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This Week in Chancery Court: Comcast Trial, Qurate (Correct)

By Jennifer Kay

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This Week in Chancery Court: Comcast Trial, Qurate (Correct)

By Jennifer Kay 2024-12-02T05:00:02000-05:00

Comcast Corp. and an Apollo Global Management Inc. affiliate go to trial this week in the Delaware Chancery Court over the end of a contract for an emergency voice system.

Here's more from the calendars for the Chancery Court and Delaware Supreme Court:

Monday: Seavitt v. N-able Inc., Del. Ch., No. 2023-0326, hearing 12/2/24.

At issue: In July, Vice Chancellor J. Travis Laster ruled that software company N-able Inc. had violated Delaware's corporate laws with accords giving extensive veto and board rights to two major private equity firms, Silver Lake Group LLC and Thoma Bravo LLC. Now he'll consider a \$4 million fee award application from the attorneys representing the N-able investor leading the litigation. The company says in a brief opposing the award that the same attorneys, who were awarded \$6 million in a separate landmark case on stockholder agreements, only deserve to take home up to \$1.5 million for their work regarding N-able.

Court action: The hearing on attorneys' fees will be held via video-conference.

N-able Loses Stockholder Pact Case as Judge Confronts New Twist

Tuesday: In re Sears Hometown & Outlet Stores Inc. S'holder Litig., Del. Ch., No. 2019-0798, Zoom hearing 12/3/24.

At issue: Laster previously cut the amount of damages that he determined billionaire Eddie Lampert owed to former Sears Hometown and Outlet Stores Inc. to \$8.7 million, from \$18.3 million. In August, he granted a motion to intervene filed by investment vehicle Cannon Square LLC "for the sole issue of addressing the question of law that Cannon Square has raised about its alleged entitlement to recover damages." Lampert's attorneys argue in a brief that "No principle of Delaware law supports awarding such additional damages to a single class member."

Court action: A hearing on Cannon Square's motion for further relief will be held via video-conference.

Lampert Wins \$10 Million Damage Reduction in Sears Hometown Case

Tuesday: JB Capital Partners LP v. Gain Cap. Holdings Inc., Del. Ch., No. 2020-0644, settlement hearing 12/3/24.

At issue: An investor's 2020 lawsuit challenged the \$236 million price of StoneX Group Inc.'s acquisition of GAIN Capital Holdings Inc., which runs online trading platforms. A proposed \$55 million settlement would resolve the litigation, including \$24 million to settle a class action, according to a brief. JB Capital Partners LP, a private equity firm, had said its nearly 2.9 million GAIN shares were involuntarily bought out for \$6 apiece in the merger. It now says the class will receive "an excellent result" with an additional \$1.15 per share, before fees and expenses. The firm's attorneys also seek a \$6 million fee award. Vice Chancellor Nathan A. Cook must sign off on the deal.

Court action: The settlement hearing will be held in Wilmington, Del.

Wednesday: In Re Hennessy Capital Acquisition Corp. IV S'holder Litig., Del., No. 245,2024, oral arguments 12/4/24.

At issue: The Delaware Supreme Court hears oral arguments in the appeal of Chancery Court ruling dismissing a challenge to the SPAC transaction that made electric vehicle startup Canoo Inc. into a publicly traded company. A Hennessy Capital LLC investor argues in a brief that "the trial court ignored abundant allegations of unfairness" in the deal. Hennessy Capital and its principals say in an answering brief that the investor is using "this appeal to set forth a new and different theory."

Court action: Oral arguments will be heard in Dover, Del.

Canoo SPAC Deal Sponsors Defeat Lawsuit Over Blank-Check Merger

Wednesday: Comcast Cable Comms. Mgmt. LLC v. CX360 Inc., Del. Ch., No. 2024-0991, trial 12/4/24.

At issue: Vice Chancellor Lori Will is presiding over a trial regarding claims that an Apollo Global Management Inc. affiliate plans to endanger the lives by cutting off its emergency voice system contract with Comcast Corp. over a business dispute. A Comcast unit alleges CX360 Inc. retaliated against the telecom giant for switching contractors after a 2022 outage. In an order expediting the litigation, Will also ordered the parties to continue performing their obligations under the service agreement. The "interactive voice response" system at issue "can reduce wait times, enable callers to perform tasks without a live customer service agent, and route callers to live agents," according to a pre-trial brief. Comcast wants CX360 to continue operating as normal under the service agreement's terms until its expiration Feb. 28, 2025. CX360 wants the Oct. 31 termination date it previously announced to be honored.

Court action: A three-day trial begins in Wilmington, Del.

Comcast Sues Apollo Affiliate, Says Breach Will Risk Lives (2)

Friday: Atallah v. Malone, Del. Ch., No. 2021-1116, settlement hearing 12/6/24.

At issue: Billionaire “cable cowboy” John Malone has agreed to step down from the board of Qurate Retail Inc. next year to resolve investor litigation over claims he, along with Liberty Media Corp. Chief Executive Officer Greg Maffei, drained \$52 million out of media conglomerate Qurate through a complex stock scheme. The proposed settlement also would require certain transactions involving Qurate, Malone, and Maffei to be approved by a committee of independent directors. Vice Chancellor Sam Glasscock III must approve the deal. He’ll also consider a \$3.125 million fee award application from the attorneys representing the investors who brought the litigation.

Court action: The settlement hearing will be held in Georgetown, Del.

‘Cable Cowboy’ Malone Loses Bid to End Qurate Stock Case (2)

Friday: Siseles v. Lutnick, Del. Ch., No. 2023-1152, settlement hearing 12/6/24.

At issue: Laster must give final approval to a \$12 million settlement to end litigation challenging View Inc.’s 2021 blank-check merger, which took the “smart glass” maker public by combining it with a special purpose acquisition company. The shareholder lawsuit said Cantor Fitzgerald LP, its billionaire chief Howard Lutnick, and other architects of the merger were driven by lopsided incentives to dupe the SPAC’s investors into a doomed deal that gave insiders a windfall. The settlement provides an average recovery of \$0.32 per share which “compares favorably with the per-share recoveries in similar SPAC settlements that this Court has approved,” according to a brief from the investors leading the litigation. Their attorneys seek a fee award of \$2.1 million.

Court action: A settlement hearing will be held in Wilmington, Del.

Cantor, Lutnick Pay \$12 Million to Settle View Inc. SPAC Case

(Corrects case being argued Wednesday before the Delaware Supreme Court.)

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DXC Technology Draws Investor Suit Over Statements, Governance

By Maia Spoto

- **COURT:** E.D. Va.
- **TRACK DOCKET:** [1:24-cv-02144](#)

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DXC Technology Draws Investor Suit Over Statements, Governance

By Maia Spoto 2024-11-29T17:08:39000-05:00

- **COURT:** E.D. Va.
- **TRACK DOCKET:** [1:24-cv-02144](#)

DXC Technology Co.'s board has perpetrated "systematic failures of corporate governance" and a "pattern of public misstatements" that have opened the company to significant harm, a group of shareholders alleges.

The technology services company told investors that efforts to integrate businesses it acquired and reduce the accompanying costs were succeeding. But DXC artificially reduced the costs it reported and covered up internal chaos, investors said in a Tuesday complaint filed in the US District Court for the Eastern District of Virginia.

- The complaint cites comments from the company's CEO from a May conference call, saying that DXC was "in reality 'a not fully functional organization,'" which prompted stock prices to drop.
- "DXC and its continuing public shareholders should not be left holding the bag for Defendants' multi-year fraud and staggering failures of corporate governance," said the complaint, which names former CEO Michael Salvino, CEO Raul Fernandez, and CFO Robert Del Bene among several defendants.
- DXC was hit with another investor suit in August alleging it misrepresented its ability to integrate the companies and business systems it has acquired.

Cohen Milstein Sellers & Toll PLLC and Saxena White PA represent the plaintiffs.

The case is Judges of the Probate Court Retirement Fund v. DXC Tech. Co. , E.D. Va., No. 1:24-cv-02144, 11/26/24 .

Tilray Beats Investor Suit Over Vote to Increase Share Limit

By Mike Vilensky

- Cannabis company said it could up limit with majority standard
- Majority standard lawful under Delaware statute, court says

Bloomberg Law News 2024-12-02T09:44:00657497422-05:00

Tilray Beats Investor Suit Over Vote to Increase Share Limit

By Mike Vilensky 2024-11-29T11:21:28000-05:00

- Cannabis company said it could up limit with majority standard
- Majority standard lawful under Delaware statute, court says

Tilray Brands Inc. persuaded a judge to toss an investor's lawsuit alleging the Canadian cannabis company tried to mislead them into increasing its share limit.

There's no genuine fact dispute that the company can lawfully up its shares of common stock with only a majority of votes cast—rather than a majority of shares outstanding—to approve a proposed increase, Delaware's Chancery Court said in a Nov. 27 opinion.

The stockholder class action complaint argued that a "single vote provision" of Tilray's charter requires a majority of the voting power carried by all outstanding shares. The suit says the company unlawfully told investors it could pass the increase with a majority of votes cast.

The majority of votes cast standard is lawful because statutory changes Delaware lawmakers adopted in 2023 altered the default standard for stockholder votes to allow for a majority of votes cast rule, Vice Chancellor J. Travis Laster said, granting summary judgment to Tilray.

The company's charter closely tracks the new statutory language permitting a "class vote opt out"—meaning a majority of votes cast can carry the day, Laster said.

"Because the language is functionally identical, the defendants can reasonably read the Single Vote Provision as simply a restatement of the Class Vote Opt-Out," Laster wrote.

The majority of votes cast standard is also permissible because it predates the Delaware statutory changes, which were intended to address charters like Tilray's, the judge said. Delaware lawmakers intended to "override pre-existing provisions that sought to implement" a majority of outstanding shares standard, the judge said.

Ashby & Geddes PA, Fields Kupka & Shukurov LLP, and Kaskela Law LLC represented the investor. DLA Piper LLC represented Tilray.

The case is Salama v. Simon , Del. Ch., No. 2024-1124, 11/27/24 .

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Vista Wins Novel Appeal Ruling in \$2 Billion Mindbody Deal Case

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Mike Leonard

Securities Law

- Vista wins ruling of first impression, but ex-CEO still liable
- Judge awarded \$1 per share to Mindbody ex-investors in 2023

Vista Equity Partners Management LLC prevailed in court Monday against a challenge to its \$1.9 billion take-private deal for Mindbody Inc., but the app maker's ex-CEO remains on the hook for about \$48 million.

Delaware's top court issued a novel decision for Vista, rejecting claims that the private equity giant assisted a scheme by former Mindbody CEO Richard Stollmeyer to tilt the sales process toward a transaction that offered him fast liquidity and a host of post-deal perks. At the same time, the appellate court upheld most of a 2023 ruling that hit Stollmeyer with \$1 per share in damages over the \$36.50-per-share buyout.

Justice Karen L. Valihura, writing in a 110-page opinion, acknowledged a contract provision requiring Vista to notify Mindbody if the latter's disclosures were misleading or incomplete. But a Delaware Chancery Court judge still went too far when she ruled the investment firm "knowingly participated" in Stollmeyer's breaches, Valihura said, confronting several issues of first impression.

Imposing aiding and abetting liability on an outside bidder that "passively stood by" could "collapse the arms'-length distance between the third-party buyer and the target, forcing the buyer to consider its duty to the target's stockholders instead of to its own," Valihura wrote. "Vista provided no affirmative assistance at all and took no action that actively furthered Stollmeyer's disclosure breach."

Mindbody, Vista, and Stollmeyer are represented by Quinn Emanuel Urquhart & Sullivan LLP; Richards Layton & Finger PA; and Kirkland & Ellis LLP. The Mindbody investors who led the litigation are represented by Friedlander & Gorris PA and Bernstein Litowitz Berger & Grossmann LLP.

The case is *In re Mindbody Inc. S'holder Litig.*, Del., No. 484,2023, opinion 12/2/24 .

—With assistance from Jennifer Kay.

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B. Riley-Backed Franchise Group Seeks Litigation Shield for CEO

By Randi Love

- Vitamin Shoppe brand owner wants injunction protection for CEO
- Franchise Group faces other issues with lenders, B. Riley

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B. Riley-Backed Franchise Group Seeks Litigation Shield for CEO

By Randi Love 2024-11-29T13:26:33000-05:00

- Vitamin Shoppe brand owner wants injunction protection for CEO
- Franchise Group faces other issues with lenders, B. Riley

A bankrupt B. Riley Financial Inc.-backed company is looking to enjoin a group of shareholders from pursuing claims against its chief executive officer, saying they will harm reorganization efforts.

A July suit filed by a group of stockholders in the Delaware Chancery Court against Franchise Group Inc. CEO Andrew Laurence, former CEO Brian Kahn, his investment firm, and B. Riley belongs to the company's estate, according to FRG's Wednesday filing in the US Bankruptcy Court for the District of Delaware.

Allowing the stockholders to pursue claims against Laurence essentially brings action against FRG, the complaint said. The stockholders' suit could also "deplete assets that might otherwise be available to the debtors' estates for the benefit of all," the filing said.

The stockholders' claims should be paused by the automatic litigation stay under bankruptcy law, the filing said.

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

FRG, the owner of brands including the Vitamin Shoppe, Buddy's Home Furnishings and Pet Supplies Plus, filed Chapter 11 at the beginning of November citing months of losses and issues surrounding its backer B. Riley. FRG reported nearly \$2 billion in debt in its filing.

The stockholders' suit alleges that Kahn, his investment firm Vintage Capital Management LLC and other parties involved in FRG took the company private in August 2023 at an "unfair merger price of \$30.00 per share," according to court records.

Months after FRG's debt-fueled buyout by Kahn, the founder stepped down as CEO amid a criminal investigation into his alleged role in a securities fraud case tied to the collapse of defunct hedge fund Prophecy Asset Management.

FRG's junior and senior lenders are at odds over the bankruptcy. Junior lenders oppose the Chapter 11, saying the current direction of the proceedings to hand the company to its senior lenders hurts their chances of recovering on more than \$600 million loaned to FRG.

Young Conaway Stargatt & Taylor LLP and Willkie Farr & Gallagher LLP represents Franchise Group. Bernstein Litowitz Berger & Grossmann LLP represents the stockholders.

The case is Franchise Group Inc. , Bankr. D. Del., 24-bk-12480, complaint 11/27/24 .

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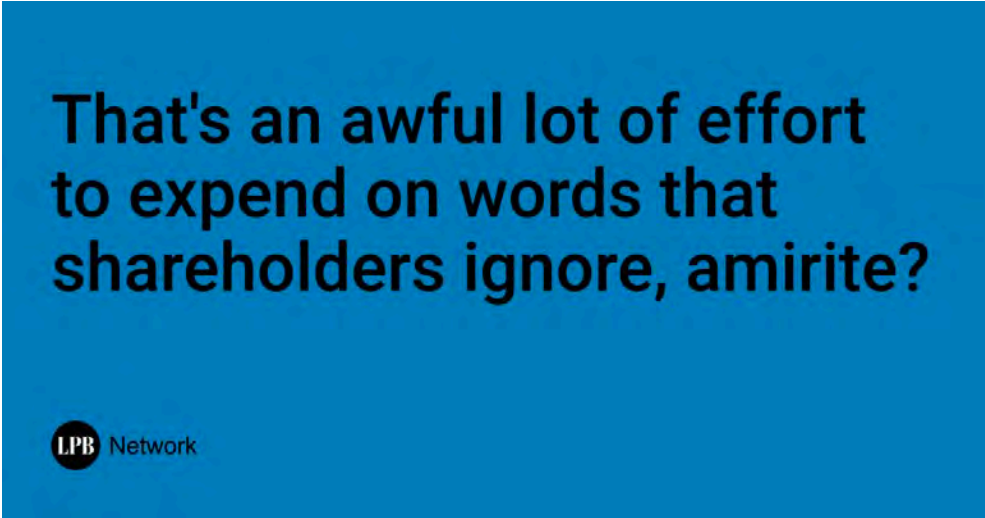
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That's an awful lot of effort to expend on words that shareholders ignore, amirite?

 [businesslawprofessors.com/2024/11/thats-an-awful-lot-of-effort-to-expend-on-words-that-shareholders-ignore-amirite](https://www.businesslawprofessors.com/2024/11/thats-an-awful-lot-of-effort-to-expend-on-words-that-shareholders-ignore-amirite)

November 29, 2024



**That's an awful lot of effort
to expend on words that
shareholders ignore, amirite?**

 Network

By Ann Lipton on November 29, 2024

I was struck by this article recently published in the WSJ on the use of AI for investor relations:

Investor relations departments at companies such as shoe brand Skechers USA and networking-systems and software provider Ciena have begun using generative artificial-intelligence to help prepare their earnings commentary.

Some have used generative AI to predict the questions analysts might ask, for example, and to ready the best answers....

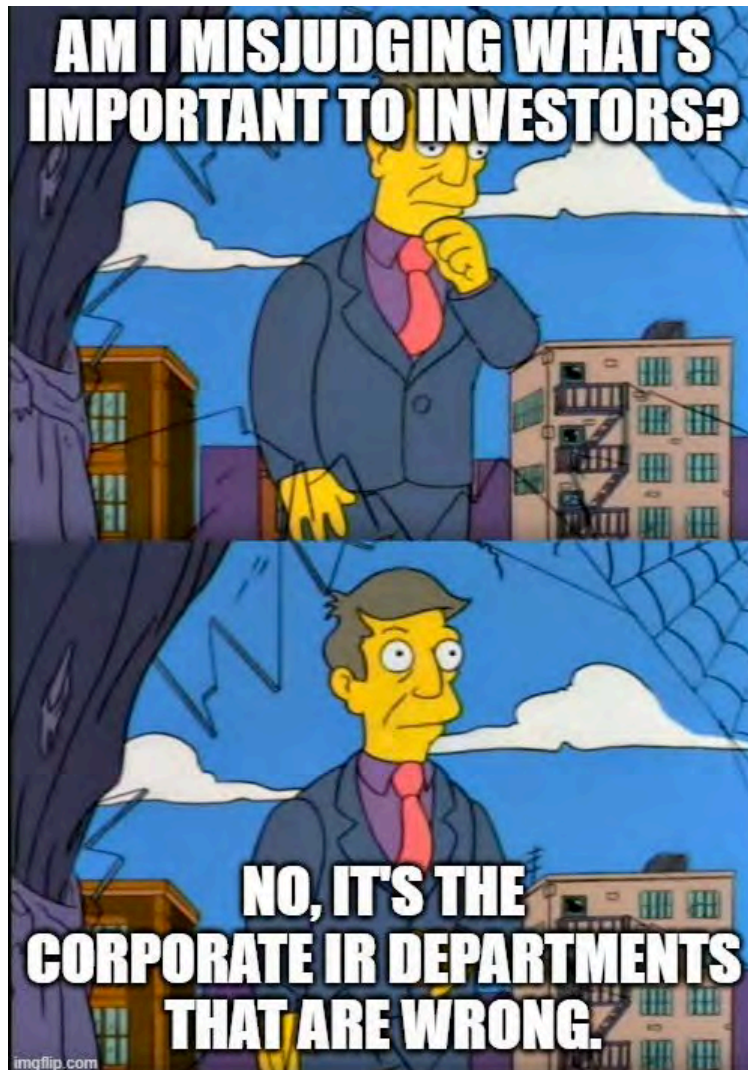
Executives at many companies are using AI to refine word choice in their prepared remarks, for instance, in deciding whether to say the quarter was “strong” or “solid,” said Dan Sandberg, head of quantitative research and solutions at S&P Global Market Intelligence. The firm’s tool recently preferred “strong,” based on the earnings metrics of other companies that used the word on their earnings calls, he said.

Generative AI can also read the harmonics in executives’ prepared statements on earnings, assessing them as upbeat, gloomy or something more measured...

As any securities litigator knows, these are exactly the kinds of nuances of communication that – when they become the subject of a securities fraud lawsuit – are routinely dismissed by courts as “puffery,” i.e., conveying no material information to investors. For example, a very quick Westlaw search yielded case after case treating the characterization of “strong”

as inactionable. See, e.g., *Ray v. StoneCo*, 2024 WL 4308130 (S.D.N.Y. Sept. 25, 2024); *Robeco Capital Growth Funds SICAV v. Peloton Interactive*, 2024 WL 4362747 (S.D.N.Y. Sept. 30, 2024); *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200 (9th Cir. 2016); *Hawes v. Argo Blockchain*, 2024 WL 4451967 (S.D.N.Y. Oct. 9, 2024).

Once again we see that securities cases are litigated in a world that is somewhat distinct from how corporations – and markets – actually function.



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Securities Law Prof Blog

 lawprofessors.typepad.com/securities/2024/11/new-securities-law-article-in-print.html

Friday, November 29, 2024

New Securities Law Article in Print

The following law review article relating to securities regulation is now available in paper format:

Sidney Edgar, Note, *Navigating the "Wild West" of Cryptocurrency: Creating a Clear Path towards Regulation*, 51 Fla. St. U. L. Rev. 229 (2023).

Litigation Leaders: Labaton's Eric Belfi on Running Case Investigation, Analysis and Evaluation In-House

 [law.com/litigationdaily/2024/12/02/litigation-leaders-labatons-eric-belfi-on-running-case-investigation-analysis-and-evaluation-in-house](https://www.law.com/litigationdaily/2024/12/02/litigation-leaders-labatons-eric-belfi-on-running-case-investigation-analysis-and-evaluation-in-house)

Ross Todd

Welcome to another edition of our Litigation Leaders series, featuring the litigation practice leaders at some of the biggest and most innovative law firms in the country.

*Meet **Eric Belfi**, a member of the executive committee at **Labaton Keller Sucharow** and the firm's head of client development. Belfi, who has been with the plaintiffs firm for almost 19 years, practiced early in his career as a prosecutor for the New York Attorney General's office and the Westchester County District Attorney's office.*

Litigation Daily: Tell us a little about yourself—perhaps even a thing or two your partners would be surprised to learn about you.

Eric Belfi: I've been with Labaton Keller Sucharow almost 19 years, and I have 23 years of experience in this practice area, following almost six years as a white-collar prosecutor.

Thanks to my wife, I've been happily married for nearly 26 years, and we have three children, all now in college or pursuing postgraduate programs—so we're officially empty nesters! Each of our kids attends a university with a powerhouse college football team, making our visits an exciting mix of family time and college game days. With SEC and Big Ten rivalries running through the family, game days can get spirited, adding even more fun and competition to our reunions.

In terms of my interests, I have a passion for meteorology. It allows me to analyze weather patterns and make informed decisions, especially considering my extensive travel schedule. In addition to cheering on my adopted college football teams, I enjoy sailing and reading. I think my partners would be surprised to know about my interest in weather—it's a unique hobby that I find both fascinating and practical!

You started your career with stints as an assistant attorney general for the State of New York and as an assistant district attorney in Westchester County. What skills did you pick up as a prosecutor that you still use today?

My time as an assistant attorney general and assistant district attorney taught me foundational skills that I rely on to this day. Working as a prosecutor was a pivotal experience in learning how to develop and structure a case.

Although in private practice we don't have the same prosecutorial powers as the government, I work closely with our in-house investigative team, whose approach mirrors that of the AG and DA investigators I collaborated with to develop my prosecutions.

Additionally, having tried multiple jury trials greatly influences how I approach case development. The experience provides a roadmap for building strong, trial-ready cases, always ensuring that even the most complex matters remain accessible and understandable to a court and, ultimately, to a jury.

You head the firm's client development group, spearhead its non-U.S. securities litigation practice and are a member of the case analysis group. How much of your time is devoted to administrative and managerial tasks and how much is spent on client-facing work?

I feel the highest and best use of my time is on client-facing work, and I prioritize keeping it central to my responsibilities. I find that connecting directly with clients, while sometimes challenging, is also the most rewarding aspect of the practice. I prioritize staying closely engaged with our clients and understanding their needs and goals.

In addition, as a senior member of the firm's executive committee, I dedicate a significant amount of my time to the leadership of the firm and advancing the strategic priorities of the EC, including advancing business initiatives and promoting a culture of performance, collaboration, and collegiality.

Balancing these roles allows me to contribute to the firm's strategic growth while maintaining direct, impactful relationships with our clients.

What is the firm's general process for evaluating a potential piece of litigation and counseling an institutional investor considering filing suit?

We have a rigorous process for evaluating potential litigation for institutional investors. Our dedicated case evaluation team conducts a thorough review of all public information, collaborating with experts to assess financial and operational aspects. The team works closely with our in-house data and investigative units to build a comprehensive case analysis. Once our findings are complete, we counsel our clients on the potential risks and benefits, ensuring they have the insights needed to make informed decisions about pursuing litigation.

How big is the firm and where are most of your litigators concentrated geographically?

Labaton is a firm of around 80 attorneys, backed by an outstanding professional staff—the best in the business. While most of our litigators and senior team members are based in our New York office, we have also established a strong and growing presence in Delaware, where we've become a formidable force in complex litigation. Our recent expansion into London further enhances our ability to serve international clients and broaden our reach. This strategic distribution of talent across key locations enables us to meet client needs effectively on both national and international levels.

What do you see as hallmarks of Labaton Keller Sucharow litigators? What makes you different, especially from your competitors in the plaintiffs' bar?

The hallmark of Labaton Keller Sucharow litigators is their integrity, combined with keen strategy, in every phase of prosecuting a claim. Our team approaches each case with a relentless drive to uncover the truth and hold wrongdoers accountable for our clients. We conduct every investigation, analysis, evaluation, and aspect of litigation entirely in-house, giving us a unique advantage over our competitors.

For example, during the investigation phase, conducted in-house, we dive into every detail to uncover key evidence. With that evidence in hand, we put forward a complaint that tells the most compelling story possible of the defendant's malfeasance, one that resonates with legal precision and emotional impact. Every piece of evidence, every witness testimony, vividly captures the truth in court. The result, often, is that a court or jury delivers a verdict for our client and accountability prevails.

In what three areas of litigation do you have the deepest bench? (I know it's hard, but please name just three.)

Our firm's strongest areas are securities class actions, corporate governance and shareholder rights litigation, and non-U.S. securities litigation. Each of these highlights the deep experience and commitment of our team to protecting investors and enforcing corporate accountability.

Securities class actions are at the heart of what we do. We've built a powerhouse team that handles many of the most significant securities cases in the U.S., securing impactful, often historic, recoveries for institutional investors. Our attorneys have an impressive track record in tackling complex financial cases and achieving results that help protect investors and market integrity.

In corporate governance and shareholder rights litigation, we bring deep expertise to corporate governance issues. With so many major companies incorporated in Delaware, it's the go-to jurisdiction for shareholder rights and fiduciary duty cases. Our team is well-equipped to take on these high-stakes cases, challenging boards and executives when corporate conduct falls short and working to ensure that shareholder interests come first.

We're deeply involved in non-U.S. securities cases. As securities laws evolve internationally this area of securities litigation continues to grow. Our team's knowledge of foreign jurisdictions and international securities regulations means we're well-positioned to represent investors affected by fraud outside the U.S. This global focus has only been strengthened with our recent expansion into the UK with our London office, enabling us to support clients worldwide.

What were two or three of the firm's biggest in-court wins in the past year, and can you cite tactics that exemplify your firm's approach?

In the past year, the firm has achieved major in-court successes that highlight our strategic approach to litigation and our dedication to our clients.

A major victory came with our Uber case, where after years of hard-fought litigation we recovered a \$200 million settlement for investors. The Uber case is a prime example of our commitment to securing meaningful recoveries for our clients, even in cases that require multi-year efforts and significant resources.

Another notable victory from the past year was against Walmart which resulted in an important financial recovery and substantive corporate governance reforms. The case was particularly significant because it addressed Walmart's role in opioid distribution—a public health crisis that destroyed lives and communities across the country. The outcome not only provided monetary relief but also forced much-needed reforms within the company. The outcome validates our strategic approach, as well as our mission to protect investors and consumers and hold wrongdoers accountable. It also exemplifies the importance of pursuing both financial recoveries and impactful reforms when our clients' interests and the public good align.

In addition, two big milestones in ongoing cases come to mind: First, in our standout case involving DocuSign our team leveraged a confidential witness to survive a critical motion to dismiss. This tactic exemplifies our commitment to meticulous case preparation and innovative strategies, as we draw on deep investigative resources. Second, our work on the Boeing case similarly underscores our rigorous and responsive approach. In this instance, we conducted an exhaustive investigation in a very short period, ultimately building a case strong enough to survive a motion to dismiss.

What are your leadership priorities for the coming year?

In the coming year, I'm prioritizing three areas: continuing to deliver unmatched client service, strengthening our presence internationally, and investing in the next generation of Labaton's talent.

Maintaining our high standards for client service is paramount. Our clients' trust is invaluable, and I'm committed to ensuring they continue to receive both exceptional support and outstanding results.

A significant focus will also be on expanding Labaton's footprint in the UK and EU. With our London office established in the summer of 2024, we have a strong base to continue our growth throughout Europe. We are becoming the go-to firm for institutional investors in these regions, building on our reputation and expertise for significant recoveries and governance reforms.

Finally, fostering the Labaton culture is key to our long-term success. That means mentoring our younger attorneys and nurturing the tenacity, collaboration, and strategic approach that define our work. By balancing a supportive environment with a relentless pursuit of excellence, we ensure our team continues to deliver the highest standards of advocacy for our clients.

Hagens Berman Accused of Withholding Share of \$13M Award in Pharmaceutical Settlement

[law.com/2024/12/02/hagens-berman-accused-of-withholding-share-of-13m-award-in-pharmaceutical-settlement-](https://www.law.com/2024/12/02/hagens-berman-accused-of-withholding-share-of-13m-award-in-pharmaceutical-settlement-/)

Mason Lawlor

Hagens Berman Sobol Shapiro was sued by a Mississippi lawyer and pharmaceutical executive for allegedly refusing to pay a contracted share of \$13 million in attorney fees arising from an antitrust litigation against a major drug manufacturer.

This suit was surfaced by Law.com Radar, ALM's source for immediate alerting on just-filed cases in federal and state courts.

The lawsuit was filed Nov. 25 in the U.S. District Court for the Southern District of Mississippi on behalf of plaintiff Walter L. Nixon, in-house counsel and chairman of the board of the Professional Drug Co., who served as lead plaintiff in an underlying matter captioned *Professional Drug Co. v. Wyeth*. Nixon retained Thomas M. Sobol, a partner at Hagens Berman, and Dan Barrett of the Barrett Law Group in Lexington, Mississippi to pursue the antitrust matter against Wyeth regarding prices for the antidepressant medication Effexor XR.

An agreement between the parties called for Nixon to receive 15% of the attorney fee award in return for serving as the lead plaintiff in the Effexor litigation.

In June, the U.S. District Court for the District of New Jersey approved a settlement against Wyeth, which awarded the plaintiff \$13 million in attorney fees and \$2 million in expenses.

According to Nixon's present complaint, while Barrett paid 15% of his share of the fees to Nixon by August, Hagens Berman has still not paid him. The suit against the law firm was filed Monday by attorneys Christopher C. Van Cleave and Taylor Fortenberry of Van Cleave Law in Biloxi, Mississippi. The case is captioned *Nixon v. Hagens Berman Sobol Shapiro* and was filed by Christopher Van Cleave and Taylor Fortenberry of Van Cleave Law in Biloxi, Mississippi.

Nixon filed claims under bad faith, breach of contract and breach of the duty of good faith and fair dealing. He is seeking damages for the unpaid 15% of fees, pre-judgment interest from the date attorney fees were received, compensation for emotional distress, and attorney fees and incidental costs "for having to pursue litigation to enforce his rights under the Effexor contract."

"While Barrett dutifully fulfilled its obligation to pay 15% of the fees allocated to its firm under the Effexor contract, Hagens Berman breached its contractual duties, unreasonably delayed payment of fees and expenses due thereunder, and has simply refused to pay Nixon 15% of

attorney's fees allocated to Hagens Berman without any legitimate or arguable reason," the complaint said.

Neither Van Cleave nor Fortenberry could be immediately reached for comment.

Counsel has not yet appeared for Hagens Berman, and a message seeking comment from the firm went immediately unanswered.

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New Suit - Copyright

Abraham Hunter was hit with a copyright infringement lawsuit on Dec. 2 in Illinois Northern District Court. The lawsuit, filed by attorney Keith Vogt, takes aim at online retailers over the alleged sale of counterfeit versions of the plaintiff's puzzles and artwork. Counsel have not yet appeared for the defendant. The case is 1:24-cv-12355, Abraham Hunter v. The Partnerships and Unincorporated Associations Identified on Schedule A .

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New Suit - Declaratory Judgment

GoPlus Corp. was slapped with a copyright lawsuit on Dec. 2 in California Central District Court. The court action, brought by Alioth Law LLP on behalf of Ningbo Yituo Enterprise Management Co. and Ningbo Yiwei Muyinyongping Youxiangongsi, seeks a declaration that the defendant's copyright registration for a washing machine design is invalid. Counsel have not yet appeared for the defendant. The case is 5:24-cv-02548, Ningbo Yituo Enterprise Management Co., Ltd. v. Goplus Corp.

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Arguing Class Actions: CAFA's Local Controversy Exception

[law.com/nationallawjournal/2024/12/02/arguing-class-actions-cafas-local-controversy-exception](https://www.law.com/nationallawjournal/2024/12/02/arguing-class-actions-cafas-local-controversy-exception)

Adam J. Levitt



Adam J. Levitt, founding partner of DiCello Levitt. Courtesy photo

Commentary

Arguing Class Actions is a monthly column for the National Law Journal.

December 02, 2024 at 07:00 AM

🕒 7 minute read

Congress enacted the Class Action Fairness Act to confer federal jurisdiction over large, complex class action cases spanning across states. The law provides for removal of a class action to federal court, even without complete diversity, when the amount in controversy exceeds \$5 million and any plaintiff is a citizen of a different state than any defendant. 28 U.S.C. § 1332(d)(2). Certain lawmakers heralded that the law would “take [certain] cases out of State courts, where there has been a record of prejudice to defendants, and take them to the [f]ederal courts where, in the historical tradition of diversity litigation . . . there is a better opportunity for an objective determination.” 151 Cong. Rec. S999-02, S1000, 2005 WL 283380 (daily ed. Feb. 7, 2005) (statement of Sen. Specter).

Other lawmakers, however, voiced concerns that CAFA's expanded federal jurisdiction provisions would result in, for example, all environmental and mass tort cases ending up in federal court. Partially as a result of these concerns, Congress added the “local controversy exception” to CAFA, which allows class actions closely tied to one state to remain in state court. 28 U.S.C. § 1332(d)(4). In fact, the Committee on the Judiciary to which CAFA was referred used “a class action in which local residents seek compensation for property damage resulting from a chemical leak at a manufacturing plant in that community” as the primary demonstrative example to explain the local controversy exception. S. Rep. No. 14, 109th Cong., 1st Sess. 2005, 2005 WL 627977, 2005 U.S.C.C.A.N. 3, 28 (Leg. Hist.). “The purpose of [the local controversy] exception was to allow cases involving environmental torts such as a chemical spill to remain in state court if both the event and the injuries were truly local.”

The exception allows cases like these to remain in state court while streamlining class action procedures in other areas, ensuring the consistency the act was drafted to protect. The exception appears to best comport with CAFA's original purpose and intent: "[C]lass actions with a truly local focus should not be moved to federal court under this legislation because state courts have a strong interest in adjudicating such disputes." Sen. Rpt. 109-14 (Feb. 5, 2005), 2005 U.S.C.C.A.N. 3, 38.

The local controversy exception applies if four requirements are met. First, "greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed." Second, "at least [one] defendant" is "a citizen of the State in which the action was originally filed," and class members seek "significant relief" from that defendant, whose conduct forms a "significant basis" for the class members' claims. Although the conduct of this local defendant must be a basis for the class members' claims, the presence of other out-of-state defendants in the action does not defeat the application of the exception. See Sen. Rpt. 109-14 (Feb. 5, 2005), 2005 U.S.C.C.A.N. 3, 44. Third, the "principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed." Fourth, "during the 3-year period preceding the filing of [the] class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons." A prior class action that was filed in either state or federal court defeats the application of the local controversy exception. See, e.g., *McAteer v. DCH Regional Medical Center*, No. 2:17-cv-00859-MHH, 2018 WL 1089873, at *5-6 (N.D. Ala. Feb. 26, 2018).

These four requirements all supposedly work in tandem to protect "States' interests in adjudicating local disputes on behalf of their citizens." 151 Cong. Rec. S999-02, S1006, 2005 WL 283380 (daily ed. Feb. 7, 2005) (statement of Sen. Hatch). However, one peculiar result of the exception's requirements has been illuminated in recent years. Often, when a significant environmental disaster occurs, several class action lawsuits are filed in its wake. This undermines the value of the fourth of the local controversy exception requirements, which allows for removal if a similar class action has been filed within the last three years. Consequently, for environmental disasters affecting thousands of people, but contained within one state's borders, some courts have determined that only the first class action filed meets the exception's requirements and all subsequent class action cases are subject to removal. This result can conflict with the local controversy exception's focus and intent—whether there is a "significant connection to a local issue or event or [whether] a significant number of plaintiffs are from a single State," not on whether a given plaintiff filed suit first. 151 Cong.

Rec. S1225-02, S1226, 2005 WL 320889 (daily ed. Feb. 10, 2005) (statement of Sen. Vitter).

An example of this quirk occurred recently in the Northern District of Illinois. In *Mackey v. Chemtool Inc.*, three class actions were filed in state court following a massive fire at a chemical plant in Rockton, Illinois, which spewed toxic gases, dust, and smoke into the air and caused debris to litter nearby properties. The defendants removed the second- and third-filed class actions to federal court under CAFA. The court denied motions to remand because plaintiffs filed the second- and third-filed class actions one and 10 days, respectively, after the first class action was filed. 2022 WL 3290687 (N.D. Ill. Aug. 11, 2022). The fire and the class were located within Illinois and the first three elements of the local controversy exception were met. The court, however, found the local controversy exception to be “unambiguous,” and only the first-filed of the substantially similar class actions could remain in state court.

At least one other court has interpreted the term “other class action” in light of the legislative intent of the exception. *Logan v. CLUB Metro USA LLC*, 2015 WL 7253935, at *2 (D.N.J. Nov. 17, 2015). There, a class action had been previously filed in the same New Jersey state court from which *Logan* was removed, asserting the same claims against one of the same defendants sued in *Logan*. The court held that treating the previously-filed case as an “other class action” under the local controversy exception “would frustrate the statute’s purpose,” as the no-other-class-action requirement was intended to prevent “copycat...suits in multiple forums.” The court reasoned that allowing “two separate suits, alleging similar factual and statutory violations, in two separate forums” would be “plainly against Congress’s desire.”

Determining the appropriate jurisdiction in which to bring any case is an important decision that often needs to be made quickly after an environmental catastrophe. The unsettled interpretation of the fourth prong of the local controversy exception is one which legislators may not have foreseen.

Understanding the scope and limits of the local controversy exception is an important consideration that should be evaluated at the outset of any environmental class action.

Adam J. Levitt is a founding partner of *DiCello Levitt*, where he heads the firm’s class action and public client practice groups. He can be reached at alevitt@dicellolevitt.com.

Thank you to DiCello Levitt partner Daniel Rock Flynn, senior counsel Anna Claire Skinner and associates Elizabeth Carpenter and James Crisafulli for contributing to this column.

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'That Decision was Wrong:' Federal Judge Rethinks Consumer Protection Class Certification

[law.com/2024/12/02/that-decision-was-wrong-federal-judge-rethinks-consumer-protection-class-certification-](https://www.law.com/2024/12/02/that-decision-was-wrong-federal-judge-rethinks-consumer-protection-class-certification-/)

Allison Dunn



Judge William Glover Young, U.S. District Court for the District of Massachusetts. Courtesy photo

News

"Applying Chapter 93A broadly to a nationwide class would undermine these principles and impair the regulatory authority of states outside Massachusetts," U.S. District Judge William Young said, altering his decision to grant class certification in a consumer protection case against Saba University School of Medicine.

December 02, 2024 at 11:35 AM

By Allison Dunn



Rethinking class certification approval from the bench, a federal judge in Massachusetts issued a decision Tuesday indicating he had changed his mind in a false advertising case.

While writing the certification decision in the case captioned *Ortiz v. Saba University School of Medicine*, U.S. District Judge William G. Young of the District of Massachusetts said he "realized that decision was wrong." Young maintained that Natalia Ortiz, the plaintiff in the case, successfully established the four requirements for class certification under Federal Rules of Civil Procedure 23(a), but concluded that she did not specifically identify the states where other class members lived in order to apply Massachusetts consumer protection laws across the board.

Applying Massachusetts law across all states in the present case could impose "inconsistent liability standards across jurisdictions," Young said.

"Because the laws of multiple jurisdictions apply to this putative worldwide class of consumers, the differences in state and national laws predominate over common issues, leaving the predominance requirement of 23(b)(3) unsatisfied," Young wrote. "As a result, certification of the nationwide class is precluded, and the class must be decertified."

In August 2023, a trio of attorneys with Berman Tabacco, Maynard Nexsen, and the National Student Legal Defense Network, filed a complaint on behalf of Ortiz, a former student who enrolled at the for-profit Saba University School of Medicine, which is located in the Dutch Caribbean and headquartered in Massachusetts. Ortiz sought a refund based on consumer protection claims that Saba advertised inflated first-time passage rates for the multi-step U.S. Medical Licensing Examination. Saba marketed its success with statements like "virtually every student passes the USMLE Step 1 on their first attempt," "99% USMLE Step 1 first time pass rate," among others.

However, Ortiz claimed Saba failed to mention that only half of its students even sit in for the examination "because they either drop out of the program," or they don't make it past an internal Saba-administered pretest.

If a student fails to get a certain score on the pretest after four attempts, they are automatically dismissed, according to the complaint. Ortiz alleged these misrepresentations were in violation of Massachusetts General Laws chapter 93A and claimed she would not have taken out student loans for a Saba education if she knew only half of its student sat for the USMLE Step 1.

In June, Ortiz moved for class certification for other students—potentially from across the world—who also relied on Saba's "misleading marketing scheme."

In opposition, Saba's attorneys with Locke Lord pointed to material differences in state consumer protection laws. In Massachusetts, the law only requires "a showing that the alleged misrepresentation 'caused' an identifiable 'harm,' and which permits claims based on omissions." However, laws in Arizona, Pennsylvania, Texas, Virginia and Wisconsin require a "showing of reliance on representations, and one state which only permits suit to be brought for affirmative representations," according to the court's order.

Finding "at least one potentially relevant difference among the state laws," Young applied the choice-of-law rules of Massachusetts, guided by the Restatement (Second) of Conflict of Laws to determine which state has the most significant relationship to a nationwide consumer fraud claim. While Ortiz alleged Saba's misrepresentations were created and disseminated from Massachusetts, Young said Ortiz did not specifically identify where other potential plaintiffs lived.

"As explained in the commentary to Restatement § 148, while the place where the defendant made the representation is 'approximately as important' as the place where the plaintiff received the representations, the place where the plaintiff relied on a defendant's alleged misrepresentation is 'more important,'" Young wrote.

While courts in the district have allowed nationwide class certification under Chapter 93A, cases like *Bezdeck v. Vibram* in 2015, those instances involved settlement classes. Young said the district court has declined to extend Chapter 93A to multi-state cases, including in the court's 2013 ruling in *Feingold v. John Hancock Life Insurance Co.*

"Ultimately, Massachusetts choice-of-law principles consistently favor applying the consumer's home state laws to consumer fraud claims. Applying Chapter 93A broadly to a nationwide class would undermine these principles and impair the regulatory authority of states outside Massachusetts," Young said. "Accordingly, in conducting a comprehensive, functional choice-of-law analysis, the court holds that the plaintiff has failed to meet her burden of demonstrating that Massachusetts law applies to the plaintiffs' claims."

Saba had appealed Young's initial class certification ruling to the U.S. Court of Appeals for the First Circuit, but the appellate court had yet to accept jurisdiction, according to the district court's order.

Patrick Egan of Berman Tabacco in Boston, Margaret Siller of Maynard Nexsen in Nashville and Alexander Elson of the Washington, D.C.-based National Student Legal Defense Network represented the plaintiff. Egan declined to comment.

Locke Lord's Daryl Lapp, Dale Evans Jr., among others, represented Saba. Counsel did not immediately return a message seeking comment.

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Trending

New Suit - Copyright

Abraham Hunter was hit with a copyright infringement lawsuit on Dec. 2 in Illinois Northern District Court. The lawsuit, filed by attorney Keith Vogt, takes aim at online retailers over the alleged sale of counterfeit versions of the plaintiff's puzzles and

Due process in action: plaintiffs' leadership roles in JCCPs

[dailyjournal.com/articles/382209](https://www.dailyjournal.com/articles/382209)

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The last decade has been a busy one for courts. As limited budgets and growing dockets have put pressure on judges, mass tort and other complex litigation filings have taken off. These types of cases often have thousands (sometimes tens of thousands) of claimants with alleged damages in the many billions of dollars. They also span a range of industries and subject matter--from wildfire lawsuits to claims against social media companies.

To meet these unique demands, courts have increasingly used coordinated proceedings or "JCCPs" (more formally, "Judicial Counsel Coordinated Proceedings"). Under Code of Civil Procedure section 404, the Chairperson of the Judicial Council may "coordinate separate complex civil actions pending in different counties involving common issues of fact or law into a coordination proceeding for pretrial and trial before a single assigned judge."

Prescription Opioid Cases, 57 Cal. App. 1039, 1047 n.4 (2020) (citing Cal. Code Civ. Proc. § 404). JCCPs have been used in mass tort and product liability litigation when common issues--such as company and expert discovery, or general causation--span across the filed cases.

A coordinating judge "must assume an active role in managing all steps of the pretrial, discovery, and trial proceedings to expedite the just determination of the coordinated actions without delay." Cal. R. Ct. 3.541(b). To discharge this mandate, and given the breadth of these cases, judges rely heavily on the parties working cooperatively together. At the outset of most JCCPs, judges enter a series of case management orders to govern the proceedings. These orders are often negotiated by the parties, with input from the court, before being submitted as proposed orders. Chief among them is almost always a proposal to create a "Plaintiffs' Steering Committee," or a similar group of designated plaintiffs' counsel to serve as "lead" or "liaison" counsel for all plaintiffs with claims in the JCCP. Unlike many of the other initial orders, the defense side generally has limited input and visibility into how plaintiffs' leadership is selected.

The plaintiffs' lawyers appointed to leadership roles must "act fairly, efficiently, and economically in the interests of all parties and their counsel," including consulting with others on the same side "about decisions significantly affecting their clients" and facilitating information sharing. Judicial Council Deskbook on Complex Civil Litigation Management (2020) (the "Deskbook") § 2.11; see *also* Cal. R. Ct. 3.501(12)(B). In exchange for taking on

these obligations, the designated plaintiffs' lawyers often have the most direct dealings with defense counsel and the court and usually seek reimbursement from any recovery for the time they spend on issues for the "common benefit" of plaintiffs in the JCCP.

Given a plaintiffs' steering committee's broad powers, and its importance to a litigation overall, it is somewhat surprising that there are relatively few published cases addressing a trial court's duty to resolve conflicts between plaintiffs' leadership and other parties on the same side. When issues do arise, they can be significant, with the potential to impact negotiations between the parties on key issues and directly implicate the court's oversight role.

In wildfire litigation, for example, there are almost always different constituent plaintiff groups--from insurance companies to individual claimants, for example--that may have divergent views on what cases should be advanced first, what discovery should be prioritized, and other issues. There is little appellate guidance on how courts should balance these considerations. The Judicial Council has sought to fill that void in its Deskbook on Complex Civil Litigation Management, which notes in section 5.65 that, "[w]here diverse interests exist among the parties, the court may designate a committee of counsel representing diverse interests." And indeed, there are a number of specialized committees in most wildfire litigation depending on the plaintiff group being represented. But while this is excellent guidance, it is often easier said than done--as truly balancing "diverse interests" assumes that all plaintiff groups are similarly situated in terms of negotiating power and further assumes that courts have the time and ability to actively assess these issues at the outset of a case.

The complex nature of the cases themselves, and the financial resources often needed to litigate them, can also complicate matters. As the Deskbook (section 5.65) observes, "[w]hile it may be tempting to allow counsel to organize themselves, or to award leadership spots based on prior experience, some have criticized the clubby nature of a system that awards these important and potentially lucrative assignments to a few repeat players[.]" Commentators and some courts have recently argued for the value of adding "newcomers" to the plaintiffs' leadership lineup in mass actions to avoid a small group of counsel exercising too much control over a litigation where it would be undue. See *generally* Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67 (2017).

Keeping an eye on these issues is important not just for judges actively monitoring coordinated actions but for defense counsel as well. If there are segments of a plaintiff group that may "defect" from leadership at some point in time, it could unfairly subject a defendant to additional discovery beyond the protocols previously negotiated with members of a plaintiffs' steering committee. Likewise, as a matter of practice, the lead lawyers for the defense typically rely on a small number of lawyers in plaintiffs' leadership to negotiate and finalize key stipulations on issues of tremendous consequence to a JCCP overall.

Practitioners should be mindful of whether the issues being negotiated implicate plaintiff constituencies without a proverbial "seat at the table," and the extent to which that might cause additional issues later should a particular stipulation be challenged.

If the use of coordinated proceedings continues to increase as many forecast, these issues are increasingly likely to bubble to the fore. Until then, it is up to the parties and trial judges to balance these concerns with the pressing demands of advancing JCCPs forward in a reasonable manner.

Jay Bhimani *is a partner, and Allie Ozurovich is an associate at Dechert LLP.*

#382209

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TikTok Appeals Order Greenlighting Child Addiction, School Suits

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Isaiah Poritz

TikTok Inc. offices in Culver City, California, on March 20, 2024.

Photographer: Bing Guan/Bloomberg

TikTok Inc. and parent company ByteDance Ltd. filed notice Friday saying they will appeal a pair of court rulings advancing hundreds of lawsuits from parents and school districts alleging the social media app causes addiction among children.

The notice asks the San Francisco-based US Court of Appeals for the Ninth Circuit to review the trial court orders which denied TikTok's motion to dismiss based on Section 230 of the Communications Decency Act, a decades-old federal law that immunizes online platforms from lawsuits based on user-created content.

- The notice of appeal comes weeks after Meta Platforms Inc. filed similar appeals, but also requested the Ninth Circuit review and order allowing dozens of state attorneys general to advance their child safety suit
- TikTok is a defendant in a consolidated multidistrict litigation overseen by Judge Yvonne Gonzalez Rogers of the US District Court for the Northern District of California, who mostly allowed the parents and school districts to advance their suits against the social media companies, which also include Snap Inc. and Google LLC's YouTube
- Section 230, a controversial law passed by congress in 1996, bars some but not all of the child addiction and mental illness claims, Rogers ruled in the pair of October opinions

King & Spalding LLP represents TikTok.

The case is In Re: Social Media Adolescent Addiction/Pers. Inj. Products Liab. Litigation , N.D. Cal., No. 4:22-md-03047, 11/29/24 .

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Bloomberg Law News 2024-12-02T10:54:25708652108-05:00

British Columbia Can Mount Opioid Class Action, Top Court Says

By Thomas Seal2024-11-29T12:55:26781-05:00

- Province was challenged on constitutionality of legal claim
- Supreme Court of Canada dismisses pharma company appeal

The province of British Columbia can bring a class action lawsuit against pharmaceutical companies for opioid harms on behalf of multiple governments across Canada, the country's Supreme Court ruled on Friday.

In 2018, BC sued more than 40 drug manufacturers, wholesalers and distributors, alleging they fueled the harms of the opioid epidemic by deceptively underplaying the drugs' dangers in their marketing.

BC was challenged by some companies when it tried to bring a class action on behalf of other Canadian federal, provincial and territorial governments and agencies that pay for care and treatment related to the opioid crisis.

The appeal by Sanis Health Inc., Shoppers Drug Mart Inc., Sandoz Canada Inc. and McKesson Canada Corp. was [dismissed](#) Friday by the Supreme Court of Canada, deeming BC's ability to bring a class action constitutional.

The original BC civil claim was brought against companies including Apotex Inc., Bristol-Myers Squibb Co, Johnson & Johnson, Purdue Pharma LP, Teva Pharmaceutical Industries Ltd. and Loblaw Cos. Ltd. A claim against Purdue was [settled](#) for C\$150 million (\$107 million) in 2022.

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Live Nation Antitrust Case Shows Peril of ‘Batched’ Arbitration

By Katie Arcieri 2024-11-29T05:00:01000-05:00

- Court finds defects in Live Nation’s batched proceedings
- Class action against Live Nation to proceed in open court

A Ninth Circuit ruling that denied Live Nation Entertainment Inc.’s bid to compel “batched” arbitration underscores the risks that corporate defendants face when pushing to resolve consumer antitrust disputes outside of court.

Live Nation’s requirement that aggregated or batched claims go through its arbitration panel—New Era ADR Inc.—was unfair to consumers who alleged the company inflated ticket prices, the US Court of Appeals for the Ninth Circuit [ruled](#) Oct. 28. New Era’s opaque rules overtly favored the concert promoter and ticketing company while failing to provide plaintiffs with advantages and protections of a class action proceeding, the court said.

Antitrust experts say defendant companies should reexamine their arbitration agreements in light of the Ninth Circuit ruling, especially if they limit plaintiffs’ ability to have a full and fair hearing on their individual circumstances. Live Nation now faces the prospect of significant damages from consumer plaintiffs who can pursue their class action in open court.

“It is going to have implications for any company that’s thinking about using batching provisions,” said Richard Frankel, law professor at Drexel University who studies arbitration proceedings. “The lawyer in me would say, ‘You’ve got to look at this opinion very carefully and make sure that if you are going to use batching, it doesn’t run into the same problems as this batch provision.’”

New Era’s mass arbitration procedure sought to group together nearly identical cases with common issues or facts and apply precedent from bellwether decisions to other claimants’ cases, which the Ninth Circuit singled out as particularly problematic.

Live Nation has since requested an en banc [review](#) of the panel’s ruling, which affirmed a lower court [decision](#) calling New Era’s arbitration rules “unconscionable.”

Live Nation and Ticketmaster, which merged in 2010, didn't respond to a request for comment.

Rise of Mass Arbitration

The ruling raises questions about how companies with forced arbitration clauses and class action waivers should respond to mass arbitration claims.

Until recently, it was advantageous for defendants to pursue arbitration individually as a more efficient and private way of resolving claims, said William Reiss, a partner with Robins Kaplan LLP whose practice focuses on antitrust litigation. Supreme Court rulings have also been favorable to corporate defendants, holding that they can compel arbitration to circumvent class actions.

In recent years, plaintiffs' attorneys have battered defendants with thousands of arbitration claims on behalf of individual clients, which the defense bar says is extremely costly to manage and [pressures](#) their clients to settle.

"A defendant has to pay a certain amount in filing fees for every arbitration that is filed against it," Reiss said. "You just multiply however many arbitrations a plaintiffs' lawyer brings by the fee, and it becomes prohibitively expensive."

Batching Procedures

Some corporate defendants like Live Nation responded to the mass filings by using batching, in which cases are grouped and adjudicated sequentially. Decisions in those bellwether cases are precedential on common issues in the batched cases, as well as in cases that plaintiffs file later on.

But the batching technique has raised issues of adequate due process, said Maria Glover, civil procedure and civil justice professor at Georgetown Law.

"Defendants drafted contracts and fought in the Supreme Court to get arbitration defined as bilateral, and now they want to retract that generally and in individual cases," Glover said. "Courts have to look at any sort of potentially binding result with a little bit of suspicion."

The Ninth Circuit took issue with New Era’s batching procedure, along with its lack of adequate right to discovery and other procedural limitations.

“A batched plaintiff whose case is not a bellwether case has no notice of the bellwether cases and no opportunity to be heard in those cases,” the Ninth Circuit said. “Further, that plaintiff has no guarantee of adequate representation in those cases and has no right to opt out of the batched cases that will be bound by the results in the bellwether cases.”

The opinion also blasted Live Nation’s agreements as “dense, convoluted and internally contradictory” to the point of being “borderline unintelligible.” The majority opinion was by Judge William A. Fletcher, with a concurrence by Judge Lawrence VanDyke.

Corporate defendants now face a dilemma: They can choose the bilateral arbitration route to try to minimize class action exposure, or mimic Live Nation’s specific batch method but risk that a court finds the terms unfair, Reiss said. Although the Ninth Circuit deemed New Era’s arbitration rules unenforceable under California law, the court’s reasoning highlights potential obstacles for other defendants.

“It’s really a cost-benefit analysis for some of these corporate defendants,” Reiss said.

Abandoning Arbitration?

Companies may decide to end the practice of forcing disputes into arbitration, as Amazon.com Inc. did in 2021. More recently, video game company Valve Corp. dropped its mandatory clause in September from its Steam subscriber agreement, said Paul Bland, co-chair of the appeals and complex briefing department at Berger Montague.

“There may be some cases where companies are so worried that plaintiffs will be able to make the mass arbitration approach work that they will abandon it,” Bland said. “Their intention is just to litigate these cases in court.”

Live Nation and Ticketmaster are represented by Latham & Watkins LLP. The plaintiffs are represented by Keller Postman LLC and Quinn Emanuel Urquhart & Sullivan LLP.

The case is [Heckman v. Live Nation Ent.](#) , 9th Cir., No. 23-55770, 10/28/24 .

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Pennsylvania pharmacies seek to centralize GoodRx antitrust claims in Rhode Island

[reuters.com/legal/government/pennsylvania-pharmacies-seek-centralize-goodrx-antitrust-claims-rhode-island-2024-11-27](https://www.reuters.com/legal/government/pennsylvania-pharmacies-seek-centralize-goodrx-antitrust-claims-rhode-island-2024-11-27)

Brendan Pierson

A general view shows CVS Digital Experience Center at CVS headquarters of CVS Health Corp in Woonsocket, Rhode Island, U.S., October 30, 2023. REUTERS/Faith Ninivaggi
Purchase Licensing Rights [↗](#), opens new tab

Nov 27 (Reuters) - Two independent pharmacies are seeking to centralize in Rhode Island federal court at least four proposed class action lawsuits accusing drug coupon aggregator GoodRx and pharmacy benefit managers, including CVS Caremark (CVS.N) [↗](#), opens new tab and Cigna's (CI.N) [↗](#), opens new tab Express Scripts, of attempting to push small pharmacies out of the market by depriving them of payments for generic drugs.

In a motion [↗](#), opens new tab filed on Tuesday before the U.S. Judicial Panel on Multidistrict Litigation, Pennsylvania-based Old Baltimore Pike Apothecary and Smith's Pharmacy said that the court in Providence was a convenient venue because CVS Caremark is headquartered there, and because it has a relatively light docket and is easily reachable by plane and train.

In a lawsuit filed in the Rhode Island court, the two pharmacies accused GoodRx, CVS Caremark, Express Scripts and privately held PBMs Navitus and MedImpact of working together to suppress reimbursements to small pharmacies for generic prescription drugs. Three other similar lawsuits have been filed in federal court in Los Angeles, California, near GoodRx's Santa Monica headquarters. If the judicial panel grants Tuesday's motion, those cases would be transferred to a newly created multidistrict litigation in Rhode Island for pretrial proceedings.

The lawyers seeking the MDL also filed a new class action in the Rhode Island court on Tuesday on behalf of Hunnington Pharmacy in Alabama. That case is not included in the motion to centralize the cases.

"CVS Caremark generally reimburses independent pharmacies at higher levels than chain drugstores, including CVS pharmacies," CVS Caremark spokesperson Mike DeAngelis said in an email. "These lawsuits are entirely without merit, and we will vigorously defend against them."

Navitus declined to comment, as did a lawyer for one of the California plaintiffs. Other defendants and the other California plaintiffs' lawyers did not immediately respond to requests for comment.

PBMs negotiate prescription drug prices between insurers, pharmacies and drugmakers, and directly reimburse pharmacies for prescription drugs under the terms of the plans they have negotiated. They also offer discount cards that patients can use at their pharmacy networks, which were historically often used by people without insurance to pay for drugs out of pocket.

Until recently, according to the lawsuits, patients could choose to use a discount card instead of their insurance plan if it offered a lower price, but the payment would not be counted toward their deductible. GoodRx is a service that patients can use to check what discounts are available for a drug at a particular pharmacy.

The plaintiffs allege that, starting last year, the PBMs and GoodRx entered into agreements in which the PBMs would use GoodRx's software to compare all available discounts for all patients' generic drug prescriptions, and route each purchase through the PBM with the lowest price — even if it was different than the patient's PBM.

The pharmacy pays a fee, which under the new agreement is split between the patient's PBM and the PBM that handles the purchase. The PBMs do not reimburse pharmacies for these transactions, meaning the patients' cash payment represents the pharmacies' only revenue, and PBMs' profits increase, the lawsuits say.

Large pharmacies, including those directly affiliated with PBMs, such as CVS, can weather the lower reimbursements, but independent pharmacies cannot, the lawsuits say. They allege that the scheme aims to drive smaller pharmacies, which compete with larger PBM affiliates, out of the market, violating federal antitrust law.

The plaintiffs are seeking unspecified damages and court orders stopping the allegedly anticompetitive conduct.

The California plaintiffs are Minnesota-based Keaveny Drug, Michigan-based Community Care Pharmacy and Florida-based Ethos Wellness Pharmacy.

PBMs' business practices have drawn increasing scrutiny in recent years, including by the U.S. Federal Trade Commission accusing the three largest PBMs of driving up the cost of insulin drugs.

The case is *In re: GoodRx and Pharmacy Benefit Manager Antitrust Litigation*, U.S. Judicial Panel on Multidistrict Litigation, No. 74.

For Rhode Island plaintiffs: Gregory Asciolla of DiCello Levitt, Stephen Prignano of McIntyre Tate and Joshua Grabar of Grabar Law Office and others

For Keaveny Drug: Heidi Siltan of Lockridge Grindal Nauen, Bobby Pouya of Pearson Warshaw and others

For Community Care Pharmacy: Halley Josephs of Susman Godfrey; Natasha Fernandez-Silber of Edelson and others

For Ethos Wellness: Mark Richards of the Clarkson Law Firm, Jason Sultzer of Sultzer & Lipari and others

For GoodRx: David Lender of Weil, Gotshal & Manges and others

For CVS Caremark: Robert Atkins of Paul, Weiss, Rifkind, Wharton & Garrison and others

For MedImpact: Michelle Lowery of McDermott Will & Emery and others

For Navitus: Michael Jusczyk of Greenberg Traurig and others

For Express Scripts: Not available

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Brendan Pierson
Thomson Reuters

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Depo-Provera MDL Could Be Headed to California

[law.com/therecorder/2024/11/27/depo-provera-mdl-could-be-headed-to-california](https://www.law.com/therecorder/2024/11/27/depo-provera-mdl-could-be-headed-to-california)

Amanda Bronstad

What You Need to Know

- The motion cites 22 cases, most in California, filed against brand manufacturer Pfizer Inc. and authorized generic providers.
- The motion says most of the plaintiffs will be in Massachusetts or California, where innovator liability laws allow the women to sue Pfizer even if they took the unauthorized generic drug.
- Depo-Provera, approved by the FDA in 1992, is an injectable contraceptive that studies have linked to a brain tumor called intracranial meningioma.

More than 20 lawsuits have been filed over injectable contraceptive Depo-Provera, and the lawyer who filed the first suit wants the cases coordinated in California.

In a Tuesday motion, plaintiffs lawyer Ellen Relkin asked the U.S. Judicial Panel on Multidistrict Litigation to send the lawsuits to U.S. District Judges William Orrick III or Jon Tigar in the Northern District of California. Relkin said most of the plaintiffs will be in Massachusetts or California, where innovator liability laws allow the women to sue brand manufacturer Pfizer Inc. even if they took the unauthorized generic drug. But there are also authorized generic providers in the case.

“We believe there shouldn’t be any preemption problem from the U.S. Supreme Court’s *Mensing* decision,” Relkin, of New York’s Weitz & Luxenberg, told Law.com, referring to the 2011 decision in *Pliva v. Mensing*. “The authorized generic should not get *Mensing* preemption protection.”

She filed the first case in California’s Northern District on Oct. 1.

Her motion cites 22 cases filed against Pfizer and authorized generic providers. Of those, 18 are in California, six of which are in the Northern District of California. The other cases are pending in federal districts in Indiana, Massachusetts, Missouri and Nevada. The motion notes that the majority of the anticipated plaintiffs would be in California.

'That's Part of the Strategy'

Depo-Provera, approved by the U.S. Food and Drug Administration in 1992, is a contraceptive that stops a woman’s menstrual cycle for three months. But recent studies, particularly a March report in the British Medical Journal, found that the drug had a 550%

higher risk of developing a brain tumor called intracranial meningioma. The tumors, while benign, cause dizziness and headaches and require surgery to remove them.

Plaintiffs lawyers plan to file thousands of similar cases given that Depo-Provera has been used by nearly 2 million American women. In addition to Weitz & Luxenberg, plaintiffs firms that have filed cases so far include Anapol Weiss; Wagstaff & Cartmell; Nigh Goldenberg Raso & Vaughn; Eglet Adams Eglet Ham Henroid; The Lanier Law Firm; and Levin Papantonio Proctor Buchanan O'Brien Barr Mougey.

Ben Martin, of Dallas-based Ben Martin Law Group, said he has hundreds of potential Depo-Provera cases in the pipeline.

"We're going to have some cases filed before year-end, it could be a dozen or so cases by that time," he said. "I can tell you we're going to file in California in the federal districts out there, and that's part of the strategy of what's going on right now."

Realtors Get Final Approval of \$418 Million Antitrust Settlement

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Katie Arcieri, Justin Wise

The National Association of Realtors gained final approval of its \$418 million settlement with home sellers, marking a milestone in yearslong litigation over commission rules for real estate agents.

Judge Stephen R. Bough of the US District Court for the Western District of Missouri signed off on the deal at a Tuesday hearing after granting preliminary approval in April.

The settlement resolves claims in a case brought by home sellers related to broker commissions and releases NAR from liability in the litigation

Bough overruled some class members' objections to the settlement, saying every member stands to gain from the deal, both in terms of money and injunctive relief.

"Each Class member could try to prove individual damages at trial and these amounts would all vary. But courts approve class settlements all the time that forgo these individual determinations," Bough said.

The Justice Department's antitrust division said in a Nov. 24 court filing that it continues to investigate policies and practices in the residential real-estate industry. A settlement will not limit the government's ability to seek "greater relief for the conduct at issue here," the department said.

The DOJ also raised concerns over a settlement provision requiring buyers and their brokers to enter written agreements before home tours, claiming it could harm buyers and limit how brokers compete for clients.

Steve Berman, managing partner for plaintiffs' firm Hagens Berman, said in a statement to Bloomberg Law that the approved settlement will "pave the way for tens of billions in lower commissions for consumers so we are pleased this has gotten the green light."

Home seller plaintiffs in 2019 sued NAR and various brokerages, alleging they enforced rules that illegally required home sellers to pay the broker representing the buyer of their homes an inflated amount.

A Missouri jury last year returned a \$1.8 billion verdict against NAR, finding it colluded to inflate commissions.

NAR negotiated the settlement following the verdict, and agreed to change some of its business practices, including nixing requirements that listing brokers or sellers must make offers of compensation to cooperating brokers or other buyers.

NAR is represented by firms including Cooley LLP and ArentFox Schiff LLP. The plaintiffs are also represented by firms including Ketchmark & McCreight PC, Boulware Law LLC, and Cohen Milstein Sellers & Toll PLLC.

The case is *Sitzer v. NAR*, W.D. Mo., No. 4:19-cv-00332, 11/27/24 .

—With assistance from Justin Wise.

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Kansas County Sues Plastics Giants Over Alleged Recycling Lies

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Drew Hutchinson

- ‘Campaign of fraud and deception’ led to waste, complaint says
- Lawsuit comes two months after California’s plastics complaint

Ford County, Kansas, on Wednesday sued petrochemical companies—including oil and gas giants such as ExxonMobil—for allegedly worsening a waste pollution crisis by promoting plastics as recyclable when most aren’t.

The class action complaint, filed in the US District Court for the District of Kansas, accuses 11 defendants of running a “decades-long campaign of fraud and deception about the recyclability of plastics.”

ExxonMobil Corp., Chevron USA Inc., Dow Chemical Company, and other companies are named in the complaint, along with the American Chemistry Council. The filing comes two months after California Attorney General Rob Bonta (D) sued ExxonMobil in state court, claiming the same deceptive practices.

Recycling plastic isn’t “technically or economically viable,” but petrochemical companies and their trade associations misled the public to think it was, Wednesday’s complaint says. This created a public nuisance by emboldening people to buy more single-use plastics, which in turn spurred a waste crisis, the complaint says.

Communities are left to pay “significant costs” as a result, the complaint says. Plaintiffs are asking the court for damages, abatement of the plastic waste, and an injunction prohibiting companies from advertising products as recyclable.

The class includes counties located in the state that incurred costs for plastic clean up starting on Jan. 1, 1989.

Sharp Law LLP, Rebein Brothers PA, and Kerbs Law Office LLC represent the county and class of plaintiffs.

The case is Ford County v. ExxonMobil Corp. , D. Kan., No. 2:24-cv-02547, filed 11/27/24 .

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Clock Ticking for Companies to Comply With California PFAS Laws

By Sedina Banks and Sherry Jackman2024-12-02T04:30:02000-05:00

- *Greenberg Glusker partners examine California's new PFAS laws*
- *Product line audits, accredited testing help companies comply*

Two landmark California laws, [AB 1817](#) and [AB 2771](#), regulating a group of chemicals known as PFAS, will have far reaching impacts to consumer products when they take effect Jan. 1.

Companies must fully understand their regulatory requirements and exemptions, because the difference between a compliant product and one that exposes a company to liability and loss of consumer confidence could hinge on nuanced distinctions.

[PFAS](#), or per-and polyfluoroalkyl substances, are human-made chemicals that for decades were added to products such as apparel, food packaging, carpets, and personal care products. These so-called “forever chemicals” don’t break down easily in the environment and have been [linked](#) to a variety of [health](#) and safety issues.

Both laws seek to reduce PFAS in certain products—AB 1817 focuses on textiles such as clothing and AB 2771 pertains to cosmetic products. Companies should consider the following steps to meet the significant challenges in complying with these laws.

Identify PFAS in products and materials. Determining which products, components, finishes, or materials in the supply chain may contain PFAS may be difficult and costly for companies with multiple product lines and global supply chains. PFAS could present in very low concentrations, requiring highly sensitive methods for detection, and advanced testing methods is expensive, especially for non-targeted analysis.

Different testing methods can assess whether PFAS are present, depending on whether the product is a solid or liquid matrix. It’s important that companies use only accredited labs certified to test for PFAS.

Companies may want written assurances from their upstream suppliers that PFAS aren't present in their products or materials. Many companies rely on global supply chains, so regulating what chemicals are in the products is potentially difficult.

It's important for companies to establish clear communications with their suppliers early on about the regulatory requirements and expectations for compliance.

Businesses shouldn't assume that all parties in their supply chain are familiar with California's regulatory requirements, nor should they rely on verbal assurances from suppliers that products or materials don't contain PFAS. They also shouldn't assume that past lab sheets indicate future compliance, as ingredient substitutions are common given supply chain shortages.

[WATCH: PFAS, explained](#)

Formulate a compliance strategy. Companies with PFAS in their products can avoid liability under the two new laws by reformulating or ceasing to sell non-compliant products in California. The latter option is non-viable to many companies due to California's large market share—it's the fifth largest [economy](#) in the world—so not selling products in California would mean significant revenue losses.

Due to costs and logistical concerns, many companies will opt to adopt California's PFAS standards for all products sold in the US, rather than separating product lines exclusively for California. As a result, many companies will need to reformulate product lines nationwide to comply with California's PFAS bans.

Product reformulation presents its own challenges, such as potentially reduced product performance, failure to meet consumer expectations compared to prior formulations, higher manufacturing and compliance costs, and supply chain complexity.

Audit product lines for compliance. Periodic product line audits ensure continued compliance with the laws. This audit should include an evaluation of existing and new product lines.

Factors such as changes in the supply chain and materials can cause a company to inadvertently fall out of compliance. Legal and product development teams should work closely throughout this process.

Be prepared for consumer claims. Even with a robust compliance plan in place, companies should prepare for frivolous claims. It's prudent for companies to have a plan in place if they receive a threatened consumer claim.

There has been a recent increase in consumer claims and threats of class actions for alleged violations of consumer protection laws such as the Consumer Legal Remedies [Act](#), and Unfair Competition [Law](#), consumer protection laws that prohibit unfair business practices. Many of these pre-suit claims provide a short response window and a specific response protocol.

Failure to comply with these laws exposes companies to significant risks, ranging from private lawsuits, public lawsuits, government enforcement actions, and reputational damage.

As with other recent consumer product laws, such as California's [Proposition 65](#), we can expect a heightened awareness from the plaintiffs' bar seeking to monetize a company's lack of compliance.

For these reasons, companies should be diligent in their compliance efforts and seek legal and expert assistance as necessary.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

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Texas farmers say sewage-based fertilizer tainted with “forever chemicals” poisoned their land and killed their livestock

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Alejandra Martinez

December 2, 2024



Tony and Karen Coleman stand over a plot of land where they buried a deceased calf and bull on their property in Grandview on Aug. 5, 2024. *Credit: Azul Sordo for The Texas Tribune*

The fertilizer was promoted as an environmental win-win for years. An untold number of farmers and ranchers across Texas have spread it on their land.

Audio recording is automated for accessibility. Humans wrote and edited the story. See our AI policy, and give us feedback.

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JOHNSON COUNTY — Tony Coleman recognizes the signs all too well. A cow drools strings of saliva. Then it starts to limp, each step slower. Then it grows stiff.

Then it's quick. There's nothing to be done. The cow dies.

Since early 2023, the Grandview rancher has watched more than 35 of his 150 Black Angus cattle perish. July was especially brutal. In the span of a week, Coleman lost a 3-week-old calf; a cow; and Little Red, a strong bull full of spirit, leaving Coleman with nothing but unanswered questions.

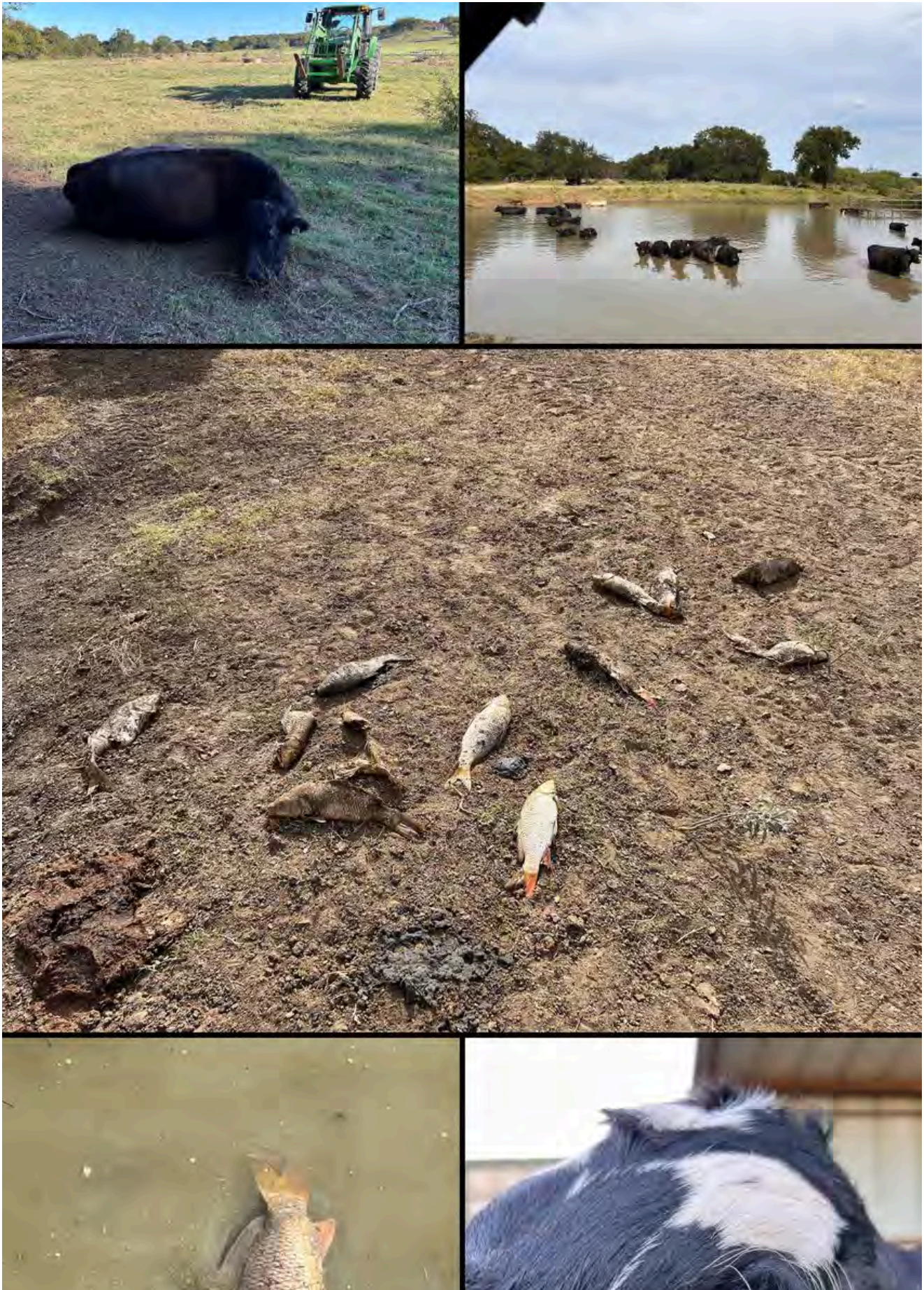
"This is destroying our lives," Coleman said. "You never know what you're going to get every day when you get down here."

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Next door, James Farmer has lost two calves, and found two of his wife's beloved horses toppled to the ground like dominos, their bodies swarmed by buzzards.

"It's hard for me to tell her, because I know she's gonna break down," he said. "Why are our animals dying? Just back to back? It never ends."

Months before, the men said they noticed a gag-inducing sewage smell drifting from smoking piles of fertilizer on their neighbor's property. Heavy rains then washed some of the fertilizer onto their land. Soon after, they said they found fish floating dead in the stock ponds their livestock drink from.





The Colemans have lost more than 35 animals. One went blind before dying, they said, a white film coating the pupil. A pair of calves died less than a week after birth. They found dead fish floating in their stock ponds. When an animal dies it's a race against time. Coleman and his neighbor James Farmer scramble to beat the buzzards and coyotes to the carcass, then drive it to a lab in College Station. *Credit:*

Courtesy of Tony and Karen Coleman

They contacted the county with their concerns, triggering a nine-month investigation. That's when their cattle and horses began to die.



The most important Texas news,
sent weekday mornings.

An environmental crime investigator in Johnson County collected samples of the dead animals' tissue and organs, the water they drank from, the soil and the fertilizer that was applied next door.

After the county received test results, the two families finally got their answer: The animals had been killed by something in the fertilizer.

The fertilizer had been made with biosolids, part of an effort to find a climate-friendly method to recycle municipal sewage. But the fertilizer also contained synthetic and highly hazardous chemicals known as PFAS, which are found in hundreds of household products and have had devastating effects on farms and ranches that inadvertently spread them on their land.

An untold number of farms and ranches across Texas and the rest of the nation may have also used fertilizer made from sewage tainted with these "forever chemicals" — which don't break down in the environment — without knowing it.

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PFAS, or perfluoroalkyl and polyfluoroalkyl substances, are man-made chemicals used since the 1940s that have a singular ability to repel oil and water and resist heat. They are used in products like nonstick cookware, pizza boxes, waterproof mascara, toilet paper, soaps and rain jackets.

There are more than 12,000 types of PFAS, but researchers have only studied the health effects of roughly 150. They can contaminate food and water and build up in the body over time. Exposure to certain PFAS has been linked to cancer, low birth rates and birth defects, damage to the liver and immune system, and other serious health problems. One study found the chemicals in the blood of nearly 97% of all Americans.

Due to their widespread use in consumer products, forever chemicals have been discharged into waterways by chemical manufacturers, trucked to landfills with household trash or flushed into city sewers via toilets, sinks, showers and washing machines.

Then they end up in local wastewater treatment plants where the solids are separated from sewage. Fertilizer companies who are often paid to haul these biosolids away process them into fertilizer that's sold to farmers and ranchers as a cheaper alternative to chemical fertilizers.

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A number of Texas wastewater plants have contracts with fertilizer companies to take their biosolids, including Fort Worth, Houston, San Antonio, Dallas and Arlington. Nationally, more than half of sewage sludge was treated and spread on land, according to one study; 19 billion pounds of it was spread on American farms between 2016 and 2021, the nonprofit Environmental Working Group found in 2022.

Wastewater treatment and biosolids experts call this an environmental win-win because those solids don't go to landfills or incinerators — processes that create greenhouse gasses, which contribute to climate change.

But nobody knows how much of that fertilizer is contaminated with PFAS, which can be absorbed by crops, consumed by livestock, and then enter the food supply. There are no requirements to test biosolids for PFAS, or to warn farmers and ranchers that they could be using contaminated fertilizer made with biosolids on their land.

"Some people are saying, [PFAS contamination] are isolated incidents. No, they're not. I guarantee that this is a problem in every single state that uses biosolids," said Kyla Bennett, a former U.S. Environmental Protection Agency employee who is now a science policy director for the nonprofit group Public Employees for Environmental Responsibility.

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"The reason we're not hearing about it all over the country, in all 50 states, is because nobody's looking for this problem," Bennett added.

According to EPA data analyzed by the nonprofit Environmental Working Group in 2022, an estimated 5% of all crop fields in the U.S. — up to 20 million acres — could have used fertilizer made with biosolids. In Texas, more than 157,000 dry metric tons of biosolids-based fertilizer were applied to agricultural lands in 2018.

While the EPA recently set limits for a handful of the chemicals in drinking water, those rules do not cover biosolids.

"The evidence is out there" that PFAS are a health hazard, Bennett said. "We shouldn't have to wait [for the EPA to act]."

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Without federal regulations, some states have taken action, requiring wastewater treatment plants to test their biosolids for PFAS or setting their own limits for PFAS in biosolids. Texas is not among them. State environmental regulators said in a statement they're not required to by law.



Tony Coleman took over the farm in 2018 after his wife's father died from liver cancer. Karen Coleman said the farm doesn't feel the same anymore — the PFAS contamination has cast a shadow over it. If they sold cattle now, she said, it would feel like a betrayal of her father's memory. "We believe in Jesus. And at the end of my time, when I have to stand in front of Jesus and I get to see my dad again, I have to answer for the decisions that we're making right now," she said. *Credit: Azul Sordo for The Texas Tribune*

Coleman and other Johnson County farmers who know their land is contaminated are now faced with an existential dilemma: Do they sell their cattle and their crops, knowing they're likely laced with PFAS, or face financial ruin?

Coleman and Farmer have both decided not to sell any cattle. That means the men now run zombie farms. They pay to feed animals and harvest hay that they won't sell — a single 900-pound steer could sell for \$4,800, Coleman said.

"Everything we plant here is just sucking this [PFAS] stuff up," Coleman said. "The cows drink the water and eat the grass. For them there is no escaping."

Anxiety in Johnson County



The Johnson County Courthouse in downtown Cleburne on July 29, 2024. *Credit: Azul Sordo for The Texas Tribune*

In February, Johnson County residents packed the courthouse and listened intently as Dana Ames, an environmental crime investigator for the county, and other local officials explained the findings from the nine-month investigation into the noxious smells and dead livestock.

Ames, who spent \$35,000 of the county's money on the investigation and sent samples to a lab in Pennsylvania, told residents that the liver of the Coleman's stillborn calf contained 610,000 parts per trillion of perfluorooctane sulfonic acid, or PFOS, one of the many types of forever chemicals.

The tissue from a calf belonging to Farmer that died a week after being born tested at 320 ppt of PFOS.

Currently, there are no federal food safety standards for PFAS. In Maine, which in 2016 became the first state to detect PFAS contamination at a farm, state officials issued limits for beef containing PFOS at 3.4 parts per billion and milk containing PFOS at 210 parts per trillion — meaning that beef or milk exceeding these levels should be considered unsafe for consumption. Maine, which has discovered 78 contaminated farms and shut five of them down, has been the only state to set its own PFAS limits for food.

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Samples of the pond water where the ranching families' livestock drink from ranged from 84 ppt to 1,333 ppt of PFAS.

The county also tested the fertilizer their neighbor spread on his farm and found 27 types of PFAS chemicals, including four out of the five the EPA has set limits for in drinking water.



Johnson County Commissioner Larry Woolley at his desk in Cleburne. *Credit: Azul Sordo for The Texas Tribune*

“These people were led to believe this was safe and a cheap fertilizer,” County Commissioner Larry Woolley said at the meeting. “And this isn’t just isolated to this one incident or multiple counties. This is going on all over.”

“The amount of beef and milk that’s gone into the food chain, who knows what their PFAS levels are? The level of victimization is widespread,” he added.

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The Colemans, Farmer and four other local farmers have sued Synagro, the Maryland-based company that produced the biosolids-based fertilizer applied on their neighbor’s fields, and Renda Environmental, a Texas-based fertilizer company that sold to the neighbor before Synagro. The lawsuit claims the companies knew about the contaminants in the fertilizer and failed to provide adequate warnings to its customers.

Synagro denies the allegations. Kip Cleverley, a spokesperson with the company, said the company did its own testing on the land where the fertilizer was applied and preliminary results found PFAS levels in the single digits parts per trillion in the surface water. The company did not provide its test results to the Tribune, saying its analysis was still in progress.

“The data strongly suggests that the farm where biosolids were used could not be a source for the PFAS allegedly found on the plaintiffs’ farms,” Cleverley said.

Renda Environmental told the Tribune the company does not comment on pending litigation.

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In a separate lawsuit filed against the EPA in June by Public Employees for Environmental Responsibility on behalf of the farmers, the group claimed the agency failed to implement restrictions on PFAS in biosolids despite knowing the health risks posed by the chemicals. Johnson County later joined the suit.

“My heart breaks [for the farmers],” said Bennett, the group’s science policy director. “It could be years until the EPA sets biosolids regulations. Somebody needs to hold their feet to the fire ... farmers are losing their livelihoods.”

The biosolids used to create the fertilizer that allegedly contaminated the Colemans’ and Farmers’ farms came from Fort Worth’s Village Creek Water Reclamation Facility, which treats sewage from 1 million people, many industries and 23 communities in North Texas. It generates between 27,000 to 31,000 tons of biosolids per year.



Top left: In one of the last steps in the wastewater treatment process, the wastewater is injected with chlorine to kill any remaining bacteria. Fort Worth Water sends the recycled water to the Dallas-Fort Worth airport for industrial use. Top right: Mary Gugliuzza, spokesperson for Fort Worth Water, said forever chemicals enter the wastewater treatment plant from homes, businesses and industrial customers. Bottom left: The first step of the wastewater treatment process involves sending raw sewage through screens to remove trash. Bottom right: Air is pumped into wastewater pools known as aeration basins, where oxygen promotes microbial growth that helps break down pollutants. *Credit: Erika Nina Suarez for the Texas Tribune*

Mary Gugliuzza, spokesperson for Fort Worth Water, said the fertilizer pellets produced by Synagro meet EPA and Texas Commission on Environmental Quality requirements.

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Gugliuzza added the city had tested some of its biosolids for PFAS even though it's not required. Those results showed PFAS in the biosolids, but Gugliuzza said that's the case at wastewater facilities across the country.

Synagro has contracts with more than 1,000 municipal wastewater plants, industrial, and agricultural customers in North America — including Fort Worth — to turn biosolids, which one employee described as resembling chocolate milk, into fertilizer that it markets as nutrient rich and environmentally friendly.

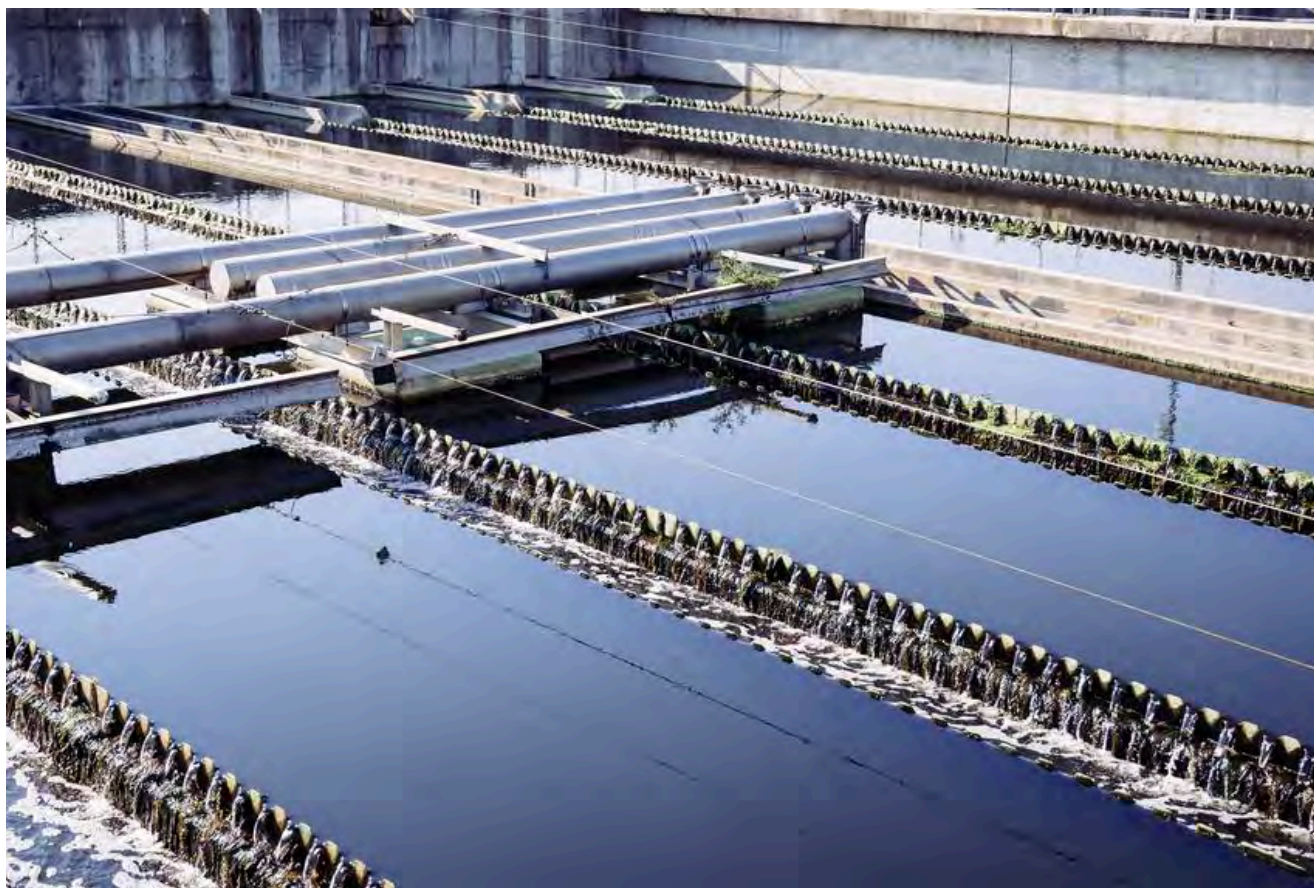
In 2022 Synagro processed 6.5 million tons of biosolids nationwide.

“The [EPA] has not suggested that any changes in biosolids management is required because of the presence of trace amounts of PFAS,” Cleverly, the company spokesperson, said.

In September, the EPA responded to the lawsuit saying it has complete discretion over which pollutants to regulate under federal law — so it can't be sued.

But the agency is now studying the presence of PFAS in wastewater and sewage sludge nationally and conducting a risk assessment on the use of biosolids and sewage sludge containing the two most widely used and studied forever chemicals — PFOA and PFOS — focusing on health risks through exposure to soil, water, crops, meat and dairy. It expects to publish the results by the end of this year, which will determine whether new federal rules are necessary.

Who should be responsible for removing forever chemicals?



In the wastewater treatment process at the San Antonio Water System's Steven M. Clouse Water Recycling Center, final clarifiers are used to separate the treated water from the remaining solids. *Credit: Chris Stokes for The Texas Tribune*

In Texas, most biosolids end up in a landfill. But the rest is diverted for agricultural use in Texas.

At San Antonio's wastewater treatment plant, water is removed from sewage sludge by using a machine that squeezes it between two tensioned belts or by spreading it in drying beds so the sun evaporates the moisture. Once it's dried to a crumb-like texture, the biosolids are piled into black mountains then transported to other facilities where two Texas compost companies turn it into fertilizer.

Pitched as a cost-effective way to improve soil fertility, biosolids have been applied to land in the U.S. since the 1970s. Scientists say they contain nitrogen, phosphorus and potassium that helps plants grow.

The EPA only requires wastewater treatment plants to test biosolids for heavy metals and pathogens that can be harmful to health.



The two most common ways to dry sewage sludge are by passing it through a belt presser — which presses the sludge between two belts to squeeze out the water — or in drying beds. Sludge spread over sand beds dries into a crumbly material after the sun's heat evaporates the moisture. *Credit: Chris Stokes for The Texas Tribune*

If the EPA issues new restrictions on PFAS in biosolids, utilities fear they are likely to bear the responsibility for removing the chemicals from wastewater.

“If we are required to treat a particular chemical that is not covered in the way you already treat, you have to design a whole new system,” said Ed Guzman, the senior vice president and chief legal and ethics officer at the San Antonio Water System. “You have to put it in place and that all takes time. It takes money.”

The cost of removal is significant: A 2023 report by the Minnesota Pollution Control Agency found that it would cost between \$2.7 million and \$18 million per pound to remove and destroy PFAS from municipal wastewater, depending on facility size, and between \$1 million and \$2.7 million per pound of PFAS removed from biosolids.

Adam Krantz, the CEO of the National Association of Clean Water Agencies, a group representing municipal wastewater treatment agencies, said the cost of remediation could be passed down to water utility customers, but argues that “polluters should pay.” “It really is the corporate polluter that needs to foot the bill for this as the wrongdoer,” he said.

Others, like Janine Burke-Wells, executive director for the North East Biosolids & Residuals Association, which represents wastewater treatment facilities and biosolids producers, said that the responsibility to curb PFAS should fall on everyone.

“Unless we really eliminate all the sources of PFAS there's always going to be a background level because [PFAS] is in everything,” Burke-Wells said.

One county doing what it can



County Commissioner Larry Woolley drives past PFAS-affected land in Grandview on July 29, 2024.

Credit: Azul Sordo for The Texas Tribune

In Johnson County, Woolley drives his silver pickup down rural roads, pointing out hay bales and miles of milo grain, corn and wheat — crops the county commissioner says have been blessed by heavy rainfall earlier this year.

Woolley, a former agriculture teacher who moved to Grandview in 1982, says he's spent sleepless nights worrying about PFAS' impacts on ranching families in this county of 180,000 residents.

"I lay awake at night thinking of the magnitude of this whole deal. It's just crazy," Woolley said. "This is just the tip of the iceberg. I think there's gonna be so much public outcry on this ... it's gonna be hard for our state officials to ignore that."

Following the county's investigation, Woolley led the charge to pass a local resolution urging farmers to stop using biosolids on their land.

The resolution called for Fort Worth to stop sending its biosolids to fertilizer companies until the TCEQ tests them for the presence of PFAS and asked the EPA to set limits on PFAS in biosolids. The resolution also called on state lawmakers to regulate the application of biosolids-based fertilizer on farmland or give power to counties to do so.

“That’s the hard part,” Woolley said. “We don’t have authority to ban biosolids.”

In July, neighboring Ellis County passed a similar resolution calling for regulation and legislation to restrict the application of biosolids on farms and ranches until further testing is done. Since then, Kaufman, Henderson, Somervell and Wise counties have done the same.

Woolley has traveled around the state to sound the alarm about PFAS at conferences for county officials. He said he and his staff are preparing to go to Austin to meet with state lawmakers during the next legislative session. He hopes they will introduce new bills that will address PFAS contamination in biosolids, including giving counties money to test for the contaminants, and require TCEQ to test biosolids statewide for forever chemicals.

So far, there have been no bills filed by state lawmakers regarding PFAS contamination in biosolids ahead of the legislative session that begins in January.

In 2021, Michigan began requiring all municipal wastewater treatment plants to test their biosolids for PFAS before spreading them on agricultural land. The state also began prohibiting the application of biosolids containing more than 150 parts per billion of PFOS on agricultural land. Since then, the state has lowered that threshold to 100 ppb and added another type of PFAS to the list, PFOA.

What experts refer to as the "Michigan model" has now been embraced by other states including California, Wisconsin and Washington. Connecticut and Maine have banned the use of biosolids on agricultural fields.

Ellen Mallory, a professor of sustainable agriculture at The University of Maine, said state response has been crucial given the lack of standards at the federal level.

“The important part here is it's really hard to have any response to PFAS contamination if we don't have any standards. So a state like Texas that has no standards, what do you do? How do you help farmers determine if their food is safe or not?” she said.

Meanwhile, Tony Coleman and his wife are still watching their livestock die. They pack dead cattle in a big cooler, load them onto a trailer and drive 140 miles to a laboratory at College Station where vet technicians perform a necropsy and remove tissue to be tested for PFAS.

The couple both work two jobs and are looking for a third. They're worried they have lost the ability to make a living off their own land.

"We can't consciously sell you a side of beef and then you eat it and you get sick. What kind of people does that make us?" Coleman said.

Disclosure: San Antonio Water System has been a financial supporter of The Texas Tribune, a nonprofit, nonpartisan news organization that is funded in part by donations from members, foundations and corporate sponsors. Financial supporters play no role in the Tribune's journalism. Find a complete list of them here.



Tony Coleman pets "Tank," a bull they raised and bottle-fed as a calf on their property in Grandview on Aug. 5, 2024. Credit: Azul Sordo for The Texas Tribune

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Japan's Push for Women on Boards Propels Lawyers, Accountants

By Kazuhiko Shimizu

- National goal seeks 30% women executives by 2030
- Businesses seen as lacking internal candidates

Bloomberg Law News 2024-12-02T09:48:21767950157-05:00

Japan's Push for Women on Boards Propels Lawyers, Accountants

By Kazuhiko Shimizu 2024-12-01T17:00:01000-05:00

- National goal seeks 30% women executives by 2030
- Businesses seen as lacking internal candidates

Japanese companies struggling to promote women within their leadership ranks are turning to lawyers, accountants, and professors, among other professionals, to make progress toward the government's looming gender diversity targets.

Japan set a national goal for women to represent 30% of executive officers, including board members, at top publicly listed companies by 2030. The Tokyo Stock Exchange also has called for at least one female executive officer by 2025 in each company listed on its prime market, oriented toward global investors.

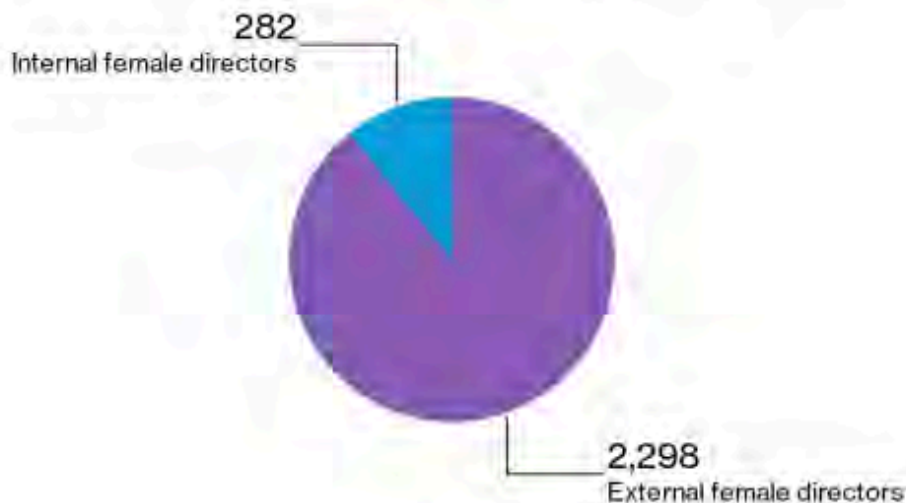
But with 2025 soon approaching, businesses still have a ways to go toward reaching the voluntary milestones. Women accounted for about 16% of executive officers at companies listed on the Tokyo Stock Exchange's prime market in July, up from 14% a year earlier, according to a gender balance report released in October by Keidanren, Japan's top business group. About 4% of these companies had no female executives, the report showed.

The vast majority of women who serve on the boards of prime market-listed companies come from outside rather than within a company, Keidanren's research found. More than half of the outside directors are lawyers, accountants, and university professors, the report said.

"So far, most companies have not managed to nurture women as candidates to join their boards of directors," said Hiroshi Kitani, a professor at Prefectural University of Hiroshima who researches human resources management and diversity.

Women Joining Boards From Outside

Most women on boards of companies in the Tokyo Stock Exchange's prime market come from outside, rather than within the business.



Source: Keidanren (Japan Business Federation)

Bloomberg Tax

It remains to be seen what the outside additions will mean for corporate governance.

"I do not see much impact on corporate management and business as a result of increasing external female executive officers," Kitani said, adding that's "because lawyers, university professors, and accountants tend to lack experience and knowledge of the businesses where they are members of the boards, as well as a sense of belonging."

Pipeline Problem

Yasuhiro Goto is an outside director of the board at San-In Godo Bank Ltd., a regional bank based in Matsue city, and an outside director at Foster Electric Co. Ltd in Tokyo. He likewise pointed to problems with the pipeline for women to become corporate executives in Japan.

There are "a limited number of women who have been working for the companies and moving up the career path from manager to department head and executive officer," said Goto, who also is an expert on Asian economies and industry and a professor at Tokyo's Asia University.

Accounting and consulting firm Deloitte's business in Japan teamed up with Shagai Laboratory Incorporated Association to launch a training and networking initiative for female executives in October. The association focuses on assisting women to become outside independent board members. Their joint project is targeting 1,000 women as members.

"We provide hard skills, management strategies, how to read financial balance sheets and networking opportunities with more than 20 company presidents and executive officers," said Taiko Otsuka, a partner at Deloitte Tohmatsu who leads its sustainability advisory work and is involved in the project. "We also arrange coaching and mentoring with them," she said.

The initiative follows other earlier efforts to help with women's professional development. Keidanren, the business group which counts more than 1,500 companies as members, established a network for female executives in 2015 to try increasing the pool of candidates. The network had 291 women as members as of April 2024.

"We have launched the network to help women executives break the 'glass ceiling' to be able to be members of boards of directors or company presidents," said Yoshihisa Masaki, director of Keidanren's social communication bureau. "There are role model programs and mentoring programs."

Pace of Change

Former Japanese Prime Minister Fumio Kishida set the 30% target for female executives in 2023.

Japan ranked 118th out of 146 countries in the World Economic Forum's 2024 global gender gap index, far below its Group of Seven (G7) peers in Europe and elsewhere. The index measures gender parity across different dimensions, including economic participation and opportunity.

Only 39 of the company presidents at 3,235 businesses in the prime market and standard market are women, representing 1% of the total, according to a gender balance survey conducted in 2024 by the Japan Research Institute Limited, a unit of Sumitomo Mitsui Financial Group.

Prime-market companies have significant market capitalization and more sophisticated corporate governance than companies on the exchange's standard or growth markets.

Given the slow pace of change so far, some observers have suggested stricter measures, such as fines for noncompliance or releasing lists of companies with the fewest female executives.

"There are no sanctions if they do not reach the targets, and they aren't required to provide plans for improvement or explanations of why they lag behind," said Yoshimasa Moriguchi, chief researcher at the Japan Research Institute Ltd.

Seniority Systems

Japanese companies should make long-term plans to help women successfully climb the managerial ladder, becoming department heads, and then executive officers and presidents, Kitani from Prefectural University of Hiroshima said.

Gender issues are exacerbated by standards for promotion at Japanese companies, which tend to value seniority and long hours instead of quality of work, Deloitte's Otsuka noted.

"Japan should change its current seniority system and allow the younger generation, even 30- to 40-year-olds with adequate ability, to become board members or executive officers," she said.

Shiseido Company, a top Japanese cosmetic maker, is an outlier when it comes to gender diversity. Women hold almost half of its executive posts.

Maki Yamamoto, department head of diversity and inclusion strategy promotion at Shiseido, is also an official in Japan's chapter of the 30% Club. The club campaigns to boost the number of women in board seats and executive leadership positions at companies globally.

"Once Japanese companies accept people from different countries, backgrounds and cultures at their headquarters, their thinking will move toward real diversity and acceptance," Yamamoto said.

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Walmart's DEI Reversal Isn't What It Seems: Beth Kowitt

By Beth Kowitt 2024-12-02T12:28:15557-05:00

Right-wing activist Robby Starbuck declared another win last week, and it was a big one.

Walmart Inc., America's largest private-sector employer, is rolling back some of its diversity efforts. It will end its sharing of data with LGBTQ+ advocacy group the Human Rights Campaign, stop using the terms DEI and Latinx in its official communications and shutter its Center for Racial Equity after its five-year, \$100 million commitment expires next year. The retailing giant will also stop considering demographic data when awarding supplier contracts and evaluate its funding of events like Pride parades.

Starbuck is taking credit for all of it.

It sets a chilling tone for corporate America's diversity efforts that a company with the resources of Walmart is pulling back on its commitment to DEI. But it's even worse that Walmart is allowing Starbuck to give the impression that he and his movement are fully responsible for the reversal.

Starbuck's crusade to eradicate "wokeness" from corporate America has followed a similar pattern: Target a company with a conservative customer base like Harley-Davidson Inc., Deere & Co. or Tractor Supply Co. "Expose" the company's commitment to diversity and inclusion or its investments in combatting climate change. Threaten a boycott. Continue an aggressive social media campaign until the company acquiesces and puts out a statement saying it will do things like end its sponsorship of Pride events and eliminate DEI roles and goals.

That's not what happened with Walmart. There was no public campaign. Both Starbuck and Walmart said they had been in discussions behind the scenes, but the public didn't know about it until Starbuck posted on [X](#) about the changes. "Our campaigns are now so effective that we're getting the biggest companies on earth to change their policies without me even posting a story outlining their woke policies," he wrote.

But some of the concessions that Starbuck takes credit for aren't really concessions at all. For example, Walmart had already started to phase out the term DEI, last year hiring a chief belonging

officer rather than a chief diversity officer. And long before Starbuck came along, Walmart, like many companies, had been looking at making changes to its supplier diversity programs in the wake of the Supreme Court's 2023 decision banning affirmative action in college admissions.

In some cases, Walmart did not go as far as Starbuck's other targets. While companies like Lowe's Cos. Inc. and Ford Motor Co. agreed to stop funding Pride parades and celebrations after pressure from Starbuck, Walmart instead said it would review funding of events that could be sexually inappropriate for kids. (Who gets to decide whether something is inappropriate is a different matter.) A spokesperson also told [HR Brew](#) that it remained committed to its employee resource groups, which most companies have weakened after becoming a Starbuck target.

While Starbuck gloated, Walmart stayed quiet. The company has not put out any official press release, letting Starbuck break the news and drive the narrative. It all reads like a cooperative communications effort between the two parties — likely the result of behind-the-scenes negotiations that probably looked something like this: Starbuck got to break the news, claim victory and take credit, while Walmart preempted a nasty public battle but didn't have to go as far as other companies in order to get Starbuck to go away.

Starbuck has in many ways done Walmart a favor, giving the company cover to walk back its DEI commitments as the business community prepares for a Trump administration that will only intensify the backlash and legal risks to anything considered "woke." Unlike Starbuck's other targets, Walmart's customer base does not lean clearly left or right. It has stores in every state and serves some 225 million shoppers every week around the globe. The company is trying to walk a fine line by neither endorsing nor countering Starbuck's larger message that "this is a massive win for our movement" and that "Walmart is setting a great example for other companies."

Walmart is perfectly capable of standing up to bullies like Starbuck when it wants to. In 2015, Rosalind Brewer, then-CEO of Walmart's Sam's Club division, [received death threats](#) after talking about the importance of diversity on CNN. The company immediately backed her, with CEO Doug McMillon putting out a statement saying, "For years, we've asked our suppliers to prioritize the talent and diversity of their sales teams calling on our company. Roz was simply trying to reiterate that we believe diverse and inclusive teams make for a stronger business. That's all there is to it and I support that important ideal."

It's telling we've seen no such message from McMillon this time around. Instead, the company said in an emailed statement, "We are willing to change alongside our associates and customers who

represent all of America,” adding that “every decision comes from a place of wanting to foster a sense of belonging, to open doors to opportunities for all our associates, customers and suppliers and to be a Walmart for everyone.”

A nice sentiment, but one that ignores that fact that some of those associates, customers and suppliers will feel abandoned by the company's shift.

Most cowardly of all is letting Starbuck paint Walmart's decision as his doing. If Walmart, with its scale and resources, is perceived as backing down, it sends the message to other companies that they don't stand a chance and therefore shouldn't bother to resist. Starbuck is right that the company is setting an example for the rest of corporate America. And it's a dangerous one.

More From Bloomberg Opinion:

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State AGs File ESG-Related Antitrust Suit Against Big Institutional Investors

[dandodiary.com/2024/12/articles/uncategorized/state-ags-file-esg-related-antitrust-suit-against-big-institutional-investors](https://www.dandodiary.com/2024/12/articles/uncategorized/state-ags-file-esg-related-antitrust-suit-against-big-institutional-investors)

December 1, 2024



By Kevin LaCroix on December 1, 2024

Posted in Uncategorized



ESG has been and remains a serious concern for corporate executives. However, the role that it plays as a part of the corporate risk equation has changed. From a time not that long ago where companies were under pressure to establish their ESG credentials and promote ESG objectives, many companies now face an opposite politically charged backlash, that, among other things, has pushed some companies to walk back their ESG-related initiatives. For example, just this past week Walmart became the latest company to drop its DEI program in response to right-wing pressure, joining similar moves by Ford, Harley-Davidson, and Lowe's, among others.

In the latest example of ways that politically-motivated activists are attempting to turn companies' ESG initiatives against them, last Wednesday a groups of eleven states' attorneys general led by Texas AG Ken Paxton filed a federal court suit against Blackrock, Vanguard, and State Street, alleging that the three institutional investors conspired to restrict the availability of coal, to the alleged detriment of consumers, and in alleged violation of federal and state antitrust laws. A copy of the Texas AG's November 27, 2024, press release about the lawsuit can be found [here](#). A copy of the state AGs' complaint can be found [here](#).

Background

Blackrock, Vanguard, and State Street are three of the world's largest institutional investors. The AGs complaint alleges that collectively the three investors own significant shareholdings in the nine largest U.S. coal companies. The complaint cites the three firms' collective ownership percentages of the coal companies ranging from under ten percent to over thirty percent. The three investors' collective ownership percentages of the two largest coal companies – Arch Resources and Peabody Energy – responsible for, respectively, 17.2% and 13.2% of all U.S. coal production – are 34.1% and 30.43%.

The complaint alleges that with each of the three investors' individual ownership interests, each of the three firms "acquired the power to influence the policies for the [coal] companies and bring about a substantial lessening of competition in the markets for coal." But, the complaint alleges, the three companies "have not just acted alone," but rather have "publicly announced their commitment to use their shares to pressure the management of all the portfolio companies in which they held assets to align with net-zero goals," including the reduction of carbon emissions from coal by 50% by 2030.

The three investors, the complaint alleges, "effectively formed a syndicate and agreed to use their collective holdings of publicly traded coal companies to induce industry-wide output reductions." Working through organizations like Climate Action 100+ and Net Zero Asset Managers the three investors allegedly coordinated their alleged anticompetitive conduct. Though the complaint notes that Black Rock and State Street publicly withdrew from Climate Action 100+, the withdrawal "does not change the reality that Defendants' holdings threaten to substantially change competition to substantially reduce competition in violation of Section 7 of the Clayton Act."

The complaint alleges that the three companies used their "immense influence" to "coerce management" to reduce the production of coal, as a result of which the supply of coal has been "artificially constrained," resulting in "increased energy prices" and in "cartel-like profits for Defendants." Defendants' acquisition and use of their shareholdings thus, the complaint alleges, violated both Section 7 of the Clayton Act and State antitrust laws, while their "syndicate" allegedly yielded "supra-competitive profits for themselves and their portfolios" in violation of the Sherman Act and state antitrust laws.

The complaint notes that while the three investors have "publicly defended their anticompetitive scheme with appeals to environmental stewardship" their activities which had the effect of lessening competition are "not saved" because there may be social or economic considerations that may be deemed beneficial. Quoting FTC Chair Lena Kahn, the complaint asserts that the antitrust laws do not turn a blind eye to an illegal deal just because the parties commit to some unrelated social benefit.

The complaint contains a further allegation against BlackRock, alleging that the firm "actively deceived investors about the nature of its funds." While the firm "consistently and uniformly represented that its non-ESG funds would be dedicated solely to enhancing shareholder value." But, the complaint alleges, Blackrock "routinely violated its pledges to investors, using all of its holdings to advance its climate goals."

The complaint seeks injunctive relief to "put an end to Defendants' illegal practices and restore free and open competition in the coal markets," as well as damages and civil penalties.

Discussion

The AGs' lawsuit has only just been filed and it remains to be seen whether or not it will prove to be meritorious. Nevertheless, there are certain things that can be said about the lawsuit.

For starters, I think it is worth noting that the eleven state AGs that collectively launched this lawsuit all are red state politicians. The lawsuit itself represents the latest effort by conservative political activists and politicians to try to punish economic actors for pursuing policy goals with which the activists and politicians disagree. It is noteworthy that the AGs filed their lawsuit in the Eastern District of Texas. As a result of a concerted effort involving judicial appointments in the district, the district now has a reliably conservative bench, as a result of which conservative activists have been able to use the courts to block policies with which they disagree and to advance right-wing priorities, as discussed here.

The Texas AG's press release quotes the AG as saying that "Texas will not tolerate the illegally weaponization of the financial industry in service of a destructive, politicized 'environmental' agenda." So, in order to prevent this from happening, the Texas AG and his red state colleagues seek to weaponize the federal courts and the antitrust laws in the service of their own politicized agenda.

I will say this. Just a short while ago, there was a working consensus that companies that failed to position themselves as prepared to advance ESG goals risked finding themselves as the target of climate and social justice activists' ire and perhaps even as the target of ESG-related litigation. The pendulum began to swing in a different direction when companies that were alleged to have overstated their ESG credentials were accused of "greenwashing." The pendulum swing gained momentum as conservative activists began targeting companies for advancing an active ESG agenda, a development that caused many companies to go silent about ESG, in a process dubbed "greenhushing."

Now companies and other economic actors who pursued ESG initiatives are being actively targeted, both in publicity campaigns and in conservative activist-led litigation. The net result is that the nature of ESG as a corporate risk has in a very short time completely changed, as the activists seek to impose a cancel culture that punishes economic actors whose policy goals differ.

In the meantime, the "anti-woke" movement is proving to be every bit as self-righteous and censorious as the supposed "woke" movement the conservative activists oppose. (And by the way, the word "woke" long ago ceased to have any meaning other than as a bogey man for conservative politicians to rail against.)

There are other ironies at work here. Active enforcement of the antitrust laws is usually associated with liberal/progressive activists. Historically, at least, it was opposed by conservatives as anti-business. Yet here is a troop of undeniably conservative politicians not only enthusiastically wielding the antitrust laws cudgel but quoting Biden administration appointee and antitrust scourge Lina Kahn in the process. Go figure.

BlackRock, Vanguard, State Street sued by Republican states over climate push

[reuters.com/legal/blackrock-state-street-vanguard-sued-by-republican-states-over-climate-accords-2024-11-27](https://www.reuters.com/legal/blackrock-state-street-vanguard-sued-by-republican-states-over-climate-accords-2024-11-27)

Jonathan Stempel, Carolina Mandl

The logo for Vanguard is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., June 1, 2022. REUTERS/Brendan McDermid/File Photo
Purchase Licensing Rights [↗](#), opens new tab

- States say firms began pressuring coal companies in 2021
- BlackRock says suit is baseless, discourages investment
- Texas AG decries 'weaponization' of financial industry

Nov 29 (Reuters) - BlackRock (BLK.N) [↗](#), opens new tab, Vanguard and State Street (STT.N) [↗](#), opens new tab have been sued by Texas and 10 other Republican-led states, which said the large asset managers violated antitrust law through climate activism that reduced coal production and boosted energy prices.

Wednesday's complaint filed in the federal court in Tyler, Texas, is among the highest-profile lawsuits targeting efforts to promote environmental, social and governance goals, or ESG.

The defendants were accused of exploiting their market power and involvement in climate advocacy groups to pressure coal companies to slash output and reduce carbon emissions from coal by more than 50% by 2030, driving up consumers' utility bills.

"Competitive markets -- not the dictates of far-flung asset managers -- should determine the price Americans pay for electricity," the states said in the complaint.

BlackRock, Vanguard and State Street together have more than \$26 trillion of assets under management.

In a statement, BlackRock said any suggestion it invested in coal producers to harm them was "baseless and defies common sense. This lawsuit undermines Texas' pro-business reputation and discourages investments in the companies consumers rely on."

State Street also said on Friday the lawsuit is "baseless" and that it invests "with a focus on enhancing shareholder value."

"We look forward to presenting the facts through the legal process," the firm wrote in a statement.

Vanguard did not immediately respond to requests for comment.

The 11 states also include Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, West Virginia and Wyoming.

Republicans have long explored using U.S. antitrust laws to target alleged collusion among investment managers to advance climate-related goals.

Climate advocates, in contrast, view assessing environmental risks as essential to determining what investments are worth.

BIG STAKES IN COAL COMPANIES

The states objected to BlackRock, Vanguard and State Street allegedly pressuring coal companies for change starting in 2021.

They also criticized the defendants' membership in the Net Zero Asset Managers Initiative, which says members are committed [↗](#), opens new tab to complying with all antitrust laws, and BlackRock's and State Street's membership in Climate Action 100+.

Vanguard left the Net Zero initiative in 2022, while BlackRock and State Street left Climate Action 100+ in February.

But the states said the withdrawals did not negate the "ongoing and future threat" of continued pressure.

It cited the defendants' investments in nine coal companies, including combined respective stakes of 34.2% and 30.4% in Arch Resources (ARCH.N) [↗](#), opens new tab and Peabody Energy (BTU.N) [↗](#), opens new tab, the largest publicly traded U.S. coal producers.

BlackRock was also accused in the lawsuit of "actively deceiving" investors about its non-ESG funds by promising to dedicate them to enhance shareholder value, when it allegedly used all its holdings to advance its climate goals.

Texas Attorney General Ken Paxton, whose office filed the lawsuit, in a statement accused the defendants of promoting an "illegal weaponization of the financial industry in service of a destructive, politicized 'environmental' agenda."

The lawsuit seeks to block the defendants from using their investments to vote on shareholder resolutions and take other steps that could undermine coal output and limit market competition.

It also seeks civil fines for violating federal antitrust and Texas consumer protection laws.

The case is Texas et al v BlackRock Inc et al, U.S. District Court, Eastern District of Texas, No. 24-00437.

KPMG Leads UK Big Four in Losing Audit Clients, Market Share

By Michael Kapoor

- Big Four still dominate large audits despite market share drop
- Mid-sized firms BDO, Grant Thornton also slip in clients

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KPMG Leads UK Big Four in Losing Audit Clients, Market Share

By Michael Kapoor 2024-12-01T19:01:01000-05:00

- Big Four still dominate large audits despite market share drop
- Mid-sized firms BDO, Grant Thornton also slip in clients

The UK arms of the Big Four accounting firms have all lost stock-exchange listed clients this year, with smaller firms continuing to increase market share, a new report found.

Adviser Rankings, which tracks the UK audit market, said Monday that the Big Four—Deloitte, Ernst & Young, KPMG and PwC, also known as PricewaterhouseCoopers—lost listed clients over the year up to Nov. 6. That held true for leading mid-size firms like BDO and Grant Thornton, too.

Despite losing clients the Big Four continued to dominate audits of the largest companies on the London stock exchange, vetting the books of all but two FTSE 100 firms.

Smaller accounting firms did increase their share of FTSE 250 clients, however, auditing 46 companies on that index compared to 39 the previous year.

The UK government has said it wants to introduce more competition to the Big Four for larger audits. That has happened to some extent, with BDO in particular picking up the audits of more FTSE 250 companies in recent years partly because the Big Four have shed smaller or problematic clients in the face of tougher regulation.

Adviser Rankings blamed the overall fall in audit clients this year on a lack of new stock exchange offerings and an 8.3% decrease in the number of listed companies over the year.

But with the exception of Deloitte, all of the Big Four saw their number of audit clients drop by more than the decrease in listed companies. KPMG lost 13.9%, PwC decreased 11.5%, and EY was down 9%.

Deloitte, meanwhile, saw a fall of just 3.6%. It is by far the smallest of the Big Four auditors, losing five companies to leave 134 quoted clients in 2024.

Deloitte said in an email that its FTSE 350 market share changed little over the year and that it audited 40% of the biggest 20 UK quoted companies. By market capitalization the firm increased its share of the quoted audit market, the statement said. "The movement is mostly related to very small cap businesses," Deloitte said.

EY and PwC declined to comment, and KPMG did not respond to a request for comment.

Among mid-size firms, BDO saw a 12.6% fall in clients but still remained the largest auditor by number of clients. The firm audited 228 listed companies this year, with PwC in second place at 223.

According to Adviser Rankings there has been no change in the top five quoted company auditors, with EY third and KPMG fourth. PKF Littlejohn beat Deloitte to rank in fifth place.

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Rentokil Hid Terminix Merger Issues, Pension Fund Alleges

By **Katryna Perera**

Law360 (November 27, 2024, 6:01 PM EST) -- A pension fund claims in a new proposed class action that pest control company Rentokil Initial PLC hid disruptions and challenges during its merger with Terminix Global Holdings Inc. to fully integrating the acquired business, negatively impacting Rentokil's revenue growth as a result.

The Laborers Local #235 Pension Fund filed a **complaint** Tuesday against Rentokil; its CEO, Andrew Ransom; its chief financial officer, Stuart Ingall-Tombs; and the CEO of Rentokil's North America region, Bradley Paulsen.

The suit proposes a class of all individuals and entities who purchased Rentokil American Depositary Shares between Dec. 1, 2023, and Sept. 10, 2024. According to the complaint, Rentokil is an England-based company that provides pest control, hygiene and wellness services worldwide.

In October 2022, Rentokil announced that it had acquired Tennessee-based Terminix for \$6.7 billion, and Rentokil claimed it was "well-positioned" to integrate Terminix into its pest control business.

"Rentokil claimed that 'integration planning has confirmed the strong potential of the combination, which is both synergistic and complementary,'" the complaint states. "Specifically, Rentokil indicated it was making '[e]xcellent progress on [the] Terminix integration' and detailed benefits of the integration, including cost synergies, additional revenues, and non-cash benefits."

The pension fund says that throughout the proposed class period, the defendants continued to tout Rentokil's progress and success in integrating Terminix. In reality, though, and unbeknownst to investors, Rentokil was facing disruption in the "early pilots" of the Terminix integration and significant and ongoing challenges that hindered a successful integration.

"As defendants were forced to admit at the end of the class period, these execution challenges were self-inflicted and 'not a market phenomenon.' Indeed, CEO Ransom ultimately conceded, 'I don't think it's market[,] I think this is on us,'" the complaint states.

However, the defendants continued to tout the alleged success of the integration even though they knew it was negatively impacting Rentokil's business and operations, specifically organic revenue growth in North America, according to the complaint.

The truth, the complaint says, began to emerge in April 2024 when Rentokil announced its financial results for the first quarter and disclosed that organic revenue growth in North America had only increased by "1.5% year-over-year, below prior guidance of 2% for the first quarter and 2% to 4% for the full year issued only six weeks earlier on March 7, 2024."

On this news, the price of Rentokil shares fell by \$2.64, or more than 9%, from a closing price of \$28.25 on April 17 to \$25.61 on April 18, according to the complaint.

Despite the poor results, Ransom allegedly assured investors during a conference call that the integration program was on track, the complaint alleges.

The defendants continued to speak of the success of the Terminix integration over the next few months, according to the complaint. But the truth, it says, was fully revealed Sept. 11 when Rentokil

issued an unscheduled "trading update," disclosing that it now anticipated only 1% North America organic revenue growth for the second half of 2024 — well below the company's prior guidance.

"During a related conference call with analysts held later that same day, Chief Financial Officer Stuart Ingall-Tombs admitted that — after nearly two years of integration efforts — Rentokil still had 'two separate businesses, which are largely at an operational front end, not integrated yet,'" the complaint states.

"During a separate conference call with analysts held later that same day, CEO Ransom elaborated, 'Integrations are always complex, and they've always got their challenges. Certainly, in the early pilots, going back a bit, we saw levels of disruption,'" the complaint further states.

On this news, the pension fund says, Rentokil's share price fell again, this time by more than 21% from \$31.60 on Sept. 10 to \$24.95 on Sept. 11, 2024.

The suit seeks damages, attorney fees and a jury trial.

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

The pension fund is represented by J. Gerard Stranch IV of Stranch Jennings & Garvey PLLC, and Marco A. Dueñas of Saxena White PA.

Counsel information for Rentokil and the other defendants was not immediately available.

The case is Laborers Local #235 Pension Fund v. Rentokil Initial PLC et al., case number 2:24-cv-02932, in the U.S. District Court for the Western District of Tennessee.

--Editing by Amy French.



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GM, Cruise Say DPA Has No Bearing On Securities Fraud Suit

By **Linda Chiem**

Law360 (November 27, 2024, 7:06 PM EST) -- General Motors and its driverless car unit Cruise LLC have told a Michigan federal judge that Cruise's deferred prosecution agreement with the U.S. Department of Justice over a San Francisco pedestrian accident doesn't help investors in a proposed securities fraud class action.

In a pair of court filings on Tuesday, GM and Cruise told U.S. District Judge Shalina D. Kumar that investor plaintiffs led by the Hollywood Police Officers' Retirement System and the Plymouth County Retirement Association cannot try to use Cruise's Nov. 15 deferred prosecution agreement to bolster their claims that the companies misrepresented the level of autonomy, readiness for commercial use, and overall safety of Cruise's autonomous vehicles.

Under its deal with the DOJ, Cruise agreed to pay a **\$500,000 criminal fine** over its botched response to an Oct. 2, 2023, accident involving a San Francisco pedestrian who was struck by a separate vehicle and then dragged by a Cruise autonomous vehicle.

Cruise was faulted for its less-than-candid disclosures to regulators in the weeks after the accident. Cruise in September agreed to pay a **\$1.5 million civil penalty** to the U.S. Department of Transportation's National Highway Traffic Safety Administration, the nation's auto safety regulator, over the same accident. Cruise in June agreed to pay a separate **\$112,500 penalty** to California regulators, and promised to disclose additional data on any collisions.

Autonomous vehicle companies are required to submit all accident reports involving their cars to the NHTSA. But Cruise's first two written reports, which were submitted on Oct. 3 and 10, 2023, did not even mention the AV's pullover maneuver and the pedestrian being dragged approximately 20 feet, according to a **third-party review** conducted by Quinn Emanuel Urquhart & Sullivan LLP for GM and Cruise.

Cruise on Tuesday **slammed** the investor plaintiffs' "misleading" assertion that with the DPA, it made "substantial admissions relevant to the allegations in this case" that "substantially supplement" the "public record" of the defendants' "knowing deceit."

"In reality, the facts underlying the DPA concern only Cruise's failure to disclose the pedestrian dragging in its 1-day and 10-day reports to NHTSA regarding the accident and during a meeting with NHTSA the day after the accident," Cruise explained. "Because all these facts were already disclosed in the Quinn report, which is incorporated by reference in the [amended complaint], the facts underlying the DPA add nothing to plaintiffs' deficient allegations that the Cruise defendants made the accident statements with intent to defraud GM investors."

GM on Tuesday **pointed out** that it and its executive defendants are not parties to Cruise's DPA with the Justice Department or the NHTSA consent order. As such, GM has made no admissions whatsoever in those documents, it says.

The parties are sparring over GM and Cruise's **motions to dismiss** the securities fraud action. The investor plaintiffs maintain they've sufficiently spelled out how they've suffered substantial losses after the truth about Cruise's AVs and the pedestrian accident came to light.

They claim in their amended complaint that GM, Cruise and their executives have misrepresented the

readiness of Cruise's AVs for commercialization, the capabilities of driving "fully autonomously 100% of the time" with humans "out of the loop," and the cars' compliance with the minimum requirements of established standards defining Level 4 autonomy, among other things.

The NHTSA, carmakers and developers of autonomous vehicle technology follow standards set by the engineering organization SAE International defining six tiers of vehicle automation. They range from Level 0, with no automation, to Level 5, with full vehicle autonomy.

Currently, the highest level of vehicle automation available for sale directly to U.S. consumers is Level 2 advanced driver assistance systems, such as Tesla's Autopilot and GM's Super Cruise. With Level 2, the car can steer, brake or accelerate by itself when the ADAS is engaged, but the human driver still has to be alert and able to take control of driving tasks at any time.

But Mercedes-Benz USA in June 2023 received approval from the California Department of Motor Vehicles to be the first company to sell to Golden State consumers vehicles equipped with a Level 3 automated driving system that won't require a human driver to constantly supervise the vehicle's driving.

Counsel for the plaintiffs declined to comment Wednesday.

The investors are represented by Carol C. Villegas, Jake Bissell-Linsk, Guillaume Buell, Matthew J. Grier and Adam Federer of Labaton Keller Sucharow LLP, Matthew Henzi and Cynthia Billings-Dunn of Asher Kelly PLLC, and Robert D. Klausner and Stuart Kaufman of Klausner Kaufman Jensen & Levinson PA.

Cruise is represented by Reid Schar, Stephen L. Ascher and Jacob P. Wentzel of Jenner & Block LLP.

GM is represented by Daniel J. Kramer, Andrew J. Ehrlich, Richard C. Tarlowe and Kristina A. Bunting of Paul Weiss Rifkind Wharton & Garrison LLP, and Stephanie A. Douglas and Roger P. Meyers of Bush Seyferth PLLC.

The case is In re: General Motors Company Securities Litigation, case number 4:23-cv-13132, in the U.S. District Court for the Eastern District of Michigan.

--Additional reporting by Jonathan Capriel, Rae Ann Varona and Sydney Price. Editing by Adam LoBelia.



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Law Profs Tell Del. Justices Moelis Appeal Would Blunt DGCL

By **Jeff Montgomery**

Law360 (November 27, 2024, 6:42 PM EST) -- Fourteen law professors have urged Delaware's Supreme Court to reject what they branded as a corporate bar effort to use an appeal from a Chancery Court ruling — potentially mooted for future claims by a new law — in order to "enact a sweeping transformation of the way that Delaware's corporate law gets made."

The state's Supreme Court approved the professors' friend of the court filing on Wednesday in the windup for high court arguments on a Moelis & Co. appeal from **a ruling** by Vice Chancellor J. Travis Laster in February. That decision rejected Moelis' claims that stockholders waited too long to sue over an agreement giving more power to founder and CEO Ken Moelis and affiliated entities, and invalidated the deal.

Delaware's corporate bar quickly drafted legislation to shield future Moelis-type rulings. Signed into law in June, the measure allows corporations to cede some governance rights to big stockholders as well as some state corporate oversight to other jurisdictions.

Moelis nevertheless appealed, arguing that Vice Chancellor Laster wrongly rejected its claims that the shareholders acted too late to challenge its longstanding stockholder agreement practice. Also challenged was a \$6 million fee awarded to stockholder attorneys, with **four law professors** submitting a friend of the court brief supporting Moelis' position.

"On the merits, Moelis' appeal will have little impact either way, as the General Assembly has since rewritten the relevant statute," said attorneys for West Palm Beach Firefighters Pension Fund, lead plaintiff in the class suit that targeted Moelis' stockholder agreement.

"Yet, in this narrow, statutory case [Moelis'] amici seek an advisory opinion that would radically redefine Delaware's ripeness doctrine and largely foreclose the Court of Chancery from playing its historical role in interpreting and enforcing the Delaware General Corporation Law" and subsequent decisions, the 14 professors argued.

By ruling out challenges of the sort brought in Moelis, the professors said, "their proposal would work a substantial change that would cripple Delaware's private enforcement regime," which has guided the DGCL's evolution, and instead help "illegal and unreasonable provisions to spread and become market-standard."

In the appeal, attorneys for Moelis argued that Vice Chancellor Laster's decision failed to show that the stockholder agreement has "the effect of removing from directors in a very substantial way their duty to use their own best judgment" on management matters, and wrongly concluded that it was not time-barred.

Prior to Moelis, attorneys for the company said in a brief, "no Delaware court had held that such rights, contained in an agreement between a stockholder and the corporation, violated" the DGCL. The decision also was described on appeal as failing to show that the stockholder deal displaced director duty to "use their own best judgment on management matters."

The West Palm Beach friends' brief asserted that two attorneys for the law professors supporting Moelis had written in a forthcoming paper elsewhere that a decision that a Moelis-type challenge was ripe "should not be construed as a fundamental shift in Delaware's view of ripeness in facial validity challenges." Instead, it was described as potentially similar to the effect of a poison pill rights plan

"adopted in response to the threat of a hostile takeover."

Vice Chancellor Laster's decision held that alleged excessive delays in a claim could not validate a void act, and even if the "laches" time-bar applied, the original suit challenged "an ongoing statutory violation" that could not go stale. The same decision also held that the West Palm Beach fund's challenge to terms of the Moelis provisions presented a "pure question of law" and was therefore ripe for the decision.

Moelis' "amici would have Delaware shut down meritorious stockholder lawsuits, insulating companies and their advisors from judicial scrutiny, even when they get Delaware law wrong," the West Palm Beach amicus brief said, branding the Moelis position bad law and worse policy.

"This court can trust the Court of Chancery to use case management tools and calibrated fee awards to manage docket congestion. It need not distort substantive law or immunize illegal practices."

Moelis & Co. is represented by John P. DiTomo and Miranda N. Gilbert of Morris Nichols Arsht & Tunnell LLP and William Savitt, Anitha Reddy, Won S. Shin and Daniel B. Listwa of Wachtell Lipton Rosen & Katz.

West Palm Beach Firefighters' Pension Fund is represented by Thomas Curry, David L. Wales, Joshua Nelson and Adam D. Warden of Saxena White PA.

Counsel for the amicus curiae are Ned Weinberger and Mark D. Richardson of Labaton Keller Sucharow LLP, Lori Marks-Esterman and Jacqueline Y. Ma of Olshan Frome & Wolosky and Joel Fleming and Amanda Crawford of Equity Litigation Group LLP.

The appellate case is Moelis & Co. v. West Palm Beach Firefighters' Pension Fund, case number 340,2024, in the Supreme Court of the State of Delaware.

The case under appeal is West Palm Beach Firefighters' Pension v. Moelis & Co., case number 2023-0309, in the Court of Chancery of the State of Delaware.

--Editing by Linda Voorhis.



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PBM Says Opioid Ruling Ignored High Court's Privilege Stance

By **Gianna Ferrarin**

Law360 (November 27, 2024, 5:56 PM EST) -- A special master's ruling that internal audit records from Express Scripts Inc. are not protected by attorney-client privilege should be overturned because it contradicts nearly 40 years of U.S. Supreme Court precedent, the pharmacy benefit manager told an Ohio federal court overseeing multidistrict opioid litigation.

In its objection to the special master's ruling, Express Scripts argued 14 documents detailing internal investigations and audits are privileged because they contain legal advice on compliance issues. The Tuesday objection by ESI comes after the special master ruled earlier this month the documents constitute business advice — not legal advice — and are subject to production requirements. That ruling should be vacated, ESI argued.

"The only 'business' purpose identified by the special master is in fact a legal one: compliance with statutes and regulations," ESI said in its objection. "If counsel cannot provide privileged advice to a business or corporation to assess compliance with law, then the attorney-client privilege is eviscerated in the corporate context; after all, it is hard to imagine a more quintessentially legal purpose than advising a client on how to comply with the law."

In the litigation, ESI and fellow pharmacy benefit manager OptumRX are **accused** of colluding with drug manufacturers to increase the accessibility and sales volume of branded opioid drugs. The litigation — brought by the city of Rochester, New York, and Lincoln County, Missouri — also accuses pharmacies, drugmakers, doctors, insurers and other healthcare entities of playing a role in the opioid epidemic.

ESI granted the special master access to a sampling of the 14 documents at issue in late October after a privilege challenge by plaintiffs, according to court filings. The documents report on audits undertaken by ESI's pharmacy compliance organization under the direction of ESI's legal department, ESI recounted in its brief.

Following review, the special master issued a **ruling** on Nov. 16 rejecting the notion that the documents were "quintessentially legal in character."

"Although ESI's documents may well contain advice from a lawyer, the advice concerns how to structure business operations to ensure compliance with regulatory requirements," the special master said in the order. "It is business advice. It is not protected by attorney-client privilege."

In particular, the special master noted the documents did not support a claim of privilege because they either did not indicate who received them or were sent to "numerous non-lawyers." The special master also said legend markings on the documents denoting they were privileged did not sufficiently demonstrate the documents contained legal advice.

But in its Tuesday opposition, ESI argued the special master's ruling goes against precedent established by the U.S. Supreme Court's 1981 decision in *Upjohn Co. v U.S.* , where justices held communications between a company's employees and counsel can be protected by attorney-client privilege.

ESI also cited Sixth Circuit precedent holding attorney-client privilege applies where "legal advice of any kind is sought," protecting communications for which legal advice is the "primary purpose."

Under this case law, "advice from counsel intended to ensure compliance with laws and regulations falls squarely within the attorney-client privilege," ESI argued. This case law also contradicts the special master's findings regarding the number of non-lawyers who received the documents, according to ESI.

"In sum, the ruling's conclusion that attorney-client communications concerning regulatory compliance are primarily for a business purpose — and therefore not privileged — is wrong as a matter of law and should be vacated," ESI said in the brief.

If the Ohio federal court backs the special master's ruling, it should certify that order for interlocutory appellate review, ESI also argued. According to ESI, the question of how to treat the 14 documents in this case has implications for differing rulings among district courts in the Sixth Circuit on whether communications involving "mixed legal and business purposes" are privileged.

Counsel for the parties did not immediately respond to a request for comment on Wednesday.

The municipal governments are represented by Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC and Peter H. Weinberger of Spangenberg Shibley & Liber.

The Express Scripts defendants are represented by Michael J. Lyle, Jonathan G. Cooper, Matthew K. Wasserman and Sage R. Vanden Heuvel of Quinn Emanuel Urquhart & Sullivan LLP.

The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Hailey Konnath. Editing by Philip Shea.

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A Look Back At Years Of Zantac Litigation: Timeline

By **Emily Field**

Law360 (November 27, 2024, 8:43 PM EST) -- After the U.S. Food and Drug Administration raised a red flag five years ago that heartburn drug Zantac and its generics contained levels of a chemical that could cause cancer, litigation kicked off in federal and state courts. Here, Law360 presents a timeline of the lawsuits, trials and settlements that ensued.

In the Federal Courts

September 2019

The FDA warned that trace amounts of cancer-causing chemical nitrosodimethylamine, or NDMA, had been found in antacid Zantac and similar generic drugs that contain ranitidine.

February 2020

The Judicial Panel on Multidistrict Litigation consolidated suits against Sanofi US Services Inc., Pfizer Inc., Boehringer Ingelheim Pharmaceuticals Inc. and GlaxoSmithKline over ranitidine products before U.S. District Judge Robin Rosenberg in the Southern District of Florida.

One thing that you have to give Judge Rosenberg's credit for she jumped on the Zoom phenomenon when nobody really knew what it was. Instead of allowing the case to grow stale, we entered deposition protocol orders that for the first time, almost exclusively, did a major product liability MDL, without people ever getting together. Eventually, I traveled to Brussels twice and took a bunch of in person depositions. But I'd say 90% of all the depositions in the case were done by Zoom.

Mikal Watts

Watts Trial Firm

April 2020

The FDA pulls all prescription and over-the-counter ranitidine drugs from the market.

July 2021

Judge Rosenberg **cuts retailers and pharmacies** from the MDL, ruling that consumers' claims that the companies' negligence played a part in the carcinogen forming in the drug were implausibly claimed. The companies were, among others, Albertsons Cos. Inc., Walgreen Co., CVS Pharmacy Inc., Costco Wholesale Corp., The Kroger Co. and Amazon.com Inc.

December 2022

Judge Rosenberg in a **341-page ruling** dismissed all claims against Pfizer, GlaxoSmithKline, Boehringer Ingelheim and Sanofi when she found that that "no scientist outside this litigation" has concluded that the drug's active ingredient causes cancer.

At that point, more than 2,450 plaintiffs had filed lawsuits in or had their suits transferred to the Florida federal court.

In the State Courts

August 2022

A 79-year-old Illinois man voluntarily dismissed his suit in state court one week before the trial started, which would have been the first in state and federal litigation. He cited health reasons behind his decision.

January 2023

The New York Litigation Coordinating Panel **consolidated** more than 40 suits over Zantac after the federal MDL was tossed a month earlier. The panel found that coordination would not disrupt or delay the progress of the cases or increase their expense, and would best serve the needs of the court and the parties. The suits were brought against Boehringer, Sanofi-Aventis US LLC, Chattem Inc., GlaxoSmithKline LLC and Pfizer Inc.

March 2023

A California appeals court **refused** to revive a nonprofit's attempt to force generic antacid drugmakers and sellers to comply with Proposition 65's labeling requirement, which warns of cancer risks when certain chemicals are present in a product, finding that federal law preempts the state statute. Named in the suit were Perrigo Co., Apotex Corp. Granules USA Inc. and Dr. Reddy's Laboratories Inc., as well as the sellers 7-Eleven Inc. and Target Corp.

August 2023

Ten Connecticut residents sued Boehringer Ingelheim, GlaxoSmithKline, Pfizer and Sanofi in state court, accusing them of turning a "blind" eye to the dangers of ranitidine.

October 2023

A settlement was reached in **October 2023** on four breast cancer cases chosen in California as bellwethers for those patients who made claims in Golden State proceedings.

January 2024

Delaware Superior Court Judge Vivian L. Medinilla heard arguments from dozens of attorneys in a multiday tussle over the admissibility of expert reports and testimony related to tens of thousands of personal injury claims over ranitidine.

We started litigation in Delaware, because all four of the drug companies are incorporated in Delaware. There are about 80,000 plaintiffs with claims, and everyone you know, the claim is that the drug manufacturers hid this information from the public. They didn't warn it could cause cancer. Now we have all these people who now have developed cancer after taking ... heartburn medication that the FDA has recalled, and so that litigation is ongoing in Delaware.

Jennifer Moore

Moore Law Group

April 2024

Sanofi said that it had reached an agreement in principle to settle about 4,000 personal injury claims linking the discontinued heartburn drug Zantac to cancer.

The financial terms of the agreement in principle are confidential, but it resolved thousands of Zantac personal injury lawsuits against the French pharmaceutical company across the country, including in California, New York and Connecticut, apart from cases filed in Delaware, according to the company's statement. Sanofi did not concede to liability.

May 2, 2024

The **first trial** in state and federal litigation over whether Zantac and its generics cause cancer started in a Chicago courtroom, as attorneys for an 89-year-old Illinois woman who told jurors that her colorectal cancer diagnosis and the suffering it's caused can be attributed to her 20-year use of the drug. The jury later found in the same month that the drugmakers were not responsible for her cancer.

July 18, 2024

GlaxoSmithKline and Boehringer Ingelheim returned to Illinois state court to face separate juries to defend against Zantac users' claims that the drug caused them to develop cancer. Plaintiff Carrie Joiner told jurors that she took Zantac for 15 years, which led to her 2021 diagnosis of colorectal cancer.

In the same building, plaintiff Martin Gross and Boehringer finished the selection of the jury that will consider whether the medication caused his prostate cancer.

July 23, 2024

A **split Second Circuit panel** allowed nine consolidated suits over carcinogens in heartburn medication Zantac to remain in Connecticut state court, with the majority ruling that the cases' consolidation is not enough to open up federal jurisdiction. The cases were brought against Pfizer, Sanofi-Aventis, GlaxoSmithKline and Boehringer Ingelheim.

July 29, 2024

GlaxoSmithKline said it had settled a lawsuit brought by an Illinois man who took the heartburn medication Zantac or its generic counterpart for more than 20 years and claimed the drug caused his prostate cancer. Plaintiff Ronald Kimbrow alleged in his May 2023 lawsuit that he used over-the-counter Zantac from 1995 to 2019, and over-the-counter ranitidine from approximately 2012 to 2018.

August 5, 2024

In a second trial victory for GlaxoSmithKline, a Chicago jury found that the company is not liable for a woman's colorectal cancer. The plaintiff, Carrie Joiner, had argued that her use of Zantac had caused her 2021 cancer diagnosis, and argued the company was negligent in its development and sale of the drug and failed to adequately warn consumers and doctors of the risks associated with taking the medication.

August 7, 2024

An Illinois state judge declared a mistrial in a lawsuit claiming Boehringer Ingelheim's over-the-counter Zantac caused the plaintiff to develop prostate cancer when the jury sent signs that they could not reach a unanimous verdict.

September 18, 2024

GlaxoSmithKline said that it had reached two settlements in California state court over cancer allegations, although the company did not disclose the deal amounts.

The company said in a brief statement that it had made confidential deals with John Russell and Annette Hughes to end their suits alleging that the over-the-counter drug caused their bladder cancer and colorectal illness.

September 19, 2024

Another mistrial was declared in a lawsuit over claims that Boehringer Ingelheim's over-the-counter Zantac caused an Illinois man's prostate cancer.

October 9, 2024

GlaxoSmithKline said that it will pay up to \$2.2 billion to settle roughly 80,000 state court cases claiming Zantac heartburn medication or the generic ranitidine caused them to develop cancer. The agreements were with 10 plaintiff's firms who together represent users of the drug in about 93% of the Zantac litigation pending against the company in the U.S.

The company also said it struck a \$70 million deal in a Connecticut laboratory's whistleblower lawsuit alleging that GSK defrauded federal health insurance programs for billions of dollars by hiding for 40 years that Zantac decomposes into a carcinogen even when just sitting on the shelf.

There's really one major defendant that, for some reason, isn't willing to settle and wants to fight for whatever reasons. And that's Boehringer. They also happen to be the only defendant that's a privately held company. They have no stockholder issues. I think it's interesting that they're the ones who are trying to fight and keep the litigation going.

R. Brent Wisner

Wisner Baum

--Additional reporting by Dorothy Atkins. Editing by Emily Kokoll and Michael Watanabe.

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32,000 Developers Certified As Class In Valve Antitrust Case

By **Matthew Perlman**

Law360 (November 27, 2024, 6:12 PM EST) -- A Washington federal court has certified a class of around 32,000 game developers in a case accusing Valve Corp. of blocking competition by enforcing pricing and other restrictions on games sold through its Steam platform.

U.S. District Judge Jamal N. Whitehead **issued an order** Tuesday certifying a **class of developers** that paid a commission to Valve for the sale or use of a game on the Steam platform between Jan. 28, 2017, and the present.

The judge appointed Quinn Emanuel Urquhart & Sullivan LLP, Constantine Cannon LLP, Lockridge Grindal Nauen PLLP and Wilson Sonsini Goodrich & Rosati PC to serve as co-lead counsel for the class.

"In opposing certification, Valve objects to plaintiffs' market definition; it also attacks whether plaintiffs have shown sufficient ... commonality and predominance," the order said. "None of Valve's critiques, however, are enough to defeat certification."

Game developers, including Wolfire and Dark Catt, accuse Valve of violating antitrust law by enforcing a most-favored-nations policy that they say prevents companies from offering cheaper or better versions of games on other platforms. The developers claim the policy allows Valve to maintain its dominance and to charge inflated commissions of around 30%.

Gamers have **similar claims** pending against Valve, some of whom defeated a company arbitration clause, while Valve has a separate case **seeking to block** several hundred gamers from further arbitrating their antitrust claims. The Tuesday order had no impact on the consumer cases.

In opposing the developers' certification bid, Valve had argued the proposed game distribution market wrongly focuses only on PC game downloads, while excluding gaming consoles and mobile games. Valve also contended the market wrongly excludes other forms of PC game distribution, such as physical stores, cloud gaming and subscription models.

But the judge said the developers' expert made clear that downloaded PC games are distinct, based on the quality of the gaming experience and other factors.

Valve also argued that there's not enough common evidence showing it has a most-favored-nations policy for a class to be certified, saying that it requires only "content parity" in its standard distribution agreements for content purchased within a game.

The judge said the developers alleged, however, that Valve interprets its policy "in a roundabout manner and through various means," all of which contributes to "a common industry understanding of Valve's price-parity expectation."

"This is sufficient, under the rule of reason, to establish common evidence of a price parity expectation that drives common market behavior," the order said.

The judge found that examples of some games selling for cheaper on other platforms and testimony from game companies explaining that they prefer to keep prices uniform across platforms, is not enough to defeat certification, since those issues raise common questions about the classwide

response to Valve's alleged expectations.

The class certification order on Tuesday also rejected a motion from Valve seeking to exclude testimony from the class's expert, Steven Schwartz, who concluded that Valve has a dominant position in the game distribution market and maintains that dominance by enforcing a most-favored-nations policy.

Among Valve's arguments against the testimony was that it assumes the existence of a most-favored-nations policy without evidence. But the judge said Valve "cloaks" its policy, so the expert relied on examples of one-on-one communications between Valve and video game companies explicitly describing the requirement to not sell games cheaper elsewhere.

The judge also rejected Valve's challenge of how Schwartz calculated the share Valve would supposedly have in a competitive market. The expert relied on sales on the Steam platform from 2008 to 2012, when Valve was still producing a large number of games, even though it now mostly sells games produced by others.

The judge said it was reasonable to use this timeframe because in a competitive market, the expert found Valve would be "relegated to generating revenue mostly from the sale of its own games."

"Ultimately, Dr. Schwartz's resulting opinion may be incorrect. But that is not the standard for admissibility," the order said. "He need only provide a reliable method to establish the existence of antitrust impact and injury, and then show that class-wide damages are susceptible to common proof."

An attorney for the class, Ankur Kapoor of Constantine Cannon LLP, told Law360 on Wednesday they are pleased with the ruling.

"On behalf of the four co-lead counsel firms, plaintiffs are pleased that the court has rightly held these issues should be resolved for all class members," Kapoor said. "We look forward to prosecuting this important case."

Representatives for Valve did not respond to a request for comment Wednesday.

The proposed class is represented by Alicia Cobb, Steig D. Olson, David LeRay, Nic V. Siebert, Andrew Faisman and Adam Wolfson of Quinn Emanuel Urquhart & Sullivan LLP, Ankur Kapoor, J. Wyatt Fore and Noah Brecker-Redd of Constantine Cannon LLP, W. Joseph Bruckner, Joseph C. Bourne, Laura M. Matson and Kyle Pozan of Lockridge Grindal Nauen PLLP, and Stephanie L. Jensen, Tyre L. Tindall, Kenneth O'Rourke and Jordanne M. Steiner of Wilson Sonsini Goodrich LLP.

Valve Corp. is represented by Blake Marks-Dias and Eric A. Lindberg of Corr Cronin LLP, Nathan M. Buchter of Fox Rothschild LLP, Charles B. Casper, Jessica Rizzo, Peter Breslauer and Robert E. Day of Montgomery McCracken Walker & Rhoads LLP and Andrew C. Indorf, Priyanka Timblo and Scott M. Danner of Holwell Shuster & Goldberg LLP.

The case is Wolfire Games LLC et al. v. Valve Corp., case number 2:21-cv-00563, in the U.S. District Court for the Western District of Washington.

—Additional reporting by Jared Foretek, Nadia Dreid, Bonnie Eslinger, Rachel Riley and Bryan Koenig. Editing by Michael Watanabe.



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AI Co. Seeks To Dismiss Actors' Class Action Over Voice Use

By **Ivan Moreno**

Law360 (November 27, 2024, 5:38 PM EST) -- A startup that makes software to create voice-over narrations has asked a Manhattan federal judge to dismiss an amended class action that accuses the company of using actors' voices without permission, saying the updated complaint takes a "kitchen-sink approach" by adding several claims but "very few new relevant facts."

Lovo Inc. said in a Monday **motion to dismiss** that the proposed class action from voice actors Paul Lehrman and Linnea Sage doubled the size of their complaint "to see if something will stick if they use enough verbs, adjectives, legal terms, irrelevant facts, and conclusory allegations."

"But, with all the bluster, there are very few new relevant facts, nothing which cures the problems with the original complaint, and nothing that plausibly states a cause of action," Lovo said.

The plaintiffs uploaded their voices to Fiverr International Ltd., which is not a party to the suit. Lovo said the plaintiffs have "failed to tell the court that Fiverr terms of service provide copyright licenses to buyers on the Fiverr platform (like Lovo)."

Therefore, Lovo said the plaintiffs' new claim that they registered copyrights for their sound recordings are "unavailing" given the Fiverr license.

Lehrman and Sage, who are married and members of the Screen Actors Guild-American Federation of Television and Radio Artists, **alleged** that they were tricked into providing voice samples by anonymous people whom they now believe were representing Lovo. The actors alleged they were told their recordings were for research and would not be made publicly available. Lehrman was paid \$1,200 and Sage \$400, according to their complaint.

In their amended complaint, Lehrman and Sage "improperly added" an anonymous or hypothetical "John Doe" plaintiff out of desperation, Lovo argued. The company said if "John Doe" is being used as a placeholder for a hypothetical plaintiff who does not exist, the court should dismiss all the "John Doe" claims.

If "John Doe" is a real person, Lovo argued he should still be dismissed because the plaintiffs violated the rules of civil procedure by not obtaining permission from the court to not name him.

"The only more specific allegation is that John Doe 'is a consumer who used the Lovo service,'" Lovo said. "All other 'John Doe' allegations are conclusory or plural. There is no allegation of any other specific action or even where he lives."

The suit claimed violations of New York's Civil Rights Law and Deceptive Practices Act, false advertising, unfair competition and false affiliation in violation of the Lanham Act, unjust enrichment and fraud, among other things.

The actors said Sage discovered in June 2023 that Lovo had been using and editing her voice in its promotional materials for years, including in an investor presentation shared on YouTube. Lehrman learned in April 2022 that a YouTube channel that was promoting videos about Russian military equipment used his computer-generated voice, according to the complaint.

The following year, Lehrman said he heard his voice used on an episode of the podcast "Deadline

Strike Talk," which "ironically ... was about the dangers of AI technologies," the complaint said. The actors said Lovo is still using their voices, including to promote its voice generator "Genny."

Lovo argued that the state claims are time-barred and that the unjust enrichment claim is preempted by the New York Civil Rights Law and duplicative of other claims. The Lanham Act claims fail, Lovo argued, because a voice alone is not protectable by the Lanham Act, and "there can be no claim for endorsement or affiliation of a voice that is anonymous or fictitious."

Counsel for the plaintiffs said in a statement to Law360 on Tuesday that Lovo's motion "is wrong on both the law and the facts."

"But it is creative," said Steve Cohen of Pollock Cohen LLP. "We look forward to showing through our opposition papers that people's voices are protected against Big Tech's illegal cloning and unauthorized use."

Lehrman and Sage are represented by Steve Cohen and Anna Menkova of Pollock Cohen LLP.

Lovo is represented by Michael S. Lazaroff, David E. Case and William W. Bergesch of Rimon PC.

The case is Paul Lehrman et al. v. Lovo Inc., case number 1:24-cv-03770, in the U.S. District Court for the Southern District of New York.

--Editing by Dave Trumbore.

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Prudential Website Visitors Get Class Cert. In Tracking Row

By **Allison Grande**

Law360 (November 27, 2024, 8:59 PM EST) -- A California federal judge has certified a class of life insurance quote seekers who are accusing Prudential Financial Inc. and its software vendor of illegally recording their keystrokes and information, finding that questions about website visitors' knowledge of this practice can be resolved on a classwide basis.

In an order issued Tuesday, U.S. District Judge Charles R. Breyer ruled that Valerie Torres and Rhonda Hyman had met the numerosity, predominance and other requirements necessary to press their suit accusing Prudential, its subsidiary Assurance IQ LLC and software provider ActiveProspect Inc. of violating the California Invasion of Privacy Act on behalf of all individuals who had filled out a form to receive a life insurance quote on Prudential's website between Nov. 23, 2021, and Dec. 13, 2022.

The plaintiffs argued that the form contained a script developed by ActiveProspect that allowed the software provider to intercept and record users' real-time interactions with the document, including their keystrokes, mouse clicks and data inputs, without their permission.

The defendants contended that the plaintiffs couldn't certify their claims on a classwide basis because individualized issues predominated over the questions of whether class members had impliedly consented to ActiveProspect's real-time interception of their information, whether they were eligible class members and whether the alleged interception occurred in California.

On the issue of consent, the defendants asserted that the court would need to conduct separate inquiries to determine whether each class member learned about the challenged conduct through a variety of possible avenues, including Prudential's privacy policies and news articles, legal advertisements and other third-party material about this "session replay" technology.

But Judge Breyer found that the existence of these multiple potential sources of information didn't doom the class claims, concluding that "the issue of how a reasonable user would understand Prudential's privacy policies is a common one that can be resolved with classwide proof" and that "a threshold common question" also exists about whether any of the third-party sources "provided notice of the challenged conduct in the first place."

"Here, only one of Defendants' sources — the Life Annuity Specialist article — could be capable of providing the kind of notice required to establish consent, and that article was published just a few weeks before the end of the class period," Judge Breyer noted. "The news articles and law firm advertisements, in contrast, are too general to give explicit notice to the particular conduct at issue here, either because they discuss session replay technology in different contexts or because they do not disclose Prudential's relationship with Assurance and ActiveProspect."

Therefore, "none of these sources create an individualized implied-consent inquiry that would predominate over common questions or threaten to make adjudication unmanageable," the judge concluded, adding that if the Life Annuity Specialist article is later found to have provided sufficient notice to establish implied consent, "the Court can later refine the class period to exclude any class members that might have seen the article."

The defendants also fell short on their argument that the proposed method of identifying injured class members through Assurance's database of those who filled out the Prudential form was "flawed"

because "at least some class members" completed the form on behalf of others.

Judge Breyer concluded that all that was necessary at the class certification stage was the plaintiffs to prove that defendants' records were "capable of showing" which individuals had filled out the Prudential form and had their communications intercepted, which they had done by citing an example of the insurers being able to cross-reference one woman's contact information to identify which form she had submitted for herself and which she filled out on behalf of her father.

Additionally, the judge refused to entertain the assertion that it couldn't be determined on a classwide basis whether the website communications were intercepted in California because some class members could have used a virtual private network, or VPN, to obscure their IP address.

Because the plaintiffs had again identified a "method that is capable of identifying class members who filled out the form while in California — namely, Assurance's alleged ability to cross-reference a class member's ZIP code with their IP address to determine who was using a VPN — "the issue of location does not defeat predominance," according to Judge Breyer.

In his ruling, which not only certified the proposed class but also named Girard Sharp LLP as class counsel and the lead plaintiffs Torres and Hyman as class representatives, Judge Breyer also addressed the threshold issue of Article III standing.

Pointing to the Ninth Circuit's **2020 decision** in **Campbell v. Facebook Inc.** , which held that provision of the California Invasion of Privacy Act at issue in the instant dispute implicates a "substantive right" that, if violated, is enough to cause the type of concrete and particularized harm necessary to establish standing to sue in federal court, Judge Breyer concluded that the plaintiffs' allegations were sufficient to move forward.

"For standing purposes, all that Plaintiffs must allege is that Defendants 'collect[ed] the contents of users' individual private messages ... without [Plaintiffs'] consent,'" Judge Breyer ruled, citing the Campbell decision. "[H]ow the collected data was later used is irrelevant."

Counsel for the parties couldn't be reached for comment Wednesday.

The plaintiffs are represented by Dena C. Sharp, Simon S. Grille, Nina R. Gliozzo and Jordan Isern of Girard Sharp LLP.

The defendants are represented by Kelly M. Klaus, Jonathan H. Blavin, Virginia Grace Davis, Laura D. Smolowe, Sidney Eisner of Munger Tolles & Olson LLP.

The case is Hazel et al. v. Prudential Financial Inc. et al., case number 3:22-cv-07465, in the U.S. District Court for the Northern District of California.

--Editing by Andrew Cohen.



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Fintech Co. Ingo, Consumers Reach Deal To End Breach Suit

By **Emilie Ruscoe**

Law360 (November 27, 2024, 6:12 PM EST) -- Fintech deposit underwriter Ingo Money Inc. has reached a handshake deal to settle proposed class action claims that for seven months it sat on news that hackers had gotten hold of a "gold mine" of customers' personal information.

In a **settlement notice** filed Tuesday in Georgia federal court, Ingo and plaintiff Jennie Corona-Cantu told U.S. District Judge Mark H. Cohen they had reached an agreement in principle to settle Corona-Cantu's claims on a classwide basis.

"The parties will work together in good faith to negotiate the remaining terms and prepare the necessary settlement filings," the notice said, noting that the parties aim to execute their settlement agreement by Dec. 6 and move for preliminary approval of the deal by Dec. 16. Other details of the settlement agreement were not immediately available Wednesday.

Corona-Cantu sued Ingo in July after the Alpharetta, Georgia-based company, which contracts with fintech companies to provide its check deposit risk management services, told consumers in late June that months earlier, certain company files had been accessed by unauthorized parties.

The California resident referenced the disclosure letter she'd received from the company telling her that her name, birthday and Social Security number had been among the records compromised in the breach.

Corona-Cantu claimed that the letter arrived far too late — in June 2024 —asserting that the company detected signs of the cybersecurity incident seven months earlier, in November 2023, just weeks after the hack allegedly happened.

"Ingo Money waited seven months to notify the public that they were at risk," Corona-Cantu said. "As a result of this delayed response, plaintiff and [the members of the proposed class of affected consumers] had no idea for seven months that their private information had been compromised and that they were, and continue to be, at significant risk of identity theft and various other forms of personal, social, and financial harm. The risk will remain for their respective lifetimes."

Corona-Cantu's complaint also pointed to the company's data security breach report to the Texas attorney general, which described the personal information stolen in the hack as including bank account and credit card numbers, driver's license numbers and ID numbers from other forms of government-issued identification, such as passports or state ID cards.

The proposed class of affected consumers would include thousands of people, Corona-Cantu estimated, noting that Ingo's website says the company has business relationships with payments giants PayPal and Venmo.

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

Corona-Cantu is represented by MaryBeth V. Gibson of the Gibson Consumer Law Group LLC and Tyler J. Bean of Siri & Glimstad LLP.

Ingo Money Inc. is represented by William P. Horkan and Marc E. Williams of Nelson Mullins Riley & Scarborough LLP.

The case is Corona-Cantu v. Ingo Money Inc., case number 1:24-cv-03023, in the U.S. District Court for the Northern District of Georgia.

--Editing by Rich Mills.

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GOP-Led States Accuse BlackRock Of Driving Up Coal Prices

By **Jessica Corso**

Law360 (November 27, 2024, 5:59 PM EST) -- Texas is leading a coalition of nearly a dozen Republican-led states suing BlackRock Inc. and two other large asset managers for allegedly running an "investment cartel" that takes advantage of their large holdings in publicly traded energy companies to drive up coal prices, a claim that BlackRock has said is "baseless and defies common sense."

The states filed a lawsuit in Texas federal court Wednesday claiming that BlackRock, State Street Corp. and the Vanguard Group have teamed up to pressure the nation's largest coal producers, including Peabody Energy and Arch Resources, into reducing their output in order to meet carbon emissions reduction goals. That decreased output led to higher coal prices, which in turn hurt American consumers and businesses that have had to pay higher electricity prices, according to the lawsuit.

The Texas attorney general's office accused the trio of asset managers of running an "investment cartel" because they collectively hold a large number of shares in every "significant" publicly traded coal producer in the United States.

"Texas will not tolerate the illegal weaponization of the financial industry in service of a destructive, politicized 'environmental' agenda," Texas Attorney General Ken Paxton said in a statement Wednesday.

However, "the suggestion that BlackRock has invested money in companies with the goal of harming those companies is baseless and defies common sense," a company spokesperson said in an email to Law360 Wednesday. "This lawsuit undermines Texas' pro-business reputation and discourages investments in the companies consumers rely on."

The BlackRock spokesperson also said that the company's energy investments are regularly reviewed by both state and federal regulators, and that the investments are focused on delivering financial returns to its clients.

State Street and Vanguard didn't immediately respond to a request for comment.

The other states that joined Wednesday's lawsuit are Alabama, Arkansas, Indiana, Iowa, Kansas, Missouri, Montana, Nebraska, West Virginia and Wyoming.

The lawsuit alleges violations of the Sherman Antitrust Act of 1890 and the Clayton Act as well as state laws against price fixing and deceptive trade practices. In addition to seeking civil penalties, the states are also asking the judge overseeing the case to force the companies to divest their stock in the coal companies or prevent them from voting in a way that would "limit competition in the relevant markets."

The states are represented by David Thompson, Brian Barnes and Harold Reeves of Cooper & Kirk PLLC, Anthony Buzbee and Christopher Leavitt of The Buzbee Law Firm as well as each states' attorney general office.

Counsel information for the defendants wasn't immediately available.

The case is Texas et al v. BlackRock Inc. et al, case number 6:24-cv-00437, in the U.S. District Court for the Eastern District of Texas.

--Editing by Alanna Weissman.

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Zoom Offers SEC \$18M To Settle 2020 Privacy Probe

By **Lauren Berg**

Law360 (November 27, 2024, 7:36 PM EST) -- Zoom Communications disclosed in a U.S. Securities Exchange and Commission filing that it has offered \$18 million to settle an agency investigation into "various security, data protection and privacy matters," including the videoconferencing platform's encryption.

Zoom disclosed in its **quarterly report** Tuesday that in the fall it "recorded an \$18.0 million accrual with respect to a tentative settlement offer for the SEC matter that remains subject to SEC approval," related to an agency probe that kicked off with a subpoena in July 2020 seeking information about privacy and security matters.

Along with the SEC, the U.S. attorney's offices in the Northern District of California and the Eastern District of New York **have been looking into** Zoom's privacy issues, particularly its interactions with foreign governments, including the Chinese government. A subpoena from EDNY was sent in June 2020, followed by subpoenas from NDCA and SEC the next month.

Zoom said in its filing that it is fully cooperating with all three investigations and has been conducting its own internal investigation.

"We do not know when these matters will be completed, including the SEC matter, which facts we will ultimately discover as a result of the investigations, or what actions the government may or may not take," Zoom said in the report.

"We are unable to predict the ultimate outcome of these matters and are unable to reasonably estimate any range of possible loss beyond the \$18.0 million settlement offer for the SEC matter," it added.

Representatives for Zoom and the SEC did not immediately respond to requests for comment Wednesday.

In 2020, the EDNY also brought **unusual criminal charges** against a former Zoom executive accused of conspiring to disrupt a series of virtual meetings commemorating the 1989 Tiananmen Square massacre in China. Prosecutors say Xinjiang Jin, also known as Julien Jin, 39, worked to break up Zoom meetings organized and held by U.S.-based individuals, under the direction of the Chinese government.

Jin, who was Zoom's primary liaison with Chinese law enforcement, is accused of working to disrupt online meetings held to discuss politically sensitive topics deemed to be unacceptable by Chinese officials. He and others allegedly infiltrated the meetings to gather evidence about purported misconduct, but instead fabricated evidence of violations of Zoom's terms of service in order to justify the termination of the meetings, according to the government.

--Editing by Alanna Weissman.

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