new, more restrictive guidance about the kinds of proposals that are permissible, he said.

It’s also likely that Trump will move quickly to block the Labor Department’s fiduciary rule that allows pension funds to consider ESG factors when making investment decisions, the BI analyst said.

This is something Trump did during his first presidency, but the Biden administration then moved to throw out the rule.

(Adds information about California’s disclosure plan in seventh paragraph.)

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Texas' New Business Court: What We've Learned From Its First 2 Months

 [law.com/texaslawyer/2024/11/07/texas-new-business-court-what-weve-learned-from-its-first-2-months](https://www.law.com/texaslawyer/2024/11/07/texas-new-business-court-what-weve-learned-from-its-first-2-months)

Ryan Sullivan

On Sept. 1 of this year, Texas became the latest state to launch a business court. Many practitioners have eagerly anticipated the Business Court's rollout, though observers have raised a litany of questions about how the court will function, its jurisdictional limits, and other key issues. While we do not yet have complete answers to all questions, the Business Court has addressed many in its first 60 days.

The Texas Business Court

The Texas Business Court is a statewide trial court "dedicated to the fair, efficient, and timely resolution of business disputes." Business Court Local Rule (BCLR) 1. The court has jurisdiction over governance disputes exceeding \$5 million and commercial disputes exceeding \$10 million, plus supplemental jurisdiction to hear certain related claims. The court is comprised of five active Divisions in Austin, Houston, San Antonio, Dallas, and Ft. Worth, with two judges assigned to each Division. The court began accepting filings on Sept. 1, 2024.

Houston Division Has More Cases Than any Other Division

Based on data from re:SearchTX, the Business Court has 37 active cases as of Nov. 1, 2024. The docket is evenly split between cases originally filed in the court and cases originally filed elsewhere and then removed to the court (19 and 18, respectively). The docket is also evenly split along jurisdictional lines: 17 cases fall within the governance category of jurisdiction, 17 fall within the commercial category, and three appear to have jurisdiction under both categories.

As to case location, the docket is heavily concentrated in the 11th Division, in Houston. The 11th Division has half of the Business Court's entire docket, the most of any Division by far. The 1st Division, in Dallas, comes second, with about a quarter of the docket. The 3rd, 4th, and 8th Divisions (in Austin, San Antonio, and Ft. Worth, respectively) collectively comprise the remaining quarter of the docket.

Business Court Location	Number of Cases as of Nov. 1, 2024
1st Division (Houston)	18
11th Division (Dallas)	9

3rd Division (Austin)	4
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4th Division (San Antonio)	3
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8th Division (Ft. Worth)	3
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These numbers mirror the relative share of Fortune 500 companies headquartered in each city. Houston is home to 36 Fortune 500 companies, the second-highest number of any city in the U.S. By comparison, Dallas is home to 21 Fortune 500 companies, Austin is home to five, San Antonio is home to six, and Ft. Worth is home to three. Litigants should expect each Division's share of cases to continue mirroring the Fortune 500 list.

Texas Business Court's Caseload Has Outpaced That of Other States' Business Courts

Some commentators predicted that litigators—and their clients—would be initially reluctant to bring disputes before the new Business Court. But 60 days in, the court's volume has outpaced that of other recently created business courts. For example, Georgia's business court saw 86 cases filed between its opening in August 2020 and April 2023, averaging approximately 34 cases per year. Wyoming's business court, which launched in 2021, saw 13 cases filed in its first 11 months of operation. By comparison, litigants filed 37 separate cases in Texas's Business Court in its first two months.

The number of cases suggests strong interest in the Business Court. However, a recent opinion by the court's 1st Division, discussed below, could lead to about a third of cases being remanded to other courts.

The Business Court Issues Its First Opinion on Jurisdiction

One of the most widely briefed issues in the Business Court so far involves removal. The Texas Government Code permits a party to remove an action to the Business Court within 30 days of discovering facts establishing the court's jurisdiction. Tex. Gov't Code Section 25A.006(f)(1). If the parties agree to removal, they may remove their suit to the court "at any time during the pendency of the action." *Id.*, Section 25A.006(f). Based on these provisions, litigants removed 18 cases to the Business Court within its first two months.

However, the act that created the Business Court, HB 19, applies "to civil actions commenced on or after Sept. 1, 2024." HB 19, Section 8. Litigants challenging removal have used this language to argue that cases filed before Sept. 1, 2024 cannot be removed to the Business Court.

In an opinion issued on the court's 60th day of operation, Judge William Whitehill of the 1st Division held that HB 19 limits the court's jurisdiction to cases filed on or after Sept. 1, 2024, only. *Energy Transfer v. Culbertson Midstream*, Cause No. 24-BC01B-0005, Business Court of Texas, 1st Division. To date, no other Division has ruled on the issue.

Whitehill's ruling has the potential to greatly reduce the number of cases before the Business Court. Nearly half of all cases currently before the Business Court—18 out of 37—were removed there. Of those, 13 are cases originally filed before Sept. 1, 2024. If other Divisions adopt Whitehill's reasoning, then about a third of cases currently before the Business Court will be remanded for lack of jurisdiction.

The Local Rules Require Short Briefs

In late October, the Business Court published its local rules. BCLR 5, which governs motions practice, imposes tight limits on the length of motions. Motions and responses generally may not exceed 7,500 words, and replies may not exceed 3,000 words. Those are fairly restrictive limits for high-dollar lawsuits involving complex business matters, particularly for dispositive motions. For discovery disputes, BCLR 5 is even stricter, imposing a cap of 3,000 words for motions and responses, and 1,250 words for replies.

The tight restrictions are likely an attempt to maximize efficiency and resolve disputes faster, one of the Business Court's explicit goals. But in cases involving entities with complicated ownership structures, nuanced issues of business law, or damages subject to expert financial modeling, BCLR 5 will challenge even the most concise writers. Expect to see frequent requests to exceed BCLR's word limits.

Ryan Sullivan is counsel in Reichman Jorgensen Lehman & Feldberg's Austin office, focusing on complex commercial litigation for both plaintiffs and defendants.

New Fifth Circuit Judges Possible for Trump, Big Cases to Shift

By Jacqueline Thomsen

- Appeals court already has six Trump appointees
- Liberal litigants expected to sue in other courts

Bloomberg Law News 2024-11-07T10:00:14020228954-05:00

New Fifth Circuit Judges Possible for Trump, Big Cases to Shift

By Jacqueline Thomsen 2024-11-07T04:45:02000-05:00

- Appeals court already has six Trump appointees
- Liberal litigants expected to sue in other courts

The US Court of Appeals for the Fifth Circuit may be cemented as an ultra-conservative powerhouse during President-elect Donald Trump's second term, even as it's unlikely to hear the kinds of high-profile policy challenges that it did during the Biden administration.

Six of the court's 17 active judges are eligible to step back from the bench, and four of them were nominated by Republican presidents. Edith Jones and Jerry Smith, are Ronald Reagan appointees, and Priscilla Richman and Leslie Southwick were appointed by George W. Bush.

That means the court, which already has six Trump appointees, could see its bench move even further to right. That's especially true if either of the Bush appointees take senior status, a form of semi-retirement for federal judges, or fully step off the bench, opening the door for a more conservative appointee to fill the seat of a moderate jurist.

"The opportunity is there now" for Republican-appointed judges to have their seat filled by Trump, said Daniel Walters, a professor at Texas A&M University School of Law.

However, Walters said, "they may be having some reservations about being replaced with Trump's brand of Republican judicial nominee."

Older generations of Republican appointed judges have been seen as more moderate than judges who were tapped during Trump's first term.

Southwick has been one of the most frequent opinion writers on the court, said Sally Richardson, a law professor at Tulane University. While he's a Bush appointee, in recent years he's been siding more often with liberal members of the court.

Richardson said his replacement under Trump would likely be more in line with other Trump appointees on the court like James Ho, Andrew Oldham, and Stuart Kyle Duncan, who are among the circuit's most conservative members.

"I don't think anyone would say Judge Southwick is a raging liberal in terms of his judicial philosophy, but to the extent he's siding more with the more liberal wing, that certainly would have an impact," Richardson said.

Another seat on the court could open up if Trump were to elevate one of the Fifth Circuit's members to the US Supreme Court. The president-elect included Ho on a shortlist of potential Supreme Court picks that was released in 2020, and Oldham is also viewed as a conservative rising star.

"Certainly any of the Trump appointees, be they on the Fifth or another circuit, all would be good shots to be a Supreme Court appointee under a Trump II presidency," Richardson said.

Forum Move

Trump's appointees on the Fifth Circuit have made their mark as they heard lawsuits filed by conservative litigants, largely challenging Biden administration policies.

But efforts to fight a second Trump administration's policies are certain to wind up in other courts. The Ninth and DC Circuits were both home to liberal lawsuits during the first Trump administration, and those and other left-leaning courts are certain to preside over future cases.

Walters said parties challenging Trump policies "are going to be strategic about where they file, and are going to look for the most friendly forum possible."

"It's probably not going to be in the district courts in the Fifth Circuit," he said, pointing to federal trial courts in California, Massachusetts, Washington, and Chicago as more likely venues.

Conservative lawsuits against Biden policies have wound their way through several of the Texas federal trial courts. The US District Court for the Northern District of Texas, which features some one or two-judge divisions, in particular has been a favored venue.

Walters said that, if the cases are filed outside the Fifth Circuit, it means missing out on "the ultimate test" of whether administrative law is applied neutrally, regardless of which political party is behind a regulation.

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Trump could bolster US Supreme Court's conservative majority

 [reuters.com/world/us/trump-could-bolster-us-supreme-courts-conservative-majority-2024-11-06](https://www.reuters.com/world/us/trump-could-bolster-us-supreme-courts-conservative-majority-2024-11-06)

John Kruzel

[1/4]The Supreme Court is pictured, in Washington, D.C., U.S., October 21, 2024.
REUTERS/Kevin Mohatt/File Photo Purchase Licensing Rights , opens new tab

- Trump named three Supreme Court justices in first term
- Conservative Thomas is 76, Alito is 74 and Roberts is 69
- Biden named only one justice in four years in office

WASHINGTON, Nov 6 (Reuters) - President-elect Donald Trump, who moved the U.S. Supreme Court dramatically rightward in his first term, may get a chance to rejuvenate its 6-3 conservative majority by replacing some or all of its three most senior conservatives with younger jurists - and perhaps even expand it if a liberal justice leaves.

Justices Clarence Thomas, 76, and Samuel Alito, 74, as well as Chief Justice John Roberts, who turns 70 a week after Trump is due to be inaugurated on Jan. 20, all were appointed by Republican presidents to their lifetime posts on the court. All three could decide to retire with the Republican Trump succeeding Democratic President Joe Biden and with Republicans taking control of the Senate, according to legal experts.

"I think it likely that one or both of Justices Thomas and Alito step down in the next presidential term, and perhaps the chief justice, too," Cornell Law School professor Gautam Hans said. "There are multiple federal judges that were confirmed under President Trump that I would anticipate being on a short list to replace them."

And Trump would be able to expand the court's conservative majority to 7-2 if one of the three liberal justices steps down during his presidency. The oldest of the three, Sonia Sotomayor, is 70 and has type 1 diabetes.

Under the U.S. Constitution, a president nominates members of the federal judiciary who must then be confirmed by the Senate. Senate rules require only a simple majority for confirming a justice.

Trump defeated Democratic U.S. Vice President Kamala Harris in Tuesday's U.S. election while Republicans seized control of the Senate from the Democrats.

He came into the presidency in 2017 with the court at a 4-4 ideological deadlock following the 2016 death of conservative Justice Antonin Scalia. Trump was able to appoint three conservative justices - Neil Gorsuch in 2017, Brett Kavanaugh in 2018 and Amy Coney Barrett in 2020 - and forge the current 6-3 ideological breakdown.

Since Barrett replaced the late liberal Justice Ruth Bader Ginsburg, the court has moved American law to the right, with rulings rolling back abortion rights, widening gun rights, rejecting race-conscious collegiate admissions policies and constraining the power of federal regulatory agencies.

LIBERALS ON THE SIDELINES

During his presidency, Biden appointed a single justice - Ketanji Brown Jackson in 2022 - but her addition did not change the court's ideological composition because her predecessor Stephen Breyer was a fellow liberal.

In recent years, the court's three liberal justices have often been relegated to a dissenting minority in major rulings. With its current ideological breakdown, the liberals need to be joined by at least two conservative colleagues to be in the majority in any ruling.

University of Illinois Chicago law professor Steve Schwinn said retirement decisions by Thomas, Alito and Roberts likely would be driven by whether they see their judicial legacies as complete or believe that more remains to be done.

"Thomas has already solidified his legacy, and I imagine he'd be happy with a replacement continuing it," Schwinn said. "I'm less sure about Alito, and less sure still about Roberts. They may feel like they still have work to do, and that Trump's presidency will embolden them to do it."

Harvard Law School professor Mark Tushnet said the retirement of any of those three likely would prompt Trump to appoint a younger judge with a conservative track record who is committed to a judicial philosophy called originalism under which the Constitution and statutes are interpreted as written in accordance with their original meaning.

"In the short run, that's likely to have relatively little effect, with one conservative originalist replacing another," Tushnet said. "But, of course, the new appointee or appointees will be there for a long time, consolidating a conservative majority that will be in place when or if a Democrat becomes president and advances a liberal policy agenda."

At the time of their confirmation, Gorsuch was 49, Kavanaugh 53 and Barrett 48, meaning they could serve for decades.

Senator Chuck Grassley may be poised to return as chair of the Senate Judiciary Committee, which vets judicial nominations, when Republicans take control of the chamber.

A spokesperson for Grassley said on Wednesday that the senator "looks forward to working with President Trump to confirm highly qualified, constitutionally sound judges to the federal judiciary."

Trump and Senate Republicans not only have the opportunity to confirm new Supreme Court justices but also continue their efforts to reshape the rest of the federal judiciary with conservative appointees. Trump won confirmation of 234 judicial nominees in his first four years in office, the second most appointments by any president in a single term.

SOTOMAYOR'S DECISION

Sotomayor has faced calls from some on the political left to retire since 2022, when Democrats won control of the Senate that they are set to relinquish in January. Sotomayor has given no indication that she is considering it.

"There's no realistic possibility that Justice Sotomayor will retire immediately and have a replacement confirmed before Jan. 20," Tushnet said. "I suppose that some hard-line progressive advocacy groups might propose that, but she won't do it, and the Democratic majority in the Senate wouldn't go along, anyway."

Some on the left had urged Ginsburg to retire during Democrat Barack Obama's 2009-2017 presidency to ensure that a Republican president did not get a chance to replace the liberal icon with a conservative, which ultimately happened when she died in 2020 at age 87.

"I think there will be calls for Justice Sotomayor to step down to allow for a quick confirmation of a successor while President Biden is still in office, but I would be surprised if those succeeded," Hans said.

"The Democrats have not had great success in facilitating strategic retirements of justices they confirmed, with Justice Ginsburg as the most prominent example. If Justice Sotomayor were inclined to have stepped down strategically I would have expected her to do so long before now," Hans added.

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Reporting by John Kruzel; Additional reporting by Nate Raymond in Boston; Editing by Will Dunham

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Trump Media shares slump as US election euphoria fades

 [reuters.com/business/media-telecom/trump-media-shares-slump-us-election-euphoria-fades-2024-11-07](https://www.reuters.com/business/media-telecom/trump-media-shares-slump-us-election-euphoria-fades-2024-11-07)

Reuters

The Nasdaq Market site is seen on the day that shares of Truth Social and Trump Media & Technology Group start trading under the ticker "DJT", in New York City, U.S., March 26, 2024. REUTERS/Shannon Stapleton/File Photo Purchase Licensing Rights , opens new tab

Nov 7 (Reuters) - Shares of Trump Media & Technology Group (DJT.O) , opens new tab slumped to a two-week low on Thursday, as speculative bets on Donald Trump winning the U.S. presidential election lost steam a day after his victory.

The stock was nearly 20% lower at 10:25 a.m. ET, on track to erase its 6% gain on Wednesday after majority owner Trump defeated Democrat Kamala Harris to secure a second White House term.

While Trump and Harris were neck and neck in most polls leading up to the election, online betting markets favored the former president more, prompting investors to pile into "Trump trades" - securities that could benefit or come under pressure under his leadership.

That led to a 200% surge in Trump Media stock in the six weeks before the election. The value of Trump's stake in the company has grown by \$2.8 billion to \$4.1 billion in that period.

The stock attracted \$7.3 million in net inflows from retail investors on Wednesday, well below its record high of \$14.4 million on Oct. 29 and other days leading up to Nov. 6, according to data from Vanda Research, indicating trading in anticipation of election results was much higher than on the voting day.

Strategists have said Trump Media's \$6.4 billion valuation is detached from fundamentals.

On Election Day, the company reported a net loss of \$19.2 million for the quarter ended September and a revenue of \$1 million.

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Reporting by Medha Singh in Bengaluru; Editing by Devika Syamnath

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Bloomberg Law News 2024-11-07T13:07:00388937077-05:00

Truth Social SPAC Ex-CEO Sued by Investors on Stock Theft Claims

By Mike Leonard 2024-11-07T10:35:13000-05:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1141](#)

The former CEO of the blank-check company that combined with Donald Trump's social media platform stole millions of shares by funneling them to offshore shell entities, according to a lawsuit filed by his co-investors.

More than three dozen of the early backers sued Patrick Orlando on Wednesday, saying he secretly transferred about two-thirds of the ownership interest in their jointly held investment entity to affiliates and corporate "alter-egos" based in the Cayman Islands. The entity, ARC Investment Global II LLC, was formed to sponsor the merger between Digital World Acquisition Corp. and [Trump Media & Technology Group Corp.](#), which operates the president-elect's Truth Social network.

Trump himself isn't accused of any wrongdoing in connection with the allegations against Orlando, which were entered on the court docket only hours after the presidential election was called. Trump Media also isn't named as a defendant.

ARC, controlled by Orlando, has received nearly 8.2 million Trump Media shares since the transaction, the suit says. But rather than distribute them proportionally to his dozens of co-founding investors, he gave them a paltry number while diverting the rest to fund his own widening legal troubles and "lavish purchases" including a \$6 million Miami home, according to the complaint in Delaware's Chancery Court.

"Orlando's nefarious and illegal practices carried over into his management and control of ARC funds and assets, which he treated as his own personal bank account," the suit says.

Orlando and ARC have spent much of the last year entangled in multiple court fights—in Delaware and Florida—over Truth Social and the special purpose acquisition company they created to take it public. Orlando also faces civil litigation brought by the Securities and Exchange Commission over

fraud allegations stemming from his time at the SPAC's helm.

Attorneys who have represented Orlando in his other Delaware cases didn't immediately respond to a request for comment Thursday.

The investors are represented by Morris, Nichols, Arsht & Tunnell LLP and Paul Hastings LLP.

The case is [ACRA Assets SA v. ARC Global Inv. II LLC](#) , Del. Ch., No. 2024-1141, complaint filed 11/6/24 .

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Opinion **Inside Business**

Spate of business scandals puts Australian boards on notice

A common thread to the controversies has been whether oversight of the country's largest companies has been bent to the will of powerful executives

NIC FILDES



From left, Mineral Resources managing director Chris Ellison and Richard White, chief executive of Wisetech © FT montage/Bloomberg/Getty Images/Reuters

Nic Fildes YESTERDAY



Chris Ellison, a brash Australian billionaire, made global headlines in August when he declared that he wanted to keep his staff at his company's head office in Perth "captive all day long". The founder and managing director of Australian miner Mineral Resources singled out staff leaving the building to buy coffee as the sort of thing that costs companies money.

Ellison is now cutting a more humble figure after stepping down as managing director of Mineral Resources after a review [found](#) he engaged in “profoundly disappointing” conduct in relation to payments to companies connected to him. The [review](#) also accused Ellison of using the company’s resources for his own benefit — such as using employees to work on his private boat — and questioned his integrity. Mineral Resources fined Ellison A\$8.8mn and is seeking to claw back remuneration and benefits worth up to A\$9.6mn.

Ellison, who has said he is “deeply sorry” for the impact on his actions on the company’s reputation, has thus been added to the growing list of corporate casualties as scandals and controversies have engulfed some of the country’s largest businesses in recent months.

That has acted as a catalyst for a bout of boardroom self-reflection. The retrospective board review, and a firm commitment to improve corporate governance, is becoming a familiar trope for Australian businesses.

It is only two weeks since the chief executive of software developer Wisetech stepped down from the company he founded 30 years ago and built into a company with a market capitalisation of A\$40bn, the biggest for an Australian tech company.

That followed a string of reports on Richard White’s private life and connections with several women, including one who joined Wisetech after starting a now-ended relationship with White. Australian media has reported the woman was given a A\$7mn waterfront mansion by White. The businessman also recently settled a high-profile civil court battle over a claim of an unpaid furniture bill with a wellness entrepreneur he is alleged to have had a relationship with.

White denied that he had acted inappropriately during discussions with the Wisetech board but further reports, including an accusation of a bullying culture within the company from a former board member, proved to be the catalyst for White to step down from his executive roles. Wisetech said White would continue to act as a consultant to the company.

Elsewhere, Nine Entertainment, Australia’s largest local media company, published a damning [report](#) into its corporate culture last month. It [found](#) “that Nine has a systemic issue with abuse of power and authority; bullying, discrimination and harassment; and sexual harassment”.

And airline Qantas published in August an [external review](#) into its culture after a tumultuous period under former chief executive Alan Joyce. That period transformed what was widely seen to be Australia's most beloved company into a "national pariah", according to *The Chairman's Lounge*, a new book by journalist Joe Aston about the airline. After the review, Qantas docked Joyce's pay by almost A\$10mn and criticised the company's former board for "too much deference to a long-tenured CEO".

White and Ellison have pointed to the fact that they disclosed to the board many of the issues that have now spilled out into the open. But a common thread of the scandals has been questions on whether boards of the country's largest companies have bent to the will of powerful executives.

Andy Schmulow, an associate professor at the University of Wollongong, said that the spate of corporate scandals reflected a "too timid" boardroom culture in the country that has allowed "a sense of entitlement and greed" to fester. "Our corporate governance model has enabled a directorial class to emerge that is accountable to no one and can do whatever it likes," he said.

The scandals, which have led to sharp share price falls in Wisetech and Mineral Resources, have prompted Australia's powerful pension funds to exert pressure on the boards of those companies and others over corporate culture. Schmulow said that those funds might have to stand up to boards more often to force change as the country's politicians and regulators have failed to do so.

Australian investors are known for backing a founder or leader with a vision capable of conjuring up a success story through hard graft and determination. But boards have surely now been put on notice to take corporate governance very seriously indeed.

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John Wood Group PLC

John Wood shares slump 60% after announcing review of write-offs

Engineering company says evaluation was prompted by 'dialogue' with its auditor



The group says the review 'will focus on reported positions on contracts in projects, accounting, governance and controls'

Rachel Millard in London AN HOUR AGO



John Wood Group shares fell 60 per cent on Thursday as the UK energy engineering company announced an independent review of one of its core divisions following multimillion dollar write-offs this year.

Shares in the London-listed group, a subject of two failed takeover bids in the past 18 months, fell after it said had agreed to a review of its projects division "in response to dialogue with its auditor". The division designs and procures for large engineering projects in sectors such as energy and mineral processing

Aberdeen-based [Wood](#) said the evaluation, to be undertaken by Deloitte, would include looking at governance and determining if there was a need for previously reported information to be restated.

It is a blow for Wood and chief executive Ken Gilmartin, who is under pressure to prove the company can implement a turnaround plan and succeed as an independent entity after a turbulent period.

Wood announced write-offs of almost \$1bn in August after deciding to exit certain types of work and recognise costs related to legacy acquisitions, pushing the company into an operating loss of \$899mn in the six months to June.

“This review will focus on reported positions on contracts in projects, accounting, governance and controls, including whether any prior year restatement may be required,” Wood said. “An update will be provided as appropriate following its conclusion.”

Wood, which employs about 35,000 on engineering and consulting projects across the world, has been struggling to turn its fortunes around after a £2.2bn takeover of Amec Foster Wheeler in 2017 saddled it with high debts and legal liabilities.

Earlier this year, the company was repeatedly pursued by Sidara, known as Dar Al-Handasah, in a bid that valued it at about £1.6bn. Dubai-based [Sidara walked away in August](#), citing “geopolitical risks and financial uncertainty”.

It was the second potential deal for Wood to collapse in just over a year. Private equity company Apollo Global decided in May 2023 against concluding a 240p-a-share bid that valued Wood at about £2.2bn at the time, including debt. Wood is now worth about £345mn after Thursday’s decline.

The company has also come under pressure from some investors to move its listing from London, but Gilmartin rejected that and told the Financial Times in August that such a move would not solve the company’s problems.

In Thursday’s trading update, Gilmartin said Wood had a “mixed quarter” in the three months to September despite strong growth in its operations division, which maintains and manages projects.

The projects division had a disappointing quarter after it was “impacted by delayed awards in our chemicals business and our continued weakness in minerals and life sciences”, he said.

Group revenue for the first nine months of the year fell about 3 per cent to \$4.3bn, and the company reiterated a full-year guidance of “high single-digit growth”.

Analysts at Citi said the trading update was “below market expectations” and they “would like to see improved operational delivery”.

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Lottery.com Leaders Say 'Con' Investor Seeks Hostile Takeover

By Jennifer Kay

Documents

 [Docket](#)

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- Investor Gurian has criminal history in stock scheme, gambling
 - Lottery.com leaders say they're working to right the company

Bloomberg Law News 2024-11-07T09:46:28021287141-05:00

Lottery.com Leaders Say 'Con' Investor Seeks Hostile Takeover

By Jennifer Kay 2024-11-06T17:53:05000-05:00

- Investor Gurian has criminal history in stock scheme, gambling
- Lottery.com leaders say they're working to right the company

Lottery.com's leaders say they're the ones being defrauded by "Florida Phil" as they're pursuing a turnaround for the lottery-ticket platform.

A lawsuit filed by Philip Gurian, whose criminal history includes a mob-related stock trading scheme and money laundering, is an attempt to use Lottery.com for criminal activity, Christopher Gooding told the Delaware Chancery Court on Wednesday.

"This action is brought by 'Florida Phil' Gurian as part of a personal vendetta, with the view to mounting an illegal, hostile takeover," said Gooding, one of Lottery.com's directors who represented himself in the telephonic hearing. "He's a con shouting 'con' at Lottery."

Gurian was convicted in 2004 in connection with a federal probe into organized crime ties to pump-and-dump schemes involving microcap stocks. In 2014, he pleaded guilty to conspiracy to commit money laundering after federal authorities accused him of running a large-scale illegal gambling business.

Gurian's lawsuit alleges Lottery.com violated the terms of an investment agreement with his firm, Honey Tree Trading LLC, and used the money to pay for CEO Matthew McGahan's \$25,000 monthly rent. Honey Tree says it loaned Lottery.com almost \$1.3 million in exchange for shares and warrants, but the company never delivered.

"I don't deny I've done things that got me into trouble" Gurian told Bloomberg Law when the lawsuit was filed in September. "That doesn't mean they can say, 'This guy is a bad guy so we have a right to steal his money.'"

Gurian misrepresented himself to Lottery.com with a pseudonym to avoid having his criminal past come to light, and Honey Tree can't prove that it's the firm's money that was invested in Lottery.com, Gooding said. The money was invested "for reasons we are forced by his history to conclude" for money laundering purposes, he said.

"There is no question that Honey Tree is presently a shareholder and was a shareholder at the time it presented its pleading," the firm's attorney, Anne Melton of Lucosky Brookman LLP, told Vice Chancellor Nathan A. Cook.

According to Honey Tree's motion asking Cook to fast-track the litigation, Lottery.com owes Delaware over \$300,000 in taxes and hasn't filed required annual reports. Gooding said Lottery.com's directors knew about its tax liabilities, but they were "blissfully unaware" of its void status until recently and are working to resolve the issue.

Cook expressed frustration with Gooding's pro se representation and admonished Lottery.com's outside counsel for not yet securing Delaware counsel for the litigation. He instructed Lottery.com's leaders to respond to Honey Tree's complaint within a week and scheduled hearings later this month to consider interim injunctive relief.

"There are highly unusual allegations being made in this matter of misconduct," Cook said. "Such actions would seem to present a sufficient threat of irreparable harm and the balance of the equities here would seem to strongly suggest this would be a matter for which expedited treatment would be appropriate."

Honey Tree is also represented by Morris, Nichols, Arsht & Tunnell. McGahan, Gooding, and the other directors represented themselves and Lottery.com pro se.

The case is Honey Tree Trading LLC v. Lottery.com, Del. Ch., No. 2024-0921, hearing 11/6/24 .

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Justices Eye Narrowing Disclosure Rules In Meta Investor Suit

By **Jessica Corso**

Law360 (November 6, 2024, 7:56 PM EST) -- The U.S. Supreme Court seemed poised Wednesday to hand Facebook owner Meta Platforms Inc. a narrow victory in a case tied to the Cambridge Analytica scandal, as justices put up a range of hypothetical scenarios to try to pin down when exactly a company needs to disclose to investors that a past event could cause future damage to its business.

Meta is seeking to shake off an investor class action stemming from revelations that tens of millions of Facebook users had their data harvested by the political consultant firm Cambridge Analytica. The company claims that news of the scandal first broke in 2015, two years before Meta filed an earnings report that led to the lawsuits.

Suing shareholders called the report misleading because it referenced data misuse as a potential risk to the platform's business interest without specifically mentioning the Cambridge Analytica scandal.

Meta said the data harvesting news was old and is urging the Supreme Court to find that corporations do not have to disclose past events with no known risk of future or ongoing harm under the risk disclosures mandated by Item 105 of the Securities and Exchange Commission's Regulation S-K.

The justices spent two hours Wednesday questioning the parties on a range of scenarios under which disclosing a past event would or would not be appropriate. Several conservative justices appeared to suggest that some limits were needed to prevent corporations from having to disclose every past event that may have harmed their business, but they struggled to find where the line should be drawn.

Both Justice Elena Kagan and Justice Samuel Alito, for example, wondered in what instance a company highlighting the damage that a devastating fire could cause to their business would also have to disclose a specific fire that already occurred at a company plant.

Justice Alito asked Kevin Barber of the U.S. Office of the Solicitor General, which stepped into the case to argue in support of the investors, whether it mattered whether the fire was caused by electrical wiring problems that might lead to a future fire or by a freak accident like a meteor or a "crazy Molotov cocktail thrower" through a factory window.

Maybe a reasonable investor would expect a company to reveal the meteor fire "because the investor would think the place is haunted, or it's cursed because this happened in the past," Justice Alito suggested.

But before Barber could answer, Justice Kagan stepped in.

"Well, that isn't what the reasonable investor would want to know in that situation — and I agree these are two different situations — but in that situation, what the reasonable investor would want to know is that there wasn't any plant ... so there wasn't going to be any output so there wasn't going to be any business," she said.

Justice Neil Gorsuch, on the other hand, wanted to know whether corporations need to disclose past events under Item 105 or if there were other provisions of the SEC's rules that would require them to disclose them elsewhere in their earnings reports.

If there isn't, Justice Brett Kavanaugh later suggested, maybe the SEC could adopt a regulation that specifically requires disclosure of past events.

"The SEC, I think you're acknowledging, could adopt a regulation that says what it currently says about risk factors and add: And, by the way, if you're identifying possible future events that could create harm, you also need to identify if those events have occurred in the past?" Justice Kavanaugh asked Kannon Shanmugam of Paul Weiss Rifkind Wharton & Garrison LLP, who argued on behalf of Meta.

Shanmugam agreed that the SEC could have added such language when it adopted cybersecurity disclosure rules last year, but said it didn't "because companies complained about the burden that that would impose."

Justice Amy Coney Barrett expressed an unwillingness to support a bright line rule, saying that no past events need to be disclosed. She said she saw a distinction between extreme "unusual or devastating" events like a fire at a factory and a risk that might be expected based on the business at hand.

"Nobody would think that a social media company wouldn't be at risk of data breaches or that data breaches hadn't happened in the past," Justice Barrett said. "Or, if you're a food supply chain, you know, E. coli outbreaks in spinach, that sort of thing."

Chief Justice John Roberts asked Kevin Russell of Goldstein Russell & Woofter LLC, representing the investors, whether cautioning an exiting guest not to slip on the stairs wouldn't automatically imply that someone had slipped there in the past.

"Your inference would be that has happened and that's why I'm giving you the warning," Justice Roberts said. He asked how to distinguish between the slippery-steps example and what happened in the Facebook case.

"You always have to ask: How would a reasonable person understand the implications of this sentence?" Russell replied.

The investors are represented by Kevin K. Russell and Daniel H. Woofter of Goldstein Russell & Woofter LLC, Salvatore J. Graziano and Jeremy P. Robinson of Bernstein Litowitz Berger & Grossmann LLP and Luke O. Brooks, Joseph Daley and Darryl J. Alvarado of Robbins Geller Rudman & Dowd LLP.

Meta and its executives are represented by Kannon K. Shanmugam, William T. Marks, Matteo Godi, Jake L. Kramer, Anna P. Lipin, Audra J. Soloway and Kristina A. Bunting of Paul Weiss Rifkind Wharton & Garrison LLP and Joshua S. Lipshutz, Trenton J. Van Oss, Brian M. Lutz, Michael J. Kahn and Patrick J. Fuster of Gibson Dunn & Crutcher LLP.

The government is represented by Megan Barbero, Michael Conley, Jeffrey Berger, Emily True Parise and Allison Bitz of the U.S. Securities and Exchange Commission and Elizabeth Prelogar, Malcolm Stewart and Kevin Barber of the U.S. Office of the Solicitor General.

The case is Facebook Inc. et al. v. Amalgamated Bank et al., case number 23-980, in the Supreme Court of the United States.

--Editing by Brian Baresch.



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9th Circ. Says No New Trial For Tesla Investors' Suit

By **Katryna Perera**

Law360 (November 6, 2024, 10:36 PM EST) -- The Ninth Circuit on Wednesday ruled that a lower court didn't err in denying Tesla investors' request for a new trial regarding their \$12 billion claim over Elon Musk's 2018 tweets that he had "funding secured" to take the electric car giant private, saying there were no improper instructions given to the jury.

In an unpublished **opinion**, a three-judge panel for the federal appeals court concluded that there "was no instructional error warranting a new trial" against Tesla, Musk and multiple board members. A California federal jury **cleared** all the defendants of liability following a three-week trial in February 2023.

Investors **argued** that the verdict stemmed from an improper instruction that told jurors that they must decide whether Musk knowingly lied in his tweets about the ultimately unsuccessful go-private transaction, even though U.S. District Judge Edward M. Chen had already **granted summary judgment** on the issue of scienter ahead of trial.

On Wednesday, the panel said there were three specific sentences given to the jury at issue in the appeal. The first sentence was part of a supplemental instruction delivered during the trial, informing the jury that testimony about Musk's state of mind "might be relevant" to whether "Musk knew the statements were untrue when he made them," according to the opinion.

The second was given during a closing instruction that outlined the elements of a securities fraud claim, and it directed jurors to "decide whether [Musk] knew that the statements were untrue," the opinion said.

The third sentence, also given during a closing instruction, elaborated on the meaning of scienter and directed the jury to "decide whether Mr. Musk acted knowingly," according to the opinion, even though the district court had already found that Musk acted with scienter. According to the opinion, the instruction told the jury to assume that Musk acted with "at least reckless disregard."

Lead plaintiff Glen Littleton argued in his appeal that the sentences "impermissibly heightened his burden at trial and confused the jury," according to the opinion.

The panel said Wednesday the jury didn't have to consider knowledge for the scienter element of Littleton's securities fraud claim since the district court had already, at a minimum, found that Musk tweeted recklessly. However, the panel noted that scienter was relevant during the damages stage of the case.

"If it found liability, the jury would have to apportion liability for damages by deciding whether any defendant knowingly violated the law," the opinion said. "Littleton does not dispute that. It was not inaccurate to instruct the jury to decide whether Musk acted knowingly."

The panel acknowledged that the challenged sentences "might have been better offered elsewhere" but said it reads jury instructions "as a whole," and not "in isolation," and when considered holistically, the instructions informed the jury of the proper legal standard.

"In accordance with the district court's prior finding, the instructions appropriately directed the jury to assume recklessness. Guided by these instructions, a jury would have found scienter established," the opinion said.

The panel further concluded that even if there had been an instructional error, it was "more probably than not harmless," since a "substantially greater portion" of the trial was devoted to the element of materiality than scienter.

"A jury considering the evidence — which included testimony about a 'handshake deal' to take Tesla private and about a rise in Tesla's stock price after Musk's August 13th blog post — could reasonably have found that the essential element of materiality was not established, defeating Littleton's claim," the opinion said.

The 2023 trial stemmed from a series of August 2018 tweets in which Musk said he had "funding secured" to take Tesla private at \$420 per share. Musk said at the time that he had been engaged in go-private negotiations with Saudi Arabia's sovereign wealth fund but that the kingdom backpedaled after his tweets.

The Tesla investors alleged they lost \$12 billion when shares crashed after Musk said funding was not, in fact, secured. Musk spent **three days on the witness stand** during the trial, saying he was earnestly trying to keep shareholders informed about what he believed to be a solid handshake deal.

Jurors deliberated for less than a day before returning a verdict in the defendants' favor. In a later opinion denying a new trial, Judge Chen said there was **substantial evidence** for jurors to find Musk's tweets weren't material to trading decisions.

Musk **previously agreed** to pay a \$20 million U.S. Securities and Exchange Commission fine and step down as Tesla's chairman because of the 2018 tweets.

Counsel for Musk told Law360 on Wednesday that they are pleased with the Ninth Circuit's decision.

Counsel for Littleton did not immediately respond to requests for comment.

U.S. Circuit Judges Richard R. Clifton, Jennifer Sung and Gabriel P. Sanchez sat on the panel for the Ninth Circuit.

The investor class is represented by Nicholas I. Porritt, Adam M. Apton and Alexander A. Krot of Levi & Korsinsky LLP.

Tesla, Musk and the board members are represented by Michael Lifrak, Alex Bergjans, Alex Spiro, Ellyde R. Thompson and Andrew J. Rossman of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Glen Littleton v. Elon Musk et al., case number 23-16010, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Rachel Scharf. Editing by Rich Mills.



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Automation Co. UiPath Beats Some Shareholder Claims

By **Katryna Perera**

Law360 (November 6, 2024, 9:43 PM EST) -- A New York federal judge has dismissed several claims from a proposed investor class action against UiPath Inc. that alleges the automation software company misrepresented its technological advancements, market share and revenue to artificially inflate its stock price, finding that many of the challenged statements are inactionable.

U.S. District Judge Denise Cote issued an **order** Monday tossing three groups of statements challenged in the investors' operative complaint.

The first group of alleged misstatements relates to UiPath's disclosures about its annualized renewal run rate, or ARR, a financial metric that estimates a company's annual revenue based on a shorter period of time, such as a month or quarter. The investors allege UiPath's ARR metric was artificially inflated, but Judge Cote said Monday the operative complaint does not plausibly plead that the challenged statements about the ARR were false or misleading.

"UiPath made ample disclosures regarding both the nature of the ARR metric and its limitations," the order states. "The registration statement also warned that ARR 'should be viewed independently of revenue and deferred revenue as ARR is an operating metric and is not intended to be combined with or replace these items.'"

Judge Cote also noted that UiPath's initial public offering registration statement warned that the metric does not forecast future revenue and that investors should not rely too heavily on it.

"In making its ARR claims, the plaintiff is in essence faulting UiPath for adopting a unique measure of its operations in addition to reporting its GAAP-compliant financial results," the order states, using the shorthand for Generally Accepted Accounting Principles. "The plaintiff has failed to explain, however, why UiPath was not free to develop a bespoke measurement tool and describe that tool to investors so long as it did so accurately."

Judge Cote also tossed a group of statements made in UiPath's filings with the U.S. Securities and Exchange Commission about "risk factors" that the investors alleged were misleading since two of the stated risks had already materialized.

According to the order, the allegedly misleading statements concerned competition with Microsoft and decisions by UiPath customers not to renew their licenses with the company.

Judge Cote said the complaint fails to plausibly plead that these statements, when read in context, were misleading, and that the SEC filings did not fail to disclose adverse events that had already occurred.

"This is especially true because UiPath made fulsome disclosures about its financial condition, none of which the [second amended complaint] asserts are inaccurate," the order states. "Therefore, investors were able to track, quarter by quarter, whether revenue was adversely affected by competition and UiPath's failures to expand its business. The claims based on these statements must be dismissed."

Judge Cote also dismissed a group of three statements regarding UiPath's "land-and-expand" model, saying none of them are actionable and all have been taken out of context.

The only statements the judge chose to keep in the suit were those made by UiPath's CEO, Daniel Dines, during several conferences and investor calls. According to the order, the statements were all about Microsoft and touted UiPath's robots as being more complex than those created by Microsoft.

Judge Cote said that to the extent the statements describe UiPath's robots as more complex than Microsoft's, the complaint does not plausibly allege that the statements are either false or misleading. However, Dine's statements that UiPath "did not see" Microsoft "a lot" or "that much" in deals, or that Microsoft did not affect UiPath's "win rate," were misleading, the judge said.

According to the order, testimony from two confidential witnesses recalled that UiPath did not typically fare better than Microsoft in "winning" customers and that customers brought up the competitor's robots in at least half of sales calls.

The order said that these assertions by the confidential witnesses are "sufficiently concrete" to plead that Dine's statements were misleading.

The judge also found that the suit adequately pleads that Dine acted with scienter in making the alleged false statements.

"After Microsoft acquired Softomotive in 2020, UiPath changed its marketing strategy to respond to Microsoft. CW4 describes a meeting with senior executives in early 2021 in which Dines instructed the company's engineers to assist in responding to Microsoft," according to the order. "At the time of the March 30, 2022 earnings call, UiPath announced that it was hiring a Microsoft executive as its chief business officer. At the pleading stage, these allegations are sufficient to support an inference that Dines had the requisite scienter when making the actionable statements."

Dines and other UiPath executives are battling an almost-parallel **derivative suit** in New York federal court alleging they artificially inflated the company's stock price to maximize their own personal profits.

When the COVID-19 pandemic hit, automation software like the kind UiPath develops was in high demand, according to both complaints, and other organizations such as Microsoft and IBM began investing in the industry and developing their own automation software.

By May 2020, Microsoft announced it had acquired a robotic process automation company to help jump-start its own automation software called "Microsoft Power Automate," the derivative complaint states.

Investors in both suits say that up until this point, UiPath was regarded as the industry leader. Investors were concerned by Microsoft's new offerings, but the defendants allegedly claimed that Microsoft was not a "significant competitor" of UiPath and that "Microsoft was focused on enhancing individual users to automate, while UiPath was focused on automation solutions for enterprises."

In April 2021, UiPath began its initial public offering, and instead of subjecting board members and executives to a traditional lock-up period, insiders were allowed to sell their shares immediately, the complaint states.

As a result, investors claim the defendants schemed to artificially inflate UiPath's stock price to maximize their profits before and after the IPO. According to the complaint, the scheme worked because UiPath insiders sold roughly 18.8 million shares after the IPO and received approximately \$26.7 million in returns.

According to the complaint, the defendants failed to disclose, among other things, that UiPath had implemented a substantial discounting program before the IPO, which temporarily boosted UiPath's revenue while "cannibalizing" its future sales and eroding its margins. The company's market was also not as large as portrayed, and it was losing customers to competitors, including Microsoft.

Counsel for the investors declined to comment, and counsel for UiPath did not immediately respond to requests for comment Wednesday.

The investors are represented by Thomas L. Laughlin, Max R. Schwartz and Jeffrey P. Jacobson of Scott + Scott Attorneys At Law LLP, and by Brian Schall of The Schall Law Firm.

UiPath and the individual defendants are represented by Edmund Polubinski, Patrick Blakemore and Marie Killmond of Davis Polk & Wardwell LLP.

The case is Severt et al. v. UiPath Inc. et al., case number 1:23-cv-07908, in the U.S. District Court for the Southern District of New York.

--Editing by Linda Voorhis.

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Albertsons Hit With Discovery Sanctions In Wash. Opioid Suit

By **Rachel Riley**

Law360 (November 6, 2024, 10:05 PM EST) -- A Washington state judge has partially granted the state's sanctions request in its suit accusing Albertsons of exacerbating the opioid crisis, agreeing that the grocery store chain took an "unreasonable" stance in refusing to respond to outstanding discovery requests because a deadline had passed while the case was paused.

King County Superior Court Judge Jim Rogers on Tuesday ordered Albertsons Cos. Inc. to cover the Washington Attorney General's Office's fees and costs in bringing the **motion for sanctions** after the company argued it had no obligation to respond to the state's second set of discovery requests when the stay was lifted in late August. The grocer claimed that was allowed since the fact-finding cutoff passed in June and a new schedule had yet to be set.

"The court agrees that this position was unreasonable," Judge Rogers wrote. "The court also agrees that Albertsons' most reasonable position would have been to simply ask for more time to respond after the stay was lifted or file a protective order motion, both of which the state suggested."

"Apparently, once the motion was filed, Albertsons reconsidered its position," the judge added. "It should not have taken the threat of sanctions to force this issue forward or obtain a response."

In an Oct. 2 motion for sanctions, the state accused Albertsons of using the stay to shield itself from discovery. The Attorney General's Office also sought a court order to waive Albertsons' "untimely objections" to the discovery requests.

But Judge Rogers wrote that such a waiver "is too harsh a sanction" since Albertsons decided to respond to the requests, "albeit two weeks late."

Judge Rogers also granted the attorney general's request for a discovery referee in the case, appointing retired Judge John Erlick to call the shots as the fact-finding phase continues, ordering the state and Albertsons to split the costs.

The discovery dispute arose in a consumer protection case against a series of pharmacies that was **first filed** in December 2022 but stagnated when the lead defendant, Rite Aid, filed for Chapter 11 bankruptcy.

The suit accuses the drug store chain, Albertsons, Kroger and their affiliates of fueling soaring overdose rates by dispensing a flood of prescription opioids without taking steps to ensure that they were used properly, failing to decline suspicious orders and focusing efforts on filling prescriptions fast to maximize profits.

The case was stayed in November 2023 pending Rite Aid's bankruptcy proceedings. Rite Aid's Chapter 11 **reorganization plan**, which accounts for opioid claims by state and local governments, took effect at the end of August after receiving court approval over the summer.

Kroger **finalized a deal** this week to settle opioid-related claims from Washington, 32 other states and the District of Columbia for a whopping \$1.37 billion, with the Evergreen State entitled to nearly 4% of the funds.

Though Judge Rogers has repeatedly extended the stay as to various defendants in the Washington

case, he rejected Albertsons' request to keep the stay on pause past Aug. 30.

According to the Attorney General's Office, Albertsons ignored the original Sept. 9 deadline to fulfill the state's second set of interrogatories and document requests, including dispensing data and the names of Washington pharmacists and employees at its headquarters handling opioid due diligence matters.

On Tuesday, Judge Rogers also noted that it's not clear whether the parties have resolved a motion to compel that Kroger and Albertsons filed against the state in September 2023 before the case was paused. The grocery stores had sought to force the state to conduct a wide-ranging keyword search across documents held by a series of custodians, accusing the Attorney General's Office of failing to produce records created since the state launched **prior opioid litigation** against opioid distributors Purdue Pharma, McKesson and Johnson & Johnson.

Judge Rogers requested that the parties inform the court whether the dispute was settled as part of an Oct. 10 order establishing electronic search protocol, saying he would decide the grocers' motion "immediately" if it has not been resolved.

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

The state of Washington is represented by Kelsey E. Endres, Johnathan J. Guss, Susan E. Llorens, Alison E. Cordova and Jonathan Tebbs of the Washington State Attorney General's Office.

Albertsons is represented by Mary Re Knack and Alexandria M. Smith of Ogden Murphy Wallace PLLC and Francis A. Citera and Gretchen N. Miller of Greenberg Traurig LLP.

The case is State of Washington v. Rite Aid Corp. et al., case no. 22-2-20910-1, in King County Superior Court.

--Editing by Rich Mills.

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Customers Look To Preserve Lead Class Action Against AT&T

By **Jared Foretek**

Law360 (November 6, 2024, 9:52 PM EST) -- AT&T shareholders are telling a Texas federal judge that the company acted with scienter when it allegedly misled investors about the removal of lead-covered copper cables from its network, pushing back on AT&T's motion to dismiss the suit stemming from a drop in the company's stock price.

In a new brief filed Tuesday, the plaintiffs — whose proposed class action is leading a sweeping multidistrict litigation against the company over the lead — claim that the company failed to disclose a range of existing facts about the presence of lead in their network of obsolete telephone cables.

In its September motion to dismiss, AT&T Inc. argues it couldn't be held liable for failing to disclose certain opinions on future vulnerabilities under the Private Securities Litigation Reform Act. But the plaintiffs now say their suit has never just been about possible future liabilities.

"The [amended complaint] pleads that defendants failed to disclose an array of existing facts — e.g., that AT&T was leaving tons of spent lead across the country — germane to the market's assessment of defendants' public commentary and the risk of investing in AT&T," the shareholders say in their response brief.

The investors **brought suit** last year, accusing the company of covering up the lead problem prior to a Wall Street Journal series on the health impacts of lead-covered cables in legacy networks on telecom workers. Following the reporting, AT&T's stock price fell by nearly 7% on "unusually high" trading volume, the plaintiffs say in their complaint.

The suit was **quickly joined** by others accusing the company's executives of knowing about the risks posed by the cables but not disclosing them, eventually leading to the consolidation in Texas federal court.

AT&T also defends itself by arguing it never actually projected future liability from the cable problem, and therefore couldn't have acted with scienter in not telling shareholders.

But in their Tuesday filing, the investors contend that the company knew its public statements — about plans to remove obsolete copper cables and training for employees on how to protect themselves from lead exposure — as it built out its network of new fiber optic cables were misleading.

"It has long been the law that scienter exists when defendants are aware of the facts that make their statements misleading," the plaintiffs say. "Here, defendants confess that they are alleged to know that lead poses various risks, AT&T used lead cables, and it faced lawsuits for abandoning those cables. ... That is a glaring concession that scienter is adequately alleged — and the [amended complaint] pleads much more."

According to the shareholders, AT&T regularly "praised its environmental citizenship" in public environmental, social and governance disclosures, touting commitments to "responsibly handling the waste" that the company produced. All the while, it not only owned the vast network of lead-covered cables, but had consistently "littered" the toxic waste once the cables became obsolete, routinely leaving the cables in place when they were no longer in use, the shareholders add.

The company refutes the claims in its motion to dismiss, telling the court that its public pronouncements weren't actually false, and that leaving the cable in place was actually considered a "proper method of retirement."

But the investors tell the court Tuesday that the company knew it had a "hazardous waste" issue on its hands from its legacy network. And even if the court were to find that AT&T's statements weren't literally false, they assert, plenty of precedent dictates that omissions can still land a company in hot water.

"It neither recovered these copper wires nor disposed of the hazardous waste on them as set forth in disclosures," the investors say in their brief. "AT&T represented that it disposed of hazardous waste in one of three ways, none of which included abandonment in place."

AT&T did not immediately respond to Law360's request for comment Wednesday.

The shareholders are represented by Jeremy A. Lieberman and Justin D. D'Aloia of Pomerantz LLP, and Willie C. Briscoe of The Briscoe Law Firm.

AT&T is represented by Jessica B. Pulliam, John B. Lawrence, Kirstie Wallace and James J. Beha II of Baker Botts LLP.

The case is In Re AT&T Inc. Securities Litigation, case number 3:24-cv-01196, in the U.S. District Court for the Northern District of Texas.

--Additional reporting by Katherine Smith and Sydney Price. Editing by Kristen Becker.

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Insurers Urge Del. Justices To Reverse Drug Co. Policy Ruling

By **Jeff Montgomery**

Law360 (November 6, 2024, 7:01 PM EST) -- Attorneys for three insurers battling Alexion Pharmaceuticals Inc. over potential director and officer insurance payouts in a securities action launched before Alexion received a separate federal regulator penalty told Delaware's Supreme Court on Wednesday that a lower court decision wrongly sided with the company on coverage worth an additional \$20 million.

Arguing before all five justices, Agelo L. Reppas of BatesCarey LLP, counsel to Navigators Insurance Co., said the Superior Court ruling involved "departed from the policies' plain language" and tried to "shoehorn" the securities claims into a faulty coverage analysis.

Reppas, who also argued for Swiss Re Corporate Solutions America Insurance Corp. and Endurance Assurance Corp., said the appeal put at issue Alexion efforts to tap a "tower" of excess insurance covering a period later than the one initially put in play after a U.S. Securities and Exchange Commission investigation focused on the marketing of an Alexion drug for rare genetic blood disorders.

In a supporting brief, the insurers accused Alexion of making a \$20 million "grab" by seeking coverage under the later, multiyear block of excess insurance after the company originally lined up a claim under a previous, smaller tower by way of a "notice of circumstances."

"Even applying the trial courts' flawed analysis, the court still reached the wrong conclusion in finding there was no meaningful linkage between the securities action" with a lower limit "and the SEC subpoenas," Reppas said.

Superior Court Judge Paul R. Wallace granted Alexion **partial summary judgment** in February, finding that the three insurers owed coverage under an insurance tower spanning from 2015 to 2017.

A "meaningful linkage" between an earlier SEC subpoena and the securities action was required for the insurers to bar coverage under the 2015-2017 policy, but there was only a "loose connection" between the two, Judge Wallace said.

In the balance are potential recoveries for stockholders who sued for damages in Connecticut federal court. Their securities case accused Alexion and its officers and directors of propping up company share prices by misleading investors about the company's financial success, including by way of allegedly unethical sales practices said to have violated industry standards and federal law.

In March 2015, the SEC ordered an investigation into Alexion over potentially inaccurate annual and quarterly reports and its lack of internal accounting system. Then, on May 7, 2015, the agency issued a subpoena seeking documents related to Alexion's foreign and domestic grant-making activities and any documents related to recalls of Alexion's blood disorder product, Soliris. The company later settled with the agency for \$21 million.

The stockholder suit, filed in 2016, referenced SEC findings that included that Alexion employees in Brazil and Colombia created or directed others to create inaccurate reimbursement records on payments to third parties, such as patient organizations advocating for use of Alexion treatments.

"Through that ploy, Alexion reportedly plundered about \$400 million from the Brazilian government,"

Judge Wallace observed.

Cynthia M. Jordano of Cohen Ziffer Frenchman & McKenna LLP, counsel to Alexion, told the justices that the issue before the court is whether there's a sufficient relationship between a securities action and an SEC investigation.

"The difference between these two matters are substantial. They involve different wrongful conduct," Jordano said in defense of Alexion's insurance claims. She observed that the SEC focused in part on "Alexion's failure to maintain accurate books and records of foreign payments in violation of the Foreign Corrupt Practices Act" while the securities claims focused on misrepresentations to the public.

Jordano said separately that "Alexion was faced with unique insurers in both cases pointing the finger at each other."

According to Judge Wallace's order in February, the SEC's subpoena was "broadly concerned" with Alexion's compliance with the Foreign Corrupt Practices Act. Although Brazil was mentioned in the subpoena, the SEC's eventual findings were more focused on conduct related to Turkey and Russia.

The securities action, Judge Wallace said, accused Alexion and its directors of "artificially inflating" the company's value through a number of wrongful actions, of which Alexion's activity in Brazil was only a small part.

"Alexion has always maintained in both the underlying case and the insurance case that the two matters are related," Jordano said.

Endurance Assurance Corp. is represented by Garrett B. Moritz, R. Garrett Rice and A. Gage Whirley of Ross Aronstam & Moritz, and Marc S. Casarino of Kennedys CMK LLP.

Swiss Re Corporate Solutions is represented by John C. Phillips Jr. and David A. Bilson of Phillips McLaughlin & Hall PA and James Sandnes and Sarah F. Voutyras of Skarzynski Marick & Black LLP.

Navigators Insurance Co. is represented by Bruce W. McCullough of Bodell Bove LLC and Agelo L. Reppas and Brian J. Watson of BatesCarey LLP.

Alexion Pharmaceuticals Inc. is represented by Daniel M. Silver and Benjamin A. Smyth of McCarter & English LLP and Robin L. Cohen, Cynthia M. Jordano, Orrie A. Levy and David J. Matulewicz-Crowley of Cohen Ziffer Frenchman & McKenna LLP.

The case is *In re Alexion Pharmaceuticals Inc. Insurance Appeals*, case numbers 154,2024 and 157,2024, in the Supreme Court of the State of Delaware.

The case below is N22-C10-340 in the Superior Court of the State of Delaware.

--Additional reporting by Jennifer Mandato. Editing by Linda Voorhis.



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Seattle Judge Wants Plaintiff's Comms In iPad Antitrust Suit

By **Emily Sawicki**

Law360 (November 6, 2024, 8:23 PM EST) -- A Seattle federal judge has ordered Hagens Berman Sobol Shapiro LLP to produce its communications with a client who allegedly ghosted the firm before determining if the attorneys may withdraw from representing the class representative in a proposed antitrust class action against Apple and Amazon.

In an **order** issued Tuesday, U.S. District Judge Kymberly K. Evanson gave Hagens Berman until Nov. 15 to produce "all non-privileged communications" it has had with client Steven Floyd from the time the firm first issued discovery requests through the date the order was issued, as a condition of their withdrawal.

The order came hours after Hagens Berman appeared at a **motion hearing** before Judge Evanson to defend its bid to drop Floyd as the named plaintiff in the proposed class action in Washington federal court. According to the firm, Floyd ceased communicating with the firm in January and did not respond again until August.

Floyd brought the putative class action **in 2022**, accusing the two tech giants of violating the Sherman Antitrust Act by blocking most third-party Apple resellers from offering products on Amazon's marketplace.

The suit points to an agreement struck between the companies in 2018 under which Amazon will only sell Apple tech from approved vendors, but for their part, Apple and Amazon said the deal was designed to protect consumers from scammers, not an attempted monopoly.

At the time the complaint was filed, Floyd was the sole plaintiff. After Floyd reportedly disappeared, Hagens Berman replaced him with other proposed class representatives.

"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," Hagens Berman attorney Ben M. Harrington said at the Tuesday hearing.

The companies **have suggested** Hagens Berman used Floyd as a "placeholder plaintiff," and asked the court for access to his communications with the law firm to determine what was said prior to his seemingly abrupt disappearance from the case.

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

Apple and Amazon are also seeking **discovery sanctions** against Floyd — a request Hagens Berman has **not opposed**.

In her order, Judge Evanson said she saw Apple's point when it came to learning about the lead-up to Floyd's silence. The judge denied Hagens Berman's motion to withdraw as counsel, ordering it to produce the communications for her own in camera review, as well as a detailed privilege log covering the same time period.

"In this case, the court agrees with Apple that more information from Floyd's counsel is needed in order to resolve questions of delay, prejudice, and harm to the administration of justice, before the court can adjudicate the motion to withdraw representation," Judge Evanson stated. "Likewise, that same information is needed before the court can determine the appropriate sanction, if any, for Floyd's failure to comply with this court's order."

Judge Evanson said once she is able to review the communications and the privilege log, Amazon and Apple will have until Dec. 2 to file their own motion, which could include a motion to review communications listed in Hagens Berman's privilege log.

Only after that is resolved, the judge went on, may Hagens Berman resume its bid to withdraw as Floyd's counsel.

Counsel for Amazon, Apple and the proposed class did not immediately respond to requests for comment Wednesday.

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 Rachel Riley, Ryan Boysen, Rachel Scharf, Bryan Koenig and Greg Lamm. Editing by Linda Voorhis.



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Amazon Can't 'Just Walk Out' On BIPA Claims

By **Lauraann Wood**

Law360 (November 6, 2024, 7:27 PM EST) -- An Illinois federal judge largely allowed two biometric privacy suits to proceed against Amazon and a Midway Airport shop operator over Amazon's Just Walk Out cashierless checkout technology, trimming just an unlawful profiting claim against the travel retailer.

Allowing the plaintiffs' separate suits to proceed to discovery, U.S. District Judge LaShonda Hunt said they've plausibly alleged the cameras and other technology at Amazon's Go stores and Hudson Group (HG) Retail LLC's airport shop illegally collect, use, store and disclose their biometric data without informed consent.

Amazon and Hudson argued that although the plaintiffs had pointed to patents for the JWO technology they say would allow for the collection and use of biometric data, they'd failed to plausibly allege the tech is using that patented technology or collecting biometric information at all. But Judge Hunt disagreed, siding instead with an Illinois decision that rejected a similar argument and a California federal decision finding such arguments better suited for resolution later in litigation.

Also saved for later was Hudson's argument that its operation of a business in a Chicago-owned and managed airport qualifies it for exclusion under the Biometric Information Privacy Act's government contractor exemption. The documents Hudson submitted to support its argument could be convincing, but "we need ... more of a record developed on that before we can make a determination," the judge said, ruling remotely from the bench.

The JWO technology at issue promises shoppers a seamless, "frictionless shopping experience while promising its retail customers an increase in profits by significantly lowering labor costs for their in-store personnel," according to the **Amazon customers' suit**.

The heart of the JWO technology is a complex network of sensors, cameras, machine learning and AI that automatically detects when products are lifted from store shelves and keeps track of these items in a virtual cart. The system gathers, uses, stores and shares shoppers' images — including faces, hands and voice prints, which the technology scans and processes through a computer algorithm to identify customers and the products they purchase — and then processes the payment when they leave, both suits claim.

However, using the technology "presents unparalleled privacy concerns" for shoppers because "massive amounts" of biometric data trains the complex surveillance technology without necessary notice or permission, they claim.

Judge Hunt had mixed results for the plaintiffs' unlawful profiting claim, however, as she allowed Amazon's customers to keep their claim in their suit, but said the Midway shoppers couldn't pursue theirs. The difference, Judge Hunt said, lies in the root of the companies' allegedly illegal profiting.

Amazon's customers claim the tech giant uses its Go stores' collected data to not only improve its artificial intelligence and machine learning algorithms, but also sells it to retailers, and that's enough to proceed, the judge said. The Hudson plaintiffs claim the company is illegally profiting essentially due to its minimal labor costs, but that isn't enough under Seventh Circuit precedent **governing standing** for such claims, she ruled.

Judge Hunt agreed with plaintiffs' counsel that a state court remand appeared to be the appropriate next step for the Hudson plaintiffs' federally nonviable profiting claim, but she agreed to wait to make

any moves until Hudson Group outlines its position on the matter.

"I don't know that there's much flexibility here," though, since the Seventh Circuit says the issue is standing-related, Judge Hunt said.

Representing the plaintiffs in both cases, Justin Boley of Wexler Boley & Elgersma LLP told Law360 in an email that his clients "appreciate Judge Hunt's thorough, well-reasoned opinion and we look forward to proceeding with the case."

An Amazon representative told Law360 on Wednesday that "the allegations that Just Walk Out technology collects biometric information are baseless."

"We outlined this in our motion to dismiss the complaint, and are confident we will prevail when the court reviews the evidence," the representative said.

Representatives for Hudson Group didn't immediately respond Wednesday to a request for comment.

The plaintiffs had initially launched their respective and nearly identical lawsuits in state court last year, asking a judge to award them statutory damages for Amazon and Hudson Group's alleged BIPA violations. The companies removed the suits to federal court in November 2023 and their dismissal briefing had been completed since February and March before Judge Hunt set a ruling date on Halloween, according to court records.

The plaintiffs are represented by Kenneth Wexler, Justin Boley, Tyler Story and Eaghan Davis of Wexler Boley Elgersma LLP and Ryan Stephan and James Zouras of Stephan Zouras LLP.

Amazon is represented by Moez Kaba and Sourabh Mishra of Heuston Hennigan LLP and Kathleen Stetsko and Nicola Menaldo of Perkins Coie LLP. Kaba, Mishra and Stetsko also represent Hudson Group.

The cases are Coulter v. Hudson Group (HG) Retail LLC et al., case number 1:23-cv-16176, and Van Housen et al v. Amazon.Com Inc. et al., case number 1:23-cv-15634, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Gina Kim. Editing by Kelly Duncan.



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Danone Beats Suit Alleging Microplastics In Evian, For Now

By **Craig Clough**

Law360 (November 6, 2024, 11:11 PM EST) -- An Illinois federal judge on Tuesday granted Danone Waters of America's request to dismiss a putative class action accusing the Evian-maker of violating Illinois and California state consumer fraud statutes by labeling its spring water as "natural" even though the product contains microplastics, finding the claims are preempted by federal law.

The **order** from U.S. District Judge Thomas Durkin dismissed the claims of plaintiffs Michael Daly and Michael Dotson, but with leave to amend them.

The judge held that "spring water" is federally regulated, and that the regulation does not mention microplastics. In an effort to avoid preemption, the plaintiffs appear to have focused their claims on the term "natural" instead of "spring water" while arguing water containing microplastics is not natural, but the two terms in this instance "cannot be separated," the judge said.

"The regulation uses the word 'natural' seven times, and each instance is used to describe the source of the 'spring water,'" the judge continued.

The order then listed the instances where "natural" appears in the federal regulation for spring water, including "an underground formation from which water flows naturally to the surface," "a natural force causing the water to flow" and "the natural spring."

"In other words, the plain language of the regulation defines 'spring water' as, in part, the water that is harvested from a 'natural spring' (i.e., a 'natural flow' through a 'natural orifice')," the judge wrote. "As long as water comes from a 'natural spring' it can be labeled 'spring water,' and by extension 'natural.'"

The proposed class action was filed in Illinois state court before being removed to federal court in March. A first amended complaint filed in April alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, common law fraud, unjust enrichment, California's Unfair Competition Law and California's Consumer Legal Remedies Act.

The complaint points to various studies that found microplastics in bottled water, arguing that microplastics "are not naturally occurring. Instead, microplastics are typically made from polypropylene, polyethylene, polystyrene, and other synthetic polymers."

The complaint also argues that "[a]s a result of defendant's fraudulent labeling, plaintiffs and the class paid a price premium for premium products, but instead received non-premium products." The suit seeks to represent nationwide, Illinois and California classes of consumers who have purchased Evian water over the last five years.

Danone filed a motion to dismiss the claims, arguing the plaintiffs failed to state a claim because they are all preempted by the federal regulation of spring water. The judge agreed, and noted that in their response to the motion to dismiss, the plaintiffs sought to focus their arguments on the term "natural."

"This is likely because, as Danone points out, the regulation does not mention microplastics, which according to Danone, means that the regulation does not impose a requirement regarding microplastics, thereby preempting any claim which, like plaintiffs', attempts to impose a microplastic

requirement on labels for 'spring water,'" the judge said. "Thus, plaintiffs' 'focus' their claims on the terms 'natural.'"

The judge also found that "any claim that imposes a requirement beyond this proper identification of the water's source in order to properly label 'spring water' as 'natural' is preempted. Whether the regulation imposes requirements regarding the content of 'spring water,' including whether the presence of microplastics might violate that those requirements, is irrelevant to this logic."

The ruling "comports" with three other federal ruling on lawsuits over microplastics in bottled water, the judge said, including an **August ruling** by a different Illinois federal court that found no reasonable consumer would believe "100% natural spring water" is a guarantee down to the molecular level.

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

The plaintiffs are represented by David B. Levin and Todd M Friedman of Law Offices of Todd M. Friedman PC.

Danone Waters of America LLC is represented by Yan Grinblat of DLA Piper.

The case is Michael Daly v. Danone Waters of America LLC, case number 1:24-cv-02424, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Mike Curley. Editing by Michael Watanabe.

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Hyundai, Kia Rip Cities' Bellwether Trial Bid In Car-Theft MDL

By **Linda Chiem**

Law360 (November 6, 2024, 9:10 PM EST) -- Hyundai and Kia have asked a California federal judge to reject several cities' request for bellwether trials in consolidated litigation alleging that the automakers knowingly sold vehicles with design flaws that spawned a car-theft crime wave after a viral TikTok trend popularized tips for breaking into their cars.

Hyundai Motor America Inc. and Kia America Inc. said in a Tuesday court filing that it's premature to impose a bellwether process for public nuisance and negligence cases brought by 29 U.S. cities and municipalities alleging the car thefts have **siphoned off** scarce resources from local law enforcement and first responders.

The so-called governmental entities plaintiffs "have yet to provide critical information about the thefts and attempted thefts, their efforts, if any, to respond to the thefts, the investigation and prosecution of the perpetrators of the thefts, the 'related crimes' for which GE plaintiffs also seek damages, and the budgetary impacts resulting from the alleged 'catastrophic' crime wave," the automakers said in their brief.

"GE plaintiffs are pursuing this strategy because Phase I discovery will demonstrate that highly individualized factual inquiries underlying the causation, liability, and damages theories presented by the GE plaintiffs would render any verdict or settlement in a bellwether case not 'representative' and largely inapplicable and uninformative to resolution of other GE cases," Hyundai and Kia argued.

"Indeed, the use of bellwethers in a track with just 29 plaintiffs, 22 of which are represented by the same counsel, makes no sense," they continued. "As a result, the use of bellwethers will not narrow or streamline the non-bellwether cases. Rather, it would only delay discovery and trial in the non-bellwether cases, as opposed to furthering their resolution or settlement — the opposite of efficiency."

Hyundai and Kia said U.S. District Judge James V. Selna should not even address the topic of bellwethers — or whether they are even appropriate for this litigation — until after the first phase of discovery wraps up in January.

The governmental entities plaintiffs had proposed a process in which they would pick one plaintiff, while Hyundai and Kia would pick one plaintiff from a proposed pool of four plaintiffs to be tried as bellwethers, according to a separate brief also filed Tuesday.

"The time-tested case management tool of holding bellwether trials is common practice in multidistrict litigation and provides the most efficient and effective means of steering this litigation toward resolution," they said in their brief.

The MDL accuses Hyundai and Kia of pursuing profits over safety by failing to outfit millions of model year 2011–2022 vehicles with industry-standard immobilizers to ensure cars can't be started without their keys. The MDL also encompasses claims from **hundreds of insurers** that sued to recover at least some of the more than \$1 billion they contend they paid in claims and adjustments in response to the unprecedented **crime spree** inspired by social media.

Judge Selna on Oct. 1 **granted final approval** to a \$145 million settlement that **closed out consumers' claims** in the MDL.

The MDL centers on allegations that the thefts committed by "amateur thieves" and "teenagers" gained momentum after 2020 when users of TikTok and other social media platforms began sharing viral videos offering tips and techniques to easily break into Hyundai and Kia vehicles **using just a USB cable**.

Hyundai has stated that it "continues to take comprehensive actions to assist customers and communities affected by the persistent thefts of certain model year 2011-2022 vehicles that, while fully compliant with federal anti-theft requirements, were not equipped with push-button ignitions and engine immobilizers."

Among those actions, Hyundai said it has provided no-cost anti-theft solutions to more than 1.4 million affected vehicles, worked with over 1,200 police departments, provided thousands of no-cost steering wheel locks for distribution and connected law enforcement agencies with local dealers in their area who perform the software upgrade that prevents the theft mode popularized on social media.

Kia has similarly defended the "comprehensive actions [it] has taken to support our customers. It has also pledged to "continue to work with law enforcement agencies across the country to combat criminal car theft and the role social media has played in encouraging it, and we remain fully committed to supporting our customers."

The governmental entities are represented by Gretchen Freeman Cappio of Keller Rohrback LLP and Rick L. Ashton of Allen Stovall Neuman & Ashton LLP, among others.

The insurance companies are represented by Elliott R. Feldman, Nathan M. Dooley and Kevin P. Caraher of Cozen O' Connor, William Hoffmann, Adam Romney and Susan Benson of Grotefeld Hoffmann, Timothy E. Cary of Stutman Law and Craig S. Simon of Berger Kahn.

Hyundai and Kia are represented in the governmental entities' suits by Steven G. Madison and Justin Griffin of Quinn Emanuel Urquhart & Sullivan LLP, and in the insurers' suits by Peter J. Brennan, Michael T. Brody, Kate T. Spelman, Alice S. Kim, Madeline P. Skitzki and Jenna L. Conwisar of Jenner & Block LLP.

The MDL is In re: Kia Hyundai Vehicle Theft Litigation, case number 8:22-mj-03052, in the U.S. District Court for the Central District of California.

--Editing by Rich Mills.



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Intel Accused Of Touting 'Defective' Raptor Lake Processors

By **Hailey Konnath**

Law360 (November 6, 2024, 11:25 PM EST) -- Intel has continued to promote the purported speed and performance of its "defective" 13th and 14th generation desktop processors, which go by the code name Raptor Lake, according to a proposed class action filed Tuesday in California federal court.

New Yorker Mark Vanvalkenburgh said in the suit that the desktop core processors were released in 2022 and 2023. The company quickly realized they were defective, Vanvalkenburgh said. Users and tech websites reported the issues, and Intel products also undergo testing before and after they're released, he said.

"By late 2022 and early 2023, there were numerous reports that the Intel chips were failing at high rates," he said.

Still, Intel continued to pump out marketing materials touting the speed and performance of the processors with no mention of the defect, according to the complaint.

Specifically, Vanvalkenburgh said Intel's website continues to claim that the processors boast "more power, performance and efficiency for every computing need."

"But the design and/or manufacture of Intel's 13th generation and 14th generation processors make the product defective and cause symptoms such as instability, failures and crashes," he said.

Vanvalkenburgh said that consumers, like him, bought the products expecting them to run stably and not be defective.

"If Intel wanted to be truthful, it would have clearly and prominently warned consumers that the chips are defective and subject to instability problems and unusually high crash and failure rates," he said. "Intel's packaging, however, did not disclose any of these problems, and thus made material misstatements and omissions."

Vanvalkenburgh is looking to represent a class of potentially millions of consumers who purchased the products. He's alleging fraudulent omission, breach of implied warranty and violations of New York's General Business Law.

He's seeking unspecified damages, restitution, disgorgement, attorney fees and court costs.

Intel and counsel for Vanvalkenburgh didn't immediately respond to requests for comment late Wednesday.

Vanvalkenburgh is represented by Christin Cho and Richard Lyon of Dovel & Luner LLP and Kevin Kneupper and A. Cyclone Covey of Kneupper & Covey PC.

Counsel information for Intel wasn't immediately available Wednesday.

The case is Mark Vanvalkenburgh v. Intel Corp., case number 5:24-cv-07703, in the U.S. District Court for the Northern District of California.



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Kratom Co. Failed To Warn Of 'Addictive Potential,' Suit Says

By **Jonathan Capriel**

Law360 (November 6, 2024, 6:24 PM EST) -- The company behind Kryptic Kratom and K-Chill branded supplements was hit with a proposed class action accusing the company concealing the "addictive potential" of kratom, which the suit likens to opioids, morphine and heroin.

DBZ Enterprises LLC knew that the primary ingredients in its kratom products "interacts" with the same receptors that opioids interact with, which makes them "highly addictive," the lawsuit filed in California federal court said. Yet, the company did not warn consumers about this nor provide any information about the negative side effects, the suit said.

In fact, DBZ's only warning to consumers is a "bog-standard disclaimer" that says the products shouldn't be taken with alcohol, or by a person who is "pregnant, breastfeeding, or operating heavy machinery," the suit said. Additionally, DBZ says it is not liable for "misuse of any botanical product."

"A boilerplate disclaimer is plainly insufficient," the suit said. "This is a product that poses a serious risk of intense addiction and withdrawal in line with traditional 'hard' opioids. Addiction is a disease. As such [the] defendant's products pose an unreasonable health hazard, and [DBZ] had and has a duty to disclose this fact on its products' packaging."

The suit was filed by two California residents and one Oregonian who all claim to have become addicted to K-Chill or Kryptic Kratom. They seek to represent a nationwide and two statewide classes seeking damages for violations of state business laws. Additionally, they claim the company engaged in unjust enrichment, breach of warranty and fraud by omission.

The plaintiffs, who are identified only by initials, claim they became addicted to kratom through DBZ's products. One person, R.L., claims she kicked her yearslong addiction only after entering into a treatment program and taking Suboxone, a drug used to help patients treat morphine or heroin dependency.

"The general public is largely unaware of kratom and its addictive potential," the suit said. "When reasonable consumers think of opioids, they think of heroin, fentanyl, hydrocodone, oxycodone, or morphine; they do not think of the K-Chill and Kryptic Kratom Products or expect the 'botanical extract' kratom product sold at their local gas stations or corner stores to act like an opioid, or have the same addiction and dependency risks as opioids. Kratom is extremely addictive, and as a result, tens of thousands of unsuspecting consumers have developed kratom dependencies that cause them serious physical, psychological, and financial harm."

DBZ did not immediately respond to a request for comment.

The consumers are represented by Todd D. Carpenter and Scott G. Braden of Lynch Carpenter LLP.

The case is D.B. et al., v. DBZ Enterprises LLC, case number 8:24-cv-02405, in the U.S. District Court for the Central District of California.

--Editing by Andrew Cohen.



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E-Discovery Quarterly: Recent Rulings On Metadata

By **Tom Paskowitz, Colleen Kenney and Matt Jackson** (November 6, 2024, 4:55 PM EST)

This article is part of a quarterly column analyzing the most notable e-discovery developments from the previous three months. This installment takes a closer look at recent decisions involving disputes over the forms in which parties produce electronically stored information.

Given the increasing complexity inherent in producing electronically stored information, or ESI, parties are expected to cooperate to reach agreement on critical areas up front to avoid disputes later on.[1]

This is certainly true with respect to the form of producing ESI, which is addressed in Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure. This rule provides:

Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.[2]

Under the rule, if the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained, or in a form or forms that are reasonably usable.

But as the advisory committee notes to the 2006 amendments to Rule 34 explain,

the option to produce in a reasonably usable form does not mean that a responding party is free to convert [ESI] from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation.[3]

Search functionality is often critical to this determination. The notes continue, "If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." [4]

Several recent court opinions reflect how these competing considerations play out when the parties dispute the form of production for ESI.

For example, in *Bah v. Sampson Bladen Oil Co. Inc.*, [5] the U.S. District Court for the Eastern



Tom Paskowitz



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Matt Jackson

District of North Carolina addressed a situation in which the parties had agreed in their joint report pursuant to Rule 26(f) that most ESI should be produced in TIFF format, but that some types of ESI — e.g., Excel and PowerPoint files — should be produced in native format.[6]

The parties had also agreed that ESI produced in TIFF format would "include metadata and searchable, extracted text," but the report did not specify which metadata should be produced.[7]

After the defendant produced over 13,000 pages in TIFF format accompanied by searchable, extracted text and 13 metadata fields, the plaintiff complained that the "production was 'completely unusable'" because, among other reasons, "she [could] not filter the documents by date" or categorize documents by file type.[8]

The plaintiff moved to compel the defendant to produce all available metadata fields for its production, requiring the court to resolve the ambiguity in the parties' joint Rule 26(f) report as to whether the requirement to "include metadata and searchable, extracted text" meant "all available metadata," or something less.[9]

To resolve this ambiguity, the court looked to Rule 34, which "encourages the parties to be explicit about issues related to the form of production for ESI." [10]

In its August decision, the court explained that under the rule, "[t]he requesting party should explicitly state its desired form of production and the responding party should explicitly state the form in which it is willing to produce ESI." [11]

Quoting the advisory committee note to the 2006 amendments to Rule 34, the court also noted that "[t]hese requirements are designed to avoid the very problems confronting the court and the parties here" by facilitating "the orderly, efficient, and cost-effective discovery of electronically stored information." [12]

After surveying the case law relevant to the parties' dispute, the court summarized, quoting precedent, that "if a party wants metadata, it should '[a]sk for it. Up front. Otherwise, if [the party] ask[s] too late or ha[s] already received the document in another form, [it] may be out of luck.'" [13]

As related to the parties' dispute, the court also noted that "a party who wants ESI produced in non-native format to be accompanied by all available metadata must say so."

Ultimately, the court concluded that the parties' use of the term "metadata" in their joint Rule 26(f) report, without more, entitled neither party to all available metadata.[14]

Having found that the plaintiff was not entitled to all available metadata, the court turned to the question of how much metadata was enough. Again relying on Rule 34(b)(2)(E), the court explained that "unless a request for production contains more specific instructions, any ESI produced in nonnative format must include enough metadata to be reasonably usable to the requesting party." [15]

The court cited several prior decisions supporting the proposition that, in most cases, courts find that "a production is reasonably usable if it is text searchable." [16] In particular, "[i]f the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature."

Ultimately, the court found that the defendant's production was produced "in a reasonably usable form" because the plaintiff was able to access, review and text-search the ESI produced, and there was "nothing in the record establishing that the production [was] less searchable for [the plaintiff] than it would be for [the defendant]." [17]

The court rejected an argument that the lack of metadata allowing the plaintiff to filter documents by date and to categorize documents by file type rendered the defendant's production unusable, concluding that Rule 34 does "not require that ESI be produced in the form the requesting party prefers or the one that is the most easily usable by the requesting party." [18]

Because the defendant's production was text-searchable, it met the requirement that ESI be produced in a reasonably usable format.[19]

In June, the U.S. Bankruptcy Court for the Eastern District of Virginia reached a similar conclusion in *In re: Health Diagnostic Laboratory Inc.*[20] In that case, the defendants had filed a motion in limine to strike an expert report, claiming that they had not been provided with native versions of spreadsheets the expert had used.[21]

While the spreadsheets were produced in Excel format, they did not include formulas that the defendants believed would have been embedded in the original versions of the spreadsheets.[22]

The court found that the defendants were not entitled to production of metadata because they had not asked for it. The court explained that, "[t]o obtain metadata, the caselaw indicates that the requesting party must either ask for the native format of the ESI or specifically request the metadata." [23]

But the defendants' document requests required production of ESI in "computerized or digital form," which "is not the same thing as a request for 'native format.'" [24] The court noted that "[t]he requesting party is 'the master of its production requests; it must be satisfied with what it asks for.'" [25]

As in *Bah*, the court in *Health Diagnostic* found that the spreadsheets were produced in a reasonably usable form under Rule 34, because the spreadsheets "simply tracked the transactions" and "there [was] nothing 'complex' about" them.[26]

Another court addressed a similar issue in August with respect to whether spreadsheets were produced in a reasonably usable form under Rule 34.[27]

In *Weiss Haus v. Port Authority of New York and New Jersey*, the plaintiff sought to strike an expert affidavit proffered by the defendant that was based on an analysis of general ledger information on the ground that the plaintiff could not perform calculations within the spreadsheets that the defendant downloaded from the general ledger and produced to the plaintiff.[28]

But the U.S. District Court for the Southern District of New York disagreed, finding that because the data in the spreadsheets could be sorted, "nothing indicates that the spreadsheets provided to Plaintiff are not in a reasonably usable form." [29]

The court rejected the plaintiff's argument based on the fact that the plaintiff could not create calculations within the spreadsheets, finding that nothing indicated that the plaintiff "would not be able to create his own calculations using the data to which he now has access." [30]

Takeaways

The cases discussed above reflect that parties should carefully consider the ways in which they produce documents to ensure that they will be able to comply with Rule 34's goal of a fair and reasonable approach to the form of production, and avoid disputes that arise postproduction.[31]

In particular, a party requesting ESI should consider the form — including categories of metadata — as well as the functionality of ESI the party will want, and include relevant instructions in its requests for production.

For example, parties may consider whether search functionality for documents produced in TIFF format warrants requesting specific metadata fields to avoid a dispute like the one in *Bah v. Sampson Bladen*, or specific functionality within spreadsheets like in *Weiss Haus v. Port Authority*.

Parties responding to discovery, meanwhile, should consider the form requested and if it is reasonable or feasible in light of the circumstances.

If no specific form is requested, a responding party may consider, prior to processing ESI for production, whether the form of production is reasonably usable.

Relevant considerations in this regard may include whether processing of ESI has changed or reduced any functionality inherent to the ESI, whether the producing party will have more capabilities to manipulate or use the ESI, and whether the ESI is searchable or sortable.

Although the cases above do not set a high bar for what constitutes a reasonably usable format, consideration of these questions ahead of time will avoid costly disputes after the time and expense of production have been incurred.

Tom Paskowitz is a partner at Sidley Austin LLP.

Colleen Kenney is a partner and a head of the firm's e-discovery and data analytics group.

Matt Jackson is a partner at the firm.

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[1] See, e.g., The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Principle 3 ("As soon as practicable, parties should confer and seek to reach agreement regarding the preservation and production of electronically stored information."); Fed. R. Civ. P. 26, Advisory Committee Notes to 2000 Amendments ("In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention.").

[2] Fed. R. Civ. P. 34(b)(2)(E).

[3] Fed. R. Civ. P. 34, Advisory Committee Notes to 2006 Amendments.

[4] Id.

[5] **Bah v. Sampson Bladen Oil Company, Inc.** , No. 23-CV-00330, 2024 WL 3678337 (E.D.N.C. Aug. 5, 2024).

[6] Id. at *1.

[7] Id.

[8] Id. at *2.

[9] Id. at *4.

[10] Id. at *4.

[11] Id.

[12] Id.

[13] Bah, at *4 (quoting **Aguilar v. ICE** , 255 F.R.D. 350, 357 (S.D.N.Y. 2008) (internal quotations omitted)). Delay in requesting metadata can result in waiving a party's right to request it. See, e.g., **Karlyg v. City of New York** , 20 CV 991 (PKC) (CLP), 2024 WL 4333858, *4 (declining to grant spoliation sanctions for photograph metadata because, among other reasons, the defendants accepted the photographs in PDF format, defendants made no requests for the metadata until two years later); but see **Moore v. Garnand** , No. CV 19-00290 TUC RM (MAA), 2024 WL 3291810, *2 (D. Ariz. July 3, 2024) (granting motion to compel reproduction of photographs previously produced without metadata because the photographs and their metadata should have been part of the defendants' initial discovery disclosure and reproduction would not impose undue burden).

[14] Id. *4.

[15] Id. at *4.

[16] Id. at *6.

[17] Id. at *6.

[18] Id. at *6.

[19] Id. at *6.

[20] *In re Health Diagnostic Laboratory, Inc.* , No. 15-32919-KRH, 2024 WL 2930904 (E.D. Va. June 10, 2024).

[21] Id. at *9.

[22] Id. at *10.

[23] Id. at *10 (citing Aguilar).

[24] Id.

[25] Id. (citing cases).

[26] Id. at *11.

[27] *Weissshaus v. Port Authority of New York and New Jersey* , No. 11 Civ. 6616 (RKE), 2024 WL 3904591 (S.D.N.Y. Aug 22, 2024).

[28] Id. at *1.

[29] Id. at *2.

[30] Id. See also *Myers v. Mercedes-Benz USA, LLC* , No. 23-cv-755 (DJN), 2024 WL 3835076, *7 (E.D. Va. Aug. 15, 2024) (finding that plaintiffs' difficulty with printing warranty data did not render the data "unusable" because "comprehensive data charts and spreadsheets often must be printed on numerous pages for readability.").

[31] See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production.

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