

This Week in Chancery Court: Sanctions Over Lost Facebook Emails

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Jennifer Kay

Former Facebook directors face sanctions in the Delaware Chancery Court this week over the loss of emails related to litigation over the Cambridge Analytica scandal.

Here's more from the court's calendar:

Monday: In re Facebook Inc. Derivative Litig., Del. Ch., No. 2018-0307, oral arguments 12/9/24.

At issue: Vice Chancellor J. Travis Laster ruled in May 2023 that Facebook founder Mark Zuckerberg and former directors of the social-media company had to face claims they turned a blind eye to rampant privacy violations, including allowing a firm hired by Donald Trump's 2016 presidential campaign to collect data on millions of users. He'll now consider a motion alleging Sheryl Sandberg and Jeffrey Zients, who's currently White House chief of staff for President Joe Biden (D), used personal email accounts to communicate about the Cambridge Analytica scandal, Meta Platforms Inc.'s \$5 billion settlement with the Federal Trade Commission, and regulatory inquiries. Sandberg allegedly used a fake name for her email account, and she and Zients intentionally destroyed emails even after being told to preserve all documents related to the pending litigation, according to the motion. The directors' attorneys said in a brief that the plaintiffs "have not backed up that claim, and their requests for sweeping and disproportionate relief should be denied."

Court action: Oral arguments on the motion for sanctions will be held in Wilmington, Del.

Facebook Must Face Privacy Suit Over Cambridge Analytica (2)

Monday: Buddenhagen v. Clifford, Del. Ch., No. 2019-0258, oral arguments 12/9/24.

At issue: Vice Chancellor Nathan A. Cook in May ordered the unwinding of a merger involving the wreck of the *Whydah Gally*, a slave ship captured by pirate "Black Sam" Bellamy that sank in 1717 off Cape Cod, Mass. Cook's post-trial opinion sided with a shareholder who alleged underwater explorer Barry Clifford and his late partner breached their fiduciary duties for decades and manipulated a 2018 merger of their various *Whydah*-related entities to sideline minority shareholders. The shareholder now seeks to have Clifford cover his legal expenses totaling \$3.25 million, according to a brief. Clifford's attorneys oppose the fee application, saying in a brief that the shareholder "used this litigation to pursue a personal vendetta" and could have achieved better results in an earlier stage of litigation without going to trial.

Court action: Oral arguments on the fee application will be heard in Wilmington, Del.

Unfair Shipwreck Merger Is Unwound by Chancery Court

Monday: Neem Int'l CV v. Shulman, Del. Ch., No. 2022-0187, trial 12/9/24.

At issue: An offshore investment firm filed a lawsuit in March 2022 against Ukrainian businessman Vadim Shulman, alleging he looted the now defunct biotech company Pathway Genomics Corp. while its board looked the other way. Former Joint Chiefs of Staff Chairman Peter Pace was initially named as a defendant, but Vice Chancellor Lori W. Will dismissed him without prejudice from the case in December 2022. The matter now goes to trial, and Shulman's attorneys say he won't be able to attend in person because he's not permitted to enter the country, according to a joint pre-trial brief.

Court action: A five-day trial will be held in Wilmington, Del.

Joint Chiefs Ex-Chairman Named in Pathway Genomics Investor Suit

Friday: In re Hemisphere Media Grp. Inc. S'holders Litig., Del. Ch., No. 2023-0555, settlement hearing 12/13/24.

At issue: Laster must give final approval to Hemisphere Media Group Inc.'s proposal to pay \$15 million to end a class action over its take-private buyout by Searchlight Capital Partners LP and a related side deal with TelevisaUnivision Inc. The settlement would resolve shareholder claims targeting the 2022 transactions, a private equity acquisition that valued the company at \$285 million, and the sale of a Spanish-language streaming service for \$125 million. Attorneys for the investors leading the litigation seek a \$2.94 million fee award. Two hedge funds pursuing separate litigation against Hemisphere have objected to the settlement, saying in a brief that they "do not want to receive their portion now if receiving it will be considered an election against pursuing their potentially greater appraisal remedy, which they intend to pursue."

Court action: A settlement hearing will be held via videoconference.

Hemisphere Media Buyout Challenge Case Settles for \$15 Million

Friday: Lincolnshire Police Pension Fund v. Taylor, Del. Ch., No. 2020-0487, settlement hearing 12/13/24.

At issue: Laster also has to approve a proposed \$8 million settlement to resolve investor claims that Floor & Decor Holdings Inc.'s private equity backers used misleading sales data to pump its stock for a public offering, then sold \$466 million worth before it tanked. The deal

also includes a stronger insider trading policy, the addition of an independent director, and a requirement for the board's chair to be an independent outsider, among other corporate governance improvements. The investors' attorneys have asked for a \$2.1 million fee award.

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

Floor & Decor Investor Accuses Ares Management of Insider Trades

Friday: Reith v. Lichtenstein, Del. Ch., No. 2018-0277, settlement hearing 12/13/24.

At issue: Vice Chancellor Morgan T. Zurn has to sign off on a proposed \$6 million settlement to end a shareholder's lawsuit that alleged Steel Connect Inc. and its board allowed insiders linked to a partial parent company to take majority control. The accord also requires the board maintain an independent audit committee, among other corporate governance changes. The shareholder's attorneys seek \$1.15 million for fees and expenses, plus a \$1 million mootness fee to be paid by the company.

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

Steel Connect Board Must Face Claims It Gave Insiders Control

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U.S. Attorney can unstick efforts to expose HB 6 damage by offering immunity to balking witnesses: editorial

[cleveland.com/opinion/2024/12/us-attorney-can-unstick-efforts-to-expose-hb-6-damage-by-offering-immunity-to-balking-witnesses-editorial.html](https://www.cleveland.com/opinion/2024/12/us-attorney-can-unstick-efforts-to-expose-hb-6-damage-by-offering-immunity-to-balking-witnesses-editorial.html)

December 8, 2024

1. Opinion

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In this June 2023 file photo, U.S. Attorney for the Southern District of Ohio Ken Parker, second from left, reads a statement after a jury convicted ex-Ohio House Speaker Larry Householder and lobbyist Matt Borges of racketeering in the House Bill 6 corruption case. Parker is flanked by the prosecutors who tried the case, from left to right: Matt Singer, Megan Gaffney Painter, and Emily Glatfelter. Now, by offering federal immunity to balking FirstEnergy Corp. witnesses in a state HB 6 probe, Parker can help the Public Utilities Commission of Ohio investigation get to the truth about how Ohio legislative and regulatory bodies were hijacked by corporate interests, The Plain Dealer/cleveland.com editorial board writes today. (Photo by Jake Zuckerman/cleveland.com)

By

Editorial Board, cleveland.com and The Plain Dealer

According to a maxim, said to date from ancient Greece, “The wheels of justice turn slowly, but grind exceedingly fine.” Nowhere does that seem more true today than in Ohio, where investigations, lawsuits and prosecutions over 2019’s House Bill 6 scandal continue – at a snail-like pace.

That’s partly because of procedural and legal snares that the same U.S. Attorney responsible for repeated holds on state-level HB 6 investigations can now cure, so Ohio voters and consumers can finally learn the full story of how their legislature and regulators can be and have been hijacked by greedy business interests.

Kenneth L. Parker, the U.S. attorney for Southern Ohio, leads the office that won bribery and racketeering conspiracy convictions against former House Speaker Larry Householder and ex-Ohio GOP chair Matt Borges, both now in federal prison; plea agreements with several other Statehouse figures; and a deferred prosecution agreement with Akron-based FirstEnergy Corp. However, Parker’s office never prosecuted individual FirstEnergy officials, apparently leaving that for the state.

That didn’t keep Parker from asking the Public Utilities Commission of Ohio to stay multiple investigations related to the House Bill 6 bribery scandal, asserting that they might impede the ongoing federal criminal investigation.

PUCO complied. But now that it’s restarted those probes, the PUCO investigation is being impeded by FirstEnergy lobbyists and others repeatedly taking the Fifth against self-incrimination.

Those fears likely don’t have to do with state prosecutions, since Ohio law says that people subpoenaed by the PUCO – for example, on the HB 6 scandal and pertinent FirstEnergy matters – “must testify, even if their answers are self-incriminating. Conversely, prosecutors can’t charge witnesses for ‘any transaction or matter concerning which [a PUCO witness] has testified,’” cleveland.com’s Jake Zuckerman has reported.

But a lawyer representing two PUCO-summoned HB 6 witnesses said they’d decline to answer the commission’s questions because, while Ohio law shields commission testimony from state prosecution, it doesn’t shield PUCO witnesses from potential federal prosecution. That, apparently, is also why a third former FirstEnergy employee declined to answer PUCO questions.

Parker can dispel that fear by offering the witnesses immunity against federal prosecution.

The U.S. attorney should do so.

HB 6 was the centerpiece of what arguably is the biggest pay-to-play Statehouse scandal in Ohio history. HB 6 aimed to bail out, at consumers' expense, two nuclear plants then owned by a subsidiary of FirstEnergy, but turned into a grab bag of utility goodies for FirstEnergy and others. Some of its provisions -- such as eliminating utility energy efficiency mandates and requiring ratepayer bailouts of two money-losing coal plants, one in Indiana -- still remain on the books. The coal-plant subsidy alone has so far squeezed more than \$402 million from Ohio ratepayers, according to the Office of the Ohio Consumers' Counsel.

FirstEnergy's Statehouse lobbying on HB 6 and other measures made the electric company at times seem more a political machine than a public utility: "The jury saw firsthand that FirstEnergy financed Householder's bid for Speaker in exchange for his promise to use that position to pass nuclear bailout legislation," wrote Alexis Zouhary, an assistant U.S. attorney, in a filing countering Householder's Sixth Circuit appeal of his conviction.

To un-jam the procedural complication handcuffing the PUCO investigation into HB 6 and related FirstEnergy misconduct, Parker's office -- if, as seems likely, it won't be bringing further federal indictments in the HB 6 scandal -- should grant immunity from federal prosecution to any PUCO witnesses testifying on House Bill 6 and related matters.

State prosecutors, for their part, have signaled their interest in possibly expanding their HB 6 prosecutions after asking the PUCO not to question FirstEnergy's former vice president for rates and regulatory affairs, Eileen Mikkelsen. The state's key objection: Ohio law would shield her from any state prosecution that drew on her PUCO testimony. The underlying message there is that Ohio prosecutors are watchdogging the PUCO probes to make sure they don't impede state-level prosecutions.

Ohioans deserve full disclosure of the Statehouse and regulatory schemes that ensured that FirstEnergy, a Fortune 500 company, could get their way at the PUCO and boss Ohio General Assembly members like hired help, something that predated Householder's speakership, and which -- if the stakes are high enough -- could well recur.

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SolarEdge Must Face Investor Suit on Saturated Inventory Claims

By Gillian R. Brassil

- Investors sufficiently plead SolarEdge was channel stuffing
- But plaintiffs fell short of alleging executives knew of it

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SolarEdge Must Face Investor Suit on Saturated Inventory Claims

By Gillian R. Brassil 2024-12-06T15:39:07000-05:00

- Investors sufficiently plead SolarEdge was channel stuffing
- But plaintiffs fell short of alleging executives knew of it

SolarEdge Technologies, Inc. must defend a securities fraud lawsuit alleging its executives knowingly misrepresented distributors' too-high inventory levels, a district judge said.

The investors sufficiently alleged that company executives knew the distributors it sent products to had a saturated inventory while characterizing their levels as "low" throughout 2023, said Judge Gregory H. Woods in the US District Court for the Southern District of New York on Wednesday.

The investors sufficiently plead that SolarEdge forced its product on distributors, particularly at end of quarter periods, which helped it achieve its revenue targets, the judge said. Distributors are SolarEdge's main customers that sell those products on to users.

But shareholders failed to allege that top executives were aware of any channel stuffing—the practice of forcing product on a customer to improve a company's financial figures—that later led to overly-high inventory and order cancellations.

"The Court rightfully dismissed almost the entirety of plaintiffs' allegations," attorney Christopher D. Belelieu, a partner at Gibson, Dunn & Crutcher LLP, who represents the company and executives, said in an email on Friday. "We continue to believe the only 2 alleged misstatements that remain in the case (of the over 30 originally pleaded) are meritless and we will prove as much."

The investors were unable to make good on their allegations that demand in Europe was weak or that SolarEdge's sell-through forecasts were wrongly inflated. This amounted to conjecture, as executives foreseeing projections of a slowdown in Europe isn't the same as admitting lacking demand, Woods said.

"Demand growth can flatten or slow and at the same time remain at a high level," Woods said while granting the defendants' motion to dismiss in part.

The ruling comes a year after the investors sued alleging securities violations following major stock drops. The company noted the not-optimal inventory levels held by its European distributors in August 2023 and share prices fell the next day by more than 18%, closing at \$195.51 on Aug. 2. SolarEdge later announced third quarter financial results with lowered revenue expectations, citing issues with inventory and cancellations. Share prices fell more than 27% to close at \$82.90 on Oct. 20, 2023, per the lawsuit—the stock's largest decline ever, according to data compiled by Bloomberg.

The investors' claim that it was misleading for then-chief executive officer Zvi Lando to attribute higher revenues in 2022 to myriad factors while leaving out that the company was channel stuffing in February 2023 didn't amount to a sufficient allegation of wrongdoing, Woods said.

The investors can amend their complaint to shore up its allegations on this and the claims of false and misleading statements concerning demand and sell-through rates.

SolarEdge didn't immediately respond to an email seeking comment. Neither did representation for various plaintiffs.

Pomerantz LLP and Glancy Prongay & Murray LLP represent the investors in this consolidated case.

Gibson, Dunn & Crutcher LLP represent SolarEdge, Lando and then-chief financial officer Ronen Faier.

The case is *In re Solaredge Techs., Inc. Sec. Litig.*, S.D.N.Y., No. 1:23-cv-9748-GHW, 12/4/24.

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Contracts in Texas' BlackRock lawsuit show fees for private law firms

 [reuters.com/legal/government/contracts-texas-blackrock-lawsuit-show-fees-private-law-firms-2024-12-06](https://www.reuters.com/legal/government/contracts-texas-blackrock-lawsuit-show-fees-private-law-firms-2024-12-06)

David Thomas, Mike Scarcella

Government

By David Thomas and Mike Scarcella

December 6, 2024 3:33 PM PST Updated 3 days ago

The BlackRock logo is pictured outside its headquarters in the Manhattan borough of New York City, New York, U.S., May 25, 2021. REUTERS/Carlo Allegri Purchase Licensing Rights , opens new tab

Dec 6 (Reuters) - A sizable payday could await two private law firms hired by the state of Texas for its antitrust lawsuit against asset managers BlackRock, Vanguard and State Street for allegedly driving up energy prices through climate activism.

Contracts with the Texas attorney general's office show that the Buzbee Law Firm and Cooper & Kirk stand to receive success fees of up to \$3,780 per hour or 10% of Texas' potential recovery in the case.

The law firms will receive whatever option produces the smaller sum, according to contracts obtained by Reuters through a public records request. They are not entitled to any payment if the lawsuit is unsuccessful.

Texas and a coalition of 10 other Republican-led states sued BlackRock (BLK.N) , opens new tab, Vanguard and State Street (STT.N) , opens new tab last week in Tyler, Texas, federal court, claiming they exploited their market power and involvement with 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. BlackRock and State Street called the lawsuit baseless after it was filed. A spokesperson for Vanguard did not immediately respond to a request for comment.

"This is a landmark case that could see damages in the billions," said Tony Buzbee of the Buzbee Law Firm. He said the case is his firm's first for the state of Texas, though it has represented counties and municipalities in the state, as well as other states in litigation.

Lawyers representing Texas at Cooper & Kirk did not immediately respond to requests for comment. Cooper & Kirk is also representing Montana in the case. The Montana Department of Justice did not immediately respond to a request for comment.

The firms' contracts with Texas cap hourly rates at \$945 an hour for partners and \$475 an hour for junior associates less than three years out of law school. The hourly rates would be multiplied by four if used to determine the firms' success fees.

The fee provisions are almost identical to contracts Texas signed with law firms Keller Postman and McKool Smith in a biometric privacy lawsuit against Facebook parent Meta Platforms that resulted in a \$1.4 billion settlement in July.

Reporting by David Thomas

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How a Pivot to Plaintiffs' Side Paid Off in Big Win Against Musk

By Roy Strom

- Greg Varallo led trial team in Elon Musk pay suit
- He had spent 36 years defending companies

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How a Pivot to Plaintiffs' Side Paid Off in Big Win Against Musk

By Roy Strom 2024-12-09T05:15:01000-05:00

- Greg Varallo led trial team in Elon Musk pay suit
- He had spent 36 years defending companies

Greg Varallo made his name defending corporations in Delaware shareholder lawsuits but he set a record after switching sides and going after Elon Musk's \$56 billion pay package.

Varallo won a share of a \$345 million fee by leading a trial team for Bernstein Litowitz Berger & Grossmann that challenged the executive pay package at Tesla Inc. The fee is the largest in Delaware Chancery Court history but only a fraction of the nearly \$7 billion award lawyers sought.

Chancellor Kathaleen McCormick's fee approval last week slaps an exclamation mark on a successful career change for Varallo, who launched a Delaware office for Bernstein Litowitz in 2019 after more than three decades practicing with the defense bar.

If the Musk ruling and fee withstand an expected appeal to the Delaware Supreme Court, it will add to a series of victories by the firm in Delaware since Varallo launched the office. They include wins for shareholders in cases involving Williams Cos., Columbia Pipeline Group Inc. and Mindbody Inc., and settlements with Madison Square Garden Entertainment Corp. and Paramount Global.

Varallo has handled more than a half dozen major trials since joining Bernstein Litowitz in 2019.

"It's been all guns blazing ever since," Varallo said in an interview. "There is nothing like Tesla. But we've had some exciting trials and some exciting wins."

Varallo declined to discuss the Tesla case specifically, pointing to a firm statement that said it was "pleased" with McCormick's decision.

Bold Move

The seeds of his bold career move were planted in 2017, when he was negotiating on behalf of 21st Century Fox Inc.'s \$90 million settlement to resolve shareholder claims brought by Bernstein Litowitz stemming from allegations of sexual harassment against Fox News leader Roger Ailes.

A Philadelphia native who describes himself as a "blue-collar kid" and enjoys hunting and poker, Varallo made his career representing big companies such as Fox and Goldman Sachs in major shareholder litigation.

He spent 36 years at Richards, Layton & Finger, Delaware's largest law firm, the last three as president, which is by tradition, a one-term gig. The former president then supports their predecessor and, as Varallo puts it, "sits quietly." Supporting his predecessor wasn't difficult.

"But I wouldn't be that good at sitting quietly," he said. "I don't do that well."

He got a shot at something new when a former professional adversary reached out.

Novel Negotiation

Varallo first worked across from Bernstein Litowitz partners Mark Lebovitch and Max Berger while representing Rupert Murdoch's 21st Century Fox in a shareholder lawsuit related to its phone-hacking scandal in London. He was later hired by the company to defend the Delaware lawsuit stemming from accusations of Ailes' sexual harassment.

Varallo asked the plaintiffs' lawyers to negotiate a settlement before the case was even filed. It was an effort, he said, to prevent any victims of the alleged behavior from being forced to give depositions or testimony about the incidents. Lebovitch was open to the idea, Varallo said, and the \$90 million settlement was filed in court the same day as the complaint.

"Mark kept the entire plaintiff bar at bay for a year, kept them from filing cases," Varallo said. "It was an enormous benefit to the company for a whole lot of reasons, but it couldn't have happened with anybody but BLB&G on the other side."

About two years later, Lebovitch asked if Varallo would launch a Delaware office for his firm. Varallo was reluctant, citing his respect for his firm and the people he worked with.

But he was pushed to make the jump from an unexpected source.

Unexpected Advice

At an outdoor event in Palm Springs, California where he was inducted to the American College of Trial Lawyers, Varallo bumped into Henry Gutman, a since-retired Simpson Thacher & Bartlett partner he hadn't seen in decades since they reviewed documents together as "young pups" at Cravath, Swaine & Moore.

Feeling reflective, Varallo told Gutman he was turning 60 the next day and had been presented with a career change. Gutman told him of a Japanese tradition where people reinvent themselves at age 60.

"My jaw is hitting the ground because I'm thinking about going to the other side, and here's a guy who drops out of nowhere in a polo field, haven't seen him in 30 years, and he's giving me advice from Japan on how to reinvent myself," Varallo said. "It was truly amazing."

Gutman, now an adjunct professor at New York University Law School, didn't respond to a request for comment.

Crossing Musk

The Tesla-Musk case was originally filed in 2018 by lawyers at Friedman Oster & Tejtzel and Andrews & Springer, the other two firms who will split the massive fee. Details of the split are not public.

Varallo and his firm were brought into the case as trial counsel in 2021, after it had survived an initial motion to dismiss. Varallo's highlight in the case was cross-examining Musk.

"When you try cases, the fun part is the cross," Varallo said, noting plaintiff's lawyers have more opportunities for cross examinations than defense attorneys. "So trials are a lot more fun than when you're a defense lawyer."

The 65-year-old said he intends to practice "no more than another couple of years." Then he'll do some teaching and writing.

He said his switch to plaintiff's-side work has been a "hands down" success.

"As a defense lawyer I had to explain myself to insurance companies and take large deductions to get paid," he said, referring to the fact that insurers often paid his bills. "And now I liberate large amounts of money from insurance companies."

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\$200M Uber settlement with investors approved, \$58M for attorneys

[dailyjournal.com/articles/382324](https://www.dailyjournal.com/articles/382324)

Securities

Dec. 9, 2024

The settlement resolves allegations that Uber concealed essential information in its 2019 public offering filing, including internal reports of stalling growth and passenger safety issues, as well as reports of sexual assault by drivers.



A federal judge in San Francisco granted final approval of a \$200 million settlement between a class of investors and Uber Technologies Inc. in a yearslong securities fraud dispute.

The settlement resolves claims that Uber concealed essential information in its 2019 public offering filing, including internal reports of stalling growth and passenger safety threats, as well as reports of sexual assault by drivers. The class members claimed these omissions resulted in significant investment losses.

In addition, U.S. District Judge Richard Seeborg in San Francisco awarded the class counsel, led by several attorneys at Labaton Keller Sucharow LLP, fees of \$58 million for the nearly five years of litigation. Individual plaintiffs were represented by several firms, including The Rosen Law Firm PA and Levi & Korsinsky LLP. *Boston Retirement System et al. v. Uber Technologies Inc. et al.*, 3:19-cv-06361 (N.D. Cal., filed Oct. 4, 2019).

Though no objections were made to the settlement, the company denied any wrongdoing. During the preliminary stage of the settlement, Uber's counsel contended the company was straightforward with its business model and regulatory challenges. The defense also contended it was transparent with investors about enforcement actions the company was facing after launching in certain jurisdictions and dealing with the sexual assault claims.

"The action involved difficult and complex factual and legal issues and, in the absence of settlement, would have involved lengthy proceedings whose resolution was uncertain," Seeborg wrote in his Dec. 4 order. "The requested attorneys' fees and litigation expenses

have been reviewed and approved as fair and reasonable by plaintiffs, sophisticated investors that were directly involved in the prosecution and resolution of the action and which have an interest in ensuring that any fees paid to counsel are duly earned and not excessive."

Cotchett, Pitre & McCarthy LLP was one of several other firms representing plaintiffs in the case.

Mark C. Molumphy, a partner in the firm's San Francisco office who worked on the case described the settlement as "truly historic" when contacted by telephone Friday.

He said the settlement represented "one of the largest IPO recoveries in history, particularly in a case not involving fraud."

He added that the case was unique because actions involving IPO disclosures typically focused on financial disclosures, whereas this case "primarily focused on their business model."

Given this, Molumphy predicted that the settlement could be a "harbinger" for future cases with a similar fact pattern.

The fee award reflected the fact that Seeborg understood the amount of time spent on the case and the fact that it had reached a further stage in proceedings than is typical for settlement agreements, Molumphy said.

The settlement funds will be put into an interest-bearing escrow account and paid out to those who bought Uber shares after the company went public in May 2019.

Attorneys at Allen Overy Shearman Sterling US LLP represented the defendants, which included Uber, its executives, board members and a group of banks that underwrote the IPO.

Based in San Francisco, Uber had a successful IPO, raising \$8.1 billion at \$45 per share. The company's stock plunged after the IPO, losing 42% of its value by November 2019. The company was trading around \$25 per share at that time.

Now, Uber's stock price is around \$65 per share and the company is valued at around \$140 billion.

#382324

Nevada Supreme Court to Decide Fate of Groundbreaking Contingency Cap Ballot Measure

 [law.com/nationallawjournal/2024/12/06/nevada-supreme-court-to-decide-fate-of-groundbreaking-contingency-cap-ballot-measure](https://www.law.com/nationallawjournal/2024/12/06/nevada-supreme-court-to-decide-fate-of-groundbreaking-contingency-cap-ballot-measure)

Amanda Bronstad

What You Need to Know

- Deepak Gupta represents two challengers, the Uber Sexual Assault Survivors for Legal Accountability and the Nevada Justice Association, who insist the ballot measure's description was misleading.
- During arguments, several panelists probed Uber attorney Bradley Schrager on whether the ballot measure's description of its effect, as required by Nevada law, misled voters because it was ambiguous about its definition of the word 'recovery.'
- Uber, which contributed \$5 million to the measure, backed previous initiatives in California and Massachusetts that focused on whether its drivers should be classified as independent contractors or employees.

A lawyer for an Uber-backed ballot initiative that would impose the strictest cap on contingency fees in the country faced questions this week from the Nevada Supreme Court.

An en banc panel of the state's highest court heard oral arguments on whether the ballot measure, which would impose a 20% cap on contingency fees in all civil cases, followed the parameters of Nevada law or was misleading, a position argued by attorney Deepak Gupta, who represents two challengers, the Uber Sexual Assault Survivors for Legal Accountability and the Nevada Justice Association.

At Wednesday's arguments, several panelists probed Uber attorney Bradley Schrager, of Las Vegas-based Bravo Schrager, on whether the ballot measure's description of its effect, as required by Nevada law, misled voters because it was ambiguous about whether its definition of the word "recovery" included or excluded medical costs.

"It seems to me that one word, that has consequence with respect to the 20% contingency fee," Justice Lidia Stiglich told Schrager. That could be construed as misleading, she told him.

"I don't think the absence of the word 'net' can invalidate the entire petition that is entirely simple in every other respect," Schrager replied.

Gupta, of Washington, D.C.'s Gupta Wessler, whose clients filed the suit April 8, has insisted that the initiative is intentionally misleading because its primary purpose is to limit sexual assault lawsuits against Uber Technologies Inc., a ride-sharing firm based in San Francisco. Uber faces 250 sexual assault lawsuits in multidistrict litigation in the Northern District of California.

According to Gupta's lawsuit, the measure fails to tell voters that it would limit their access to lawyers in a broad range of cases. It also doesn't inform voters about its fiscal impact, depriving Nevada's Medicaid of millions of dollars in health care reimbursements.

"At a minimum, proponents must tell voters what they're proposing, how their proposal works and what its main effects are," Gupta told the panel this week. "Yet you wouldn't know any of that from reading the description of effect."

'Initiative Would Wreck the State's Civil Justice System'

The Nevada ballot initiative is the first Uber-backed measure over contingency fees. Uber has contributed \$5 million so far. Past Uber-backed ballot measures, in California and Massachusetts, have focused on whether its drivers should be classified as independent contractors or employees.

The ballot initiative, introduced by a political action committee called Nevadans for Fair Recovery, purports to return a larger share of civil judgments to plaintiffs. If approved, the measure could end up on the 2026 ballot and become effective in 2027.

The measure ended up before the Nevada Supreme Court after Carson City District Court Judge James Russell, on May 10, sided with Uber. He concluded that although the plaintiffs "have made strong arguments" about the initiative's negative effects, they were too "speculative and hypothetical" to be in the petition's description.

Deepak Gupta, founding principal of Gupta Wessler, speaking during a panel discussion at the Federalist Society's 2018 National Lawyers Convention, held at The Mayflower Hotel in Washington, D.C., on Nov. 16, 2018. Photo: Diego M. Radzinski/ALM

Amicus groups have lined up on both sides of the appeal.

"This initiative, if enacted, would make it much harder for Nevada consumers to secure legal representation and obtain monetary relief from predatory lenders, debt collectors, scam artists, and other unscrupulous actors in the marketplace," according to a brief filed by Consumer Action, Consumer Federation of America and National Association of Consumer

Advocates. “And it will also have undisclosed consequences for Nevadans’ ability to participate in and benefit from state wide or nationwide consumer class actions. It is not exaggeration to say this initiative would wreck the state’s civil justice system.”

Another brief challenging the initiative came from the Nevada AFL-CIO, the National Employment Law Project and PowerSwitch Action.

Supporting Uber were the American Tort Reform Association, the Nevada Trucking Association Inc. and Chamber of Progress, a tech industry coalition that argued the 20% cap would help Nevadans get more from their legal recoveries.

“Empirically, contingency fees have already been capped in many states,” Chamber of Progress wrote in its brief. “And none of those states is suffering a shortage of attorneys.”

Separately, Uber has petitioned the U.S. Court of Appeals for the Ninth Circuit to reverse the U.S. Judicial Panel on Multidistrict Litigation's 2023 order coordinating the sexual assault lawsuits before U.S. District Judge Charles Breyer of the Northern District of California. On Oct. 8, Uber told the Ninth Circuit panel that a “nonconsolidation clause” in its terms of use prevented sexual assault claims from being centralized before a single judge.

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Trending

New Suit - Copyright

Sega was named in a with a copyright infringement lawsuit on Dec. 5 in California Southern District Court. The case, filed by Powers Law PC on behalf of musician John Gioeli, accuses the defendant of openly claiming ownership of the plaintiff's sound recording and musical composition for 'Live and Learn' that was written for the defendant's video game 'Sonic Adventure 2.' The complaint asserts that the music has been used without permission by the defendant for least 25 video games as well

Yardi Ruling Boosts DOJ's Legal Theory in AI Price-Fixing Cases

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Katie Arcieri, Justin Wise

A federal judge's ruling that collusion by algorithm can be considered classic price-fixing bolsters the "per se" theory, embraced by the Justice Department, that the use of AI to collude is inherently unlawful.

Judge Robert S. Lasnik of the US District Court for the Western District of Washington last week allowed a case by private plaintiffs to proceed alleging that software firm Yardi Systems Inc. conspired with property managers to inflate rent prices. In the order, Lasnik said the plaintiffs plausibly alleged a per se violation of antitrust law that presumes anticompetitive effects.

The ruling is a shift from judges' decisions in two similar cases involving hotel-casinos, where judges tossed allegations of algorithmic collusion. It also contrasts with a Tennessee federal judge, who held late last year that a price-fixing conspiracy alleged against property management software firm RealPage Inc. must surpass a higher standard of review.

"What the court is doing in *Yardi* is holding the line and refusing to read a heightened pleading standard into the law around price-fixing," Lee Hepner, senior legal counsel at American Economic Liberties Project, said. "And that is important for plaintiffs seeking to bring these cases. This is really about getting your foot in the door."

Lasnik's ruling highlights arguments made by the DOJ that it is per se illegal for competing landlords to jointly delegate key aspects of their pricing to an algorithm, even if the landlords retain some authority to deviate from its recommendations.

The allegations center on whether a group of property management companies collectively used Yardi's "RENTmaximizer" algorithmic tool that calculates a price recommendation to inflate rents.

The Dec. 4 ruling "bolsters plaintiffs' theories that even if ultimately the landlords retain some authority to disregard the recommendations, the court still says that is sufficient to state a claim and get beyond the pleading stage," said Dylan Carson, a partner with Manatt, Phelps & Phillips LLP in Washington and a former trial attorney at the DOJ's antitrust division.

Legal Tactics

The ruling is the latest turn in a group of cases targeting the use of price-setting software in industries, including hotel and home rental markets.

Exactly how it influences litigants' tactics depends on a variety of factors, including how the Ninth Circuit rules in a case alleging hotel-casinos on the Las Vegas strip used Cendyn's pricing software to inflate hotel prices, Carson said. Those plaintiffs appealed after a judge dismissed the case in May.

Litigants will have to consider whether other judges will buy into the per se theory.

The DOJ and Federal Trade Commission have pushed courts to adopt many plaintiffs' position that a group of competitors' use of the same price algorithm can amount to a per se unlawful price-fixing agreement.

But until the Dec. 4 *Yardi* decision, the per se theory had yet to be adopted in an algorithmic collusion case, said Joshua Goodman, an antitrust partner with Morgan, Lewis & Bockius LLP.

"There are several arguments for applying rule of reason to these types of cases," Goodman said, referring to what the Tennessee federal court used. "I would expect defendants to keep making those arguments."

Another factor to consider is some judges will be more "comfortable, more savvy" when evaluating cases involving newer technology, said Christine Bartholomew, a professor at University at Buffalo School of Law.

That tension among trial courts also shows how "nuanced the issues are," Joseph Ostoyich, the head of Clifford Chance's US antitrust litigation practice, said. "It's going to take a while before it all gets sorted out."

DOJ v. RealPage

Alongside the private actions, the DOJ in August sued RealPage, alleging it facilitated an information-sharing scheme that distorted competition and raised rent prices.

Courts use the rule of reason framework to analyze whether information-sharing schemes cause anticompetitive harms.

RealPage's Dec. 3 dismissal motion argued that the DOJ's lawsuit marked a pivot from its earlier "per se" positions.

"We believe the DOJ has backtracked significantly on the theory it embraced and supported" that using RealPage was per se illegal under antitrust laws, Stephen Weissman, a Gibson Dunn & Crutcher LLP partner and counsel to RealPage, said in a Dec. 4 call with reporters. The case is a "watered-down version of what one would consider to be an antitrust violation," he added.

Weissman didn't respond to a request for updated comment after the *Yardi* ruling. The FTC declined to comment on the *Yardi* ruling. The DOJ declined to comment.

Questions of Factual Proof

Lasnik's opinion recognized that there is plenty of fact-finding left in the case.

Defendants "may ultimately be able to show that Yardi's services were advertised differently than as alleged, that they provided no commercially sensitive, non-public information, or that they ignored Yardi's pricing recommendations to such an extent as to make the allegations of concerted action unlikely," he said in his ruling.

"It's all just allegations," Carson said. "If it turns out that they didn't adopt the algorithm pricing recommendations as often as the plaintiffs' allege, that may undercut the argument or the theory that they were colluding. That would beg the question of why are you paying for the service?"

Even so, the Yardi case will be seen as a win for plaintiffs pushing this type of price-fixing case.

"One district court's opinion on the pleadings doesn't change the law broadly," Ostoyich said. "But it will certainly be cited in other algorithmic pricing cases."

Plaintiffs' counsel is Hagens Berman Sobol Shapiro LLP.

The case is *Duffy v. Yardi Sys. Inc.*, W.D. Wash., No. 2:23-cv-01391, 12/4/24 .

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Judge concerned about 25% in fees for 23andMe settlement

[dailyjournal.com/articles/382323-judge-concerned-about-25-in-fees-for-23andme-settlement](https://www.dailyjournal.com/articles/382323-judge-concerned-about-25-in-fees-for-23andme-settlement)

Class Action

Dec. 9, 2024

The judge said he had serious concerns about the \$7.5 million in fees for the \$30 million settlement, noting "there was no real substantive litigation in the case" and the agreement was signed three months after lead counsel were appointed.



A motion for preliminary approval of the \$30 million settlement of a multi-district class action by millions of customers of the 23andMe genetic testing company over a data breach has been conditionally granted by a federal judge in San Francisco.

Attorney fees are to total no more than \$7.5 million, though U.S. District Judge Edward M. Chen wrote in his Dec. 4 order that he had serious concerns about the amount - which is the 25% benchmark - because "there was no real substantive litigation in the case and ... the parties immediately went into settlement discussions." He noted that lead counsel were appointed in June and the settlement agreement was signed in September.

After considering objections from thousands of intervenors who said the settlement precluded their chances to initiate or continue arbitrations with the company over the October 2023 data breach, he agreed the settlement would not cover them unless they file claims to be included. Plaintiffs with state court lawsuits may opt out of the settlement but are not deemed to have done so, Chen ordered.

The settlement agreement was executed on Sept. 5 after mediation, providing for monetary and injunctive relief plus three years of privacy monitoring and protection. Chen estimated that cash claims "should be about \$13.3 million," and class members can have 23andMe delete their information from its site.

"Cybercriminals had specifically targeted 23andMe customers of Ashkenazi Jewish and Chinese descent, offering their data for sale on the dark web," Chen wrote.

The settling parties were ordered to report back within two weeks on whether ordered modifications have been made and on the notifications to those in arbitration. *In re: 23andMe Inc. Customer Data Security Breach Litigation*, 3:24-md-03098 (N.D. Cal., filed April 16, 2024).

#382323

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Judge Approves 23andMe's \$30M Data Breach Settlement - With Conditions

[law.com/therecorder/2024/12/06/judge-approves-23andmes-30m-data-breach-settlement---with-conditions](https://www.law.com/therecorder/2024/12/06/judge-approves-23andmes-30m-data-breach-settlement---with-conditions)

Amanda Bronstad

What You Need to Know

- The judge already had flagged numerous issues with the settlement at an Oct. 29 preliminary approval hearing.
- He also raised concerns about the notices and claim forms, plus the proposed \$7.5 million in attorney fees.
- The judge declined to grant a proposed injunction, allowing 16,000 arbitrating plaintiffs to be excluded, despite 23andMe's pleas that doing so could cost more than \$30 million in filing fees.

A federal judge approved genetic testing firm 23andMe Inc.'s \$30 million data breach settlement but told lawyers to make some changes.

U.S. District Judge Edward Chen, of the Northern District of California, who already had flagged numerous issues with the settlement at an Oct. 29 preliminary approval hearing, told lawyers to come back in two weeks to answer his questions, most of which revolved around notices and claim forms. He also raised concerns about the proposed \$7.5 million in attorney fees.

"The court has serious concerns about the fee request, notwithstanding the fact that the 25% request is the benchmark," he wrote in a Wednesday order. "Plaintiffs are asking for \$7.5 million for basically one year's work plus some work post-approval. This is a significant ask given that there was no real substantive litigation in the case and that the parties immediately went into settlement discussions."

Chen noted several examples of "questionable hours," but he found no evidence of collusion between class counsel and 23andMe warranted rejecting the deal. In court documents supporting the fees, co-lead class counsel pointed to the "extraordinary challenges" in obtaining a settlement given 23andMe's deteriorating financial situation.

The judge wasn't the only one with concerns. For months, lawyers representing thousands of class members who wanted to arbitrate their claims objected to a proposed preliminary injunction in the settlement that would halt them from pursuing their claims over the data breach while simultaneously making it onerous to opt out of the deal.

Concerns about the injunction also came from plaintiffs who had pending state court cases in California against 23andMe.

Another group of objectors, represented by Chicago's Edelson PC, opposed the deal for numerous reasons, primarily its weighted importance on the monitoring program over diminished monetary relief for the class, plus what they considered inflated attorney fees.

U.S. District Judge Edward Chen

In his order, Chen declined to grant the injunction, allowing the arbitrating class members to be excluded from the settlement, despite 23andMe's pleas that the 16,000 potential claims could exceed \$30 million in filing fees.

"There is a question whether those who are bound by an enforceable arbitration clause can be included in a certified class given potential concerns about typicality/adequacy," Chen wrote, adding that lawyers should change the class description as a result.

But he found the settlement was reasonable, particularly in light of 23andMe's financial condition.

23andMe attorney Rebekah Guyon, a Los Angeles shareholder at Greenberg Traurig, did not respond to a request for comment.

"We are pleased the court found the settlement fair, reasonable, and adequate, and rejected all of the substantive objections to the settlement," co-lead class counsel said in a statement. "We look forward to continuing to move forward to finalize the settlement and provided needed relief to the class."

Co-lead class counsel are: Cari Laufenberg, of Seattle's Keller Rohrback; Gayle Blatt, of San Diego's CaseyGerry; and Norman Siegel, of Stueve Siegel Hanson in Kansas City, Missouri.

"We are pleased that the court affirmed the right of arbitration claimants to pursue their claims independently from litigation, should they choose to do so," Melissa Nafash, a New York partner at Labaton Keller Sucharow, one of the firms representing the arbitrating plaintiffs, said in a statement.

Adam Apton, of Levi & Korsinsky in Washington D.C., and John Nelson, of Milberg Coleman Bryson Phillips Grossman in San Diego, who also represented arbitrating plaintiffs, did not respond to a request for comment.

Jay Edelson, of Edelson, said in a statement, "We're disappointed, because the court had a chance to send a clear message to the plaintiffs' bar: that weak settlements which primarily benefit the lawyers aren't acceptable in modern practice. Unfortunately, that didn't happen."

Judge Had Long List of Questions

23andMe said the breach impacted nearly 7 million users. Much of that information included sensitive genetic profiles that ended up on the dark web, particularly for those of Ashkenazi Jewish or Chinese descent, and some involved health care information.

The settlement, reached less than a year after the filing of about 40 class actions, provides monetary relief and a specialized credit monitoring program designed by CyEx, called "Privacy Shield," specifically for a class of about 6.4 million in the 23andMe settlement. The \$30 million settlement includes the monitoring program, valued at about \$2 million, up to \$1 million in settlement administration costs, \$15,500 in service awards to the named plaintiffs and \$7.5 million in attorney fees, or 25% of the gross fund, plus \$300,000 in expenses.

From the start, plaintiffs' lawyers were divided on how quickly to negotiate a settlement, particularly since 23andMe was facing possible bankruptcy.

Norman Siegel, with Stueve Siegel
Hanson. Photo: John Disney/ALM

Those financial problems were front in center when class counsel reached their settlement, according to filings supporting the deal. Both sides reached agreement following a mediator's proposal over the summer.

On Sept. 25, Chen issued a 10-page order with a long list of questions about the settlement, including whether co-lead class counsel had discussed the injunction with lawyers for the arbitrating plaintiffs or those with state court cases. After the preliminary approval hearing, he continued to have concerns about the notice, opt-out form and assurances from CyEx about the benefits of the monitoring program.

Chen's order, while excluding arbitrating plaintiffs from the settlement, included the state court plaintiffs, who can opt out of the deal.

Barry Walker, of San Francisco-based Potter Handy, which represents nearly 3,000 plaintiffs in seven state court cases against 23andMe in California, did not respond to a request for comment.

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UnitedHealthcare Tells Employees to 'Shut Up'

 [kenklippenstein.com/p/unitedhealthcare-tells-employees](https://www.kenklippenstein.com/p/unitedhealthcare-tells-employees)

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UnitedHealthcare wasted no time telling its employees not to talk to the press in the wake of the killing of its CEO Brian Thompson, according to an internal company memo I obtained. Thompson has been accused of profiting off of insider selling before an anti-trust investigation by the Justice Department was publicly revealed — part of the story employees say they wish the media would cover.

“You can tell they really just want us to shut up and not acknowledge it,” a source within the company told me. “Supervisors are afraid to speak up about the corruption for fear of losing our jobs. It’s like we’re being forced to lionize Brian instead of analyze who he was.”

Here’s what the memo sent to UnitedHealthcare employees yesterday morning says:

“...we ask that you adhere to our corporate communication policy regarding interactions with the news media. All media inquiries should be directed to our Communications Department. Please refrain from making any statements or comments to the media to ensure that our communications remain consistent and respectful.”



United’s communications department did not respond to a request for comment.

In an internal video statement sent to employees, CEO of UnitedHealth Group (UnitedHealthcare’s parent company) Andrew Witty said, “Brian was a truly extraordinary person who touched the lives of countless people throughout our organization and beyond.”

Rank-and-file employees at UnitedHealthcare tell a different story.

“Thompson took massive pay outs while we at the bottom had to work harder and longer,” one employee told me. “Meanwhile Witty brought in AI to learn from us. So they have the money for AI and massive bonuses, but we’re still using software that is massively behind the industry standard. They’ve been lying to us.”

Resentment for Thompson was widespread at the company, the employee said, citing an internal company announcement about his death that only garnered 28 comments despite being seen by 16,000 employees.

 Pinned conversation**UnitedHealth Group**

3h ago

19 shares • Seen by 16,076

As we process the tragic death of our friend and colleague, Brian Thompson, we are providing various support resources so you do not fa... see more

 1 attachment

353

Show 7 previous comments

Collapse

**Mendell, Cindy** 1h ago

I hope they find the individual so our executives and their families can rest better. Is there any updates on the investigation? Is there any reason to think th... see more



3

**Cassell, Tabatha J** 1h ago

Sending thoughts and prayers to Mr. Thompson's family, friends and colleagues in the aftermath of this senseless loss.



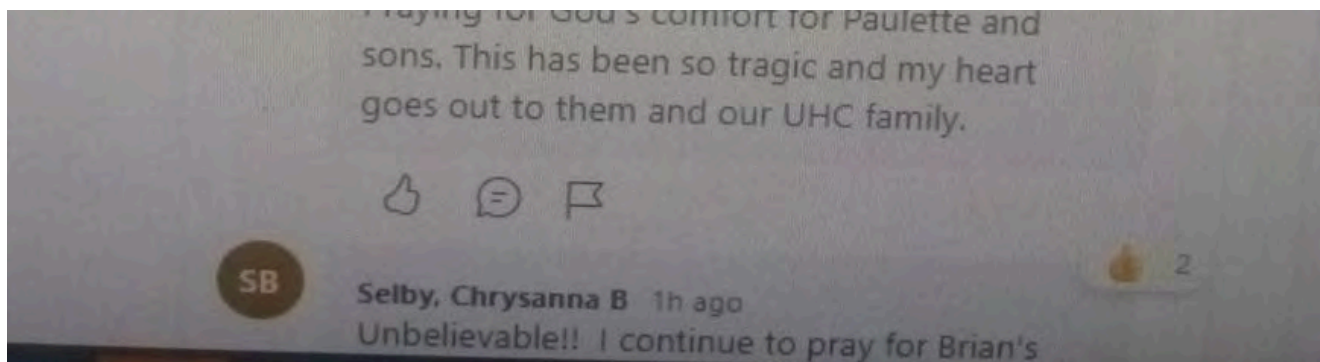
5

**Koyanagi, Lindi** 1h ago

Praying for God's comfort for...



5



Screenshot of internal UnitedHealth Group message board

In a July earnings call, Witty touted the firm's investment in artificial intelligence, saying it "will generate billions of dollars of efficiencies over the next several years," including by enhancing "provider find and price care capabilities..."

Thompson's death, nevertheless, has provoked widespread condemnation of the company, of the insurance industry, which will undoubtedly result in "efficiencies" that lay off workers and amplify the inequities of insurance-driven health care. (UnitedHealthcare, which insures more than 10 percent of the American population, made \$8.9 billion in profit through the first three quarters of this year.)

Company financial disclosures show that Thompson's annual compensation, including bonuses, was \$10.2 million. In March, Thompson was sued by a firefighters pension accusing him of selling off \$15 million of company stock during a Justice Department antitrust investigation, as I wrote about yesterday. The UnitedHealth Care employee also criticized Thompson's reported sale of \$5.6 million in company stock the same day as news of a ransomware attack plunged the stock's value by 8 percent.

I've taken a lot of heat for reporting critically on Thompson. I've been accused of being insensitive or worse — condoning his murder. I do not. I just don't believe it's the job of a journalist to withhold facts because they're uncomfortable. Sadly much of the major media are doing exactly that.

USA TODAY began one of its stories on Thompson's killing describing him as a "well-liked executive," a "Midwesterner" and a "father" before lamenting how he "became a meme and source of ridicule on social media." The USA TODAY report made no mention of the accusations against Thompson.

Don't the accusations of profiteering and disregard for workers at least merit a passing mention, even just as context to perhaps understand the killing? The major media might find it distasteful that so many are taking to social media to express their contempt for the health insurance industry. Meanwhile, as the leaked email shows, the company is trying its hardest to control the narrative (to the benefit of the company).

Christina Elliott, a senior company official, instructed employees to “avoid social media,” adding that she had deleted her own accounts.

them with your love and give them peace. May they feel your presence in their sorrow and find hope and healing in your embrace.

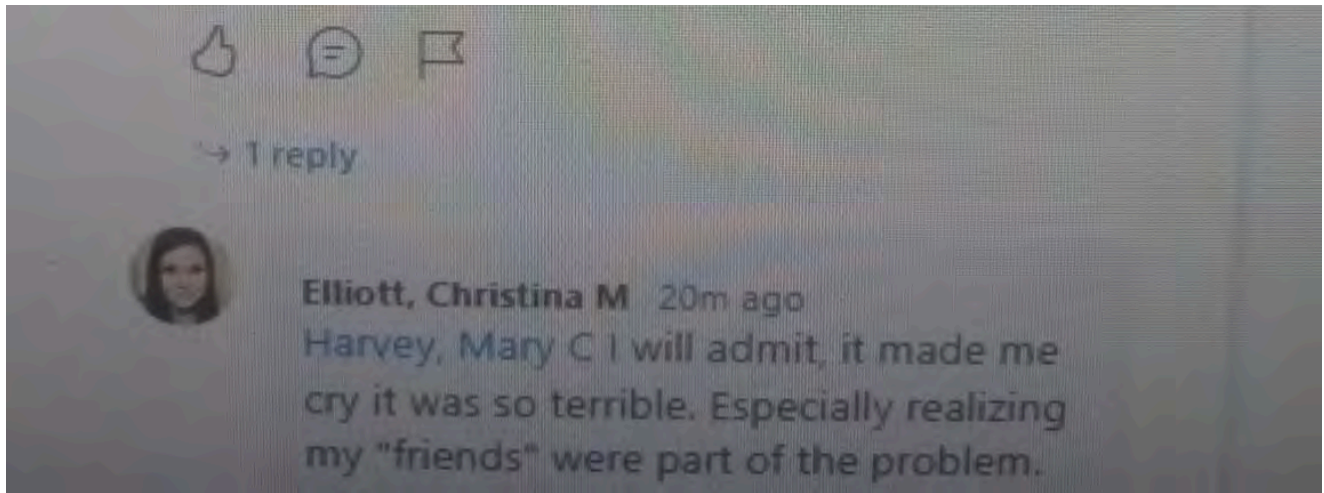
**SB**

Selby, Chrysanna B 38m ago
Amen



Elliott, Christina M 33m ago

I want to say first of all, my thoughts and prayers are with BT's family and friends, and colleagues that knew him well. As well as all of us at UHC, and UHG who are struggling with this. I would like to thank the company for their ongoing support of our mental well being in general but stepping it up in this difficult time. I encourage all of my colleagues to take advantage of the offerings they are providing, and take care of yourselves. Avoid social media, if possible. I personally deactivated My socials. And remember, it's ok to not be ok. That's why they are offering us the tools needed to get through this. Virtual hugs to you all!
see less



This story is yet another example of how ill suited the major media is in reporting important truths when norms and conventions get in the way — in this case social mores around death (even of a powerful public person.) Help us stay on the parts of this story deemed too awkward for big media outlets by subscribing below.

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— *Edited by William M. Arkin*

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'Serious Misconduct' From Monsanto Lawyer Prompts Mistrial in Chicago Roundup Case

 [law.com/2024/12/06/serious-misconduct-from-monsanto-lawyer-prompts-mistrial-in-chicago-roundup-case](https://www.law.com/2024/12/06/serious-misconduct-from-monsanto-lawyer-prompts-mistrial-in-chicago-roundup-case)

Aleeza Furman

A judge declared a mistrial Friday in a Chicago Roundup case after one of Monsanto's attorneys mentioned during a cross-examination that the plaintiff had once been charged with a criminal offense.

Associate Judge Daniel Trevino of the Cook County Circuit Court ruled that the lawyer's line of questioning constituted "serious misconduct" and cautioned the defense against "any further conduct that could result in sanction or a contempt finding," according to a transcript from the proceeding. The case had been in its fourth week of trial.

The plaintiffs filed their motion for a mistrial earlier in the day Friday in response to a cross-examination conducted Thursday by Shook, Hardy & Bacon product liability co-chair Hildy Sastre, who was trial counsel for Monsanto alongside Irwin Fritchie Urquhart Moore & Daniels partner Timothy Daniels and Riley Safer Holmes & Cancila partner Matthew Fischer.

According to the plaintiffs' motion, Sastre asked the plaintiffs' exposure expert a question about an alcohol-related criminal charge against plaintiff Paul Antonou. The plaintiffs argued that by mentioning the criminal charge, Sastre introduced irreversible prejudice into the case.

The plaintiffs alleged that the mention of the criminal charge was the latest example of a string of improper conduct from Monsanto's counsel throughout the trial, claiming that the defense "repeatedly disregarded the court's rulings to sneak objectionable evidence into the jury's consideration."

The plaintiffs argued that the prejudice created by "the unbelievably inflammatory question related to an 'alcohol-related' criminal charge, as well as the further prejudice caused by Monsanto's repeated rebuffs of this court's authority," warranted more than just a curative instruction.

During a sidebar addressing the motion for mistrial, Trevino said the defense had been permitted to mention Antonou's alcohol usage to a certain extent. However, Trevino said, defense counsel veered into improper questioning by mentioning the criminal offense.

"It has no relevance to the witness' opinions, nor to the testing of the witness' opinions, nor to criticisms of the witness ... nor was it impeaching of this witness' opinions," Trevino held, according to the transcript.

A spokesperson for Monsanto said in a statement that the company believes the “cross-examination regarding risks factors for [Antonou’s] injury was appropriate given the evidentiary record in this case.” The spokesperson called the plaintiffs’ decision to seek a mistrial “unusual and telling.”

Houston-based Jason Itkin of Arnold & Itkin and Philadelphia-based Thomas Kline of Kline & Specter, who represented Antonou, said in a joint statement that they are “extremely frustrated by Monsanto’s conduct, but we are not deterred.” They added, “We look forward to retrying Paul’s case and at least a dozen more in multiple jurisdictions in 2025.”

Representing the plaintiffs alongside Itkin and Kline were Arnold & Itkin attorney Noah Wexler, Kline & Specter partner Tobi Millrood and Chicago-based Clifford Law Offices partner Bradley Cosgrove.

The case, caption *Antonou v. Monsanto*, marked the fourth Roundup trial for Arnold & Itkin and Kline & Specter. It also marked the duo's first Roundup trial to not end in an outright plaintiffs verdict.

Though Monsanto has won its fair share of trials in the broader Roundup litigation, the company has yet to win against the Arnold & Itkin and Kline & Specter team. The three Roundup cases the firms tried before *Antonou*—all of which were in Philadelphia state court—yielded verdicts of \$175 million, \$2.25 billion (later reduced to \$404 million), and \$78 million.

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You Might Like

'Stake Out My Space': Attorneys, Law Professors Flock from X to Bluesky

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Avalon Zoppo

What You Need to Know

- Bots, toxic rhetoric leads lawyers to move to X alternative Bluesky.
- Bluesky added millions of users following Trump's election victory.

Georgia Court of Appeals Judge Stephen Dillard said he always makes a point to get acquainted with emerging social media platforms. So last May, he signed up for the then-invitation only microblogging app Bluesky.

The problem? There weren't many attorneys or law professors with accounts.

But that changed following the 2024 election, as many in the legal community have flocked to the new social network as an alternative to Elon Musk's X, formerly known as Twitter. More than 24 million users are now on the burgeoning app, with new users often citing the growing number of bots, ads and toxic rhetoric on X as the reason for their migration.

"A lot of people that I've developed friendships with over the years, and a lot of lawyers in Georgia. are moving over [to Bluesky]," said Dillard, one of only a few judges on the site. "And I want to be able to communicate with all my constituents as much as possible. So when there's that much of a migration to a new platform, I want to stake out my space and be accessible to the folks on that platform as well."

"Just from a design and functionality standpoint, I really like Bluesky. I like how it works, and I have seen a lot less spam," he added.

'Appellate Sky'

Lawyers say they're excited to see more colleagues making their way to Bluesky and recreating #AppellateTwitter, the hashtag used by a community of lawyers, professors and judges on X to share noteworthy court opinions and appellate news. On Bluesky, some attorneys are using the hashtag "AppellateSky."

Marin Levy, a Duke University School of Law professor, said she created a Bluesky account last year as the tenor on X began to change.

"I joined Bluesky over a year ago and found it promising but it didn't yet have a critical mass," Levy said. "It feels like that changed very quickly this past week. And I am hopeful it will become a new online faculty lounge."

After Musk took over the site in 2022, the company had mass layoffs that primarily impacted teams responsible for fighting misinformation, NBC News reported at the time. News outlets also reported that the company removed language protecting transgender people from online harassment from its hateful conduct policy.

There have also been changes to X's For You feed, which shows users posts from people they don't follow based on an algorithm of what a person may be interested in. News outlets reported that X began deprioritizing tweets containing links, such as to news articles, and only displaying the tweets from users verified through a subscription to Twitter Blue on the For You feed.

Texas appellate attorney Raffi Melkonian, who has been called the Dean of Appellate Twitter, said he began seeing more ads, bots and hateful content on X in recent years, to the point that he said he has blocked dozens of accounts a day.

He joined Bluesky a year ago but didn't post regularly until recently.

"My recent increase in posting is due to the issues on Twitter," said Melkonian, of Wright, Close & Barger in Houston. "It is hard to do the kind of posting I like on Twitter now without getting really nasty responses or direct messages with advertising. Bluesky is definitely working better from that perspective, for me and I think for a lot of lawyers."

"As long as a good, critical mass of lawyers is over there, you can have all the discussions you want to have," Melkonian added. "I get more engagement now on Bluesky than I do on Twitter—more actual engagement from other lawyers who want to talk about things."

Still, Bluesky launched in February 2023 as an invite-only platform and opened to the wider public this year. Its 24 million users is only a fraction of the number of people on X, which does not share user totals but is estimated to be in the hundreds of millions, according to the BBC.

"I don't think [Bluesky] has reached the volume yet of legal conversations that we had at the height of Twitter—2020 or 2019, or whenever that was—but it's growing rapidly," Melkonian said. "I hope we can recapture some of what made it so nice to be able to talk to other lawyers online."

Some brands and users, like The Guardian and Don Lemon, have announced their departures from X altogether, citing the promotion of far-right conspiracy theories and harmful content promoted on the platform and X's new terms of service.

Dillard, however, said he plans to maintain his presence on X, in addition to Bluesky, to stay connected with as many people as possible.

"My goal is to represent all Georgians and to reach all Georgians," Dillard said. "I'm on a lot of different platforms, and I think it's important because you're going to reach different audiences on different platforms."

Echo Chamber?

There's been some criticism that Bluesky is an echo chamber for liberals and Democrats looking to isolate themselves from conservative views.

At a Federalist Society event last month, appellate lawyer Kannon Shanmugman expressed those concerns, though he has also created an account.

"It appears that the primary effect of the election on the legal academy has been to cause professors to quit Twitter in search of new platforms such as Bluesky... where they can find like-minded people and avoid encountering people with whom they disagree," said Shanmugman, chair of Paul Weiss Rifkind Wharton & Garrison's Supreme Court and appellate litigation practice.

"That is precisely what I warned about in my speech: that the left is simply withdrawing from the intellectual battlefield into a walled fortress," he said, referring to a speech he gave in September. "And while they are certainly free to do so, I believe that it will leave all of us worse off."

But there's been push back to that criticism.

Bob Loeb, a partner in Orrick's Supreme Court and Appellate Litigation practice, said it's wrong to assume people are joining the app because they want to hear others with the same political views.

He cited the ability of Bluesky users to curate their own feeds.

Like X, Bluesky has one feed that displays posts only from the list of people you follow, and another algorithmic feed labeled "Discover." According to Bluesky, the latter mixes "what's trending in the network with posts from accounts you follow and posts from accounts near your social graph."

"I do think saying 'It's just an echo chamber of people who voted for Harris or Biden' [is] inaccurate," Loeb said. "On any platform, there are people who have strident political views and if I just decide to follow those people, my feed will be full of them."

And last May, the app launched “custom feeds,” which lets third-party developers create new algorithmic feeds based on specific topics that anyone can follow. The company called this “algorithmic choice.”

Meanwhile, recent reporting has suggested X’s algorithm has been feeding people conservative posts. A Wall Street Journal analysis found that in the lead up to the Nov. 5 election, new X users with non-political interests were being fed political content and posts that leaned toward Donald Trump in their For You feed.

In Levy’s view, it’s too soon to label Bluesky an echo chamber.

“People are still getting acclimated and figuring out who is using the site,” she said. “So I am reserving judgment, and holding out hope.”

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Latest

Trending

Litigation Surge - Internet & Social Media | Class Actions

Major internet and social media companies were swarmed with class actions in federal court last week. At least five federal class actions were launched against Fortune 500 internet businesses, including two suits targeting Amazon: One accuses the company of adding a service fee to Amazon Fresh purchases in violation of California's Honest Pricing Law, while another claims that Amazon uses third-party delivery services like UPS and USPS to deliver goods to Prime members in underserved zip codes, resulting in slower and poorer service. Plus, Apple and Google were hit with a lawsuit claiming that casino games offered through their app stores including Chumba Casino, LuckyLand Slots and Global Poker constitute unregulated gambling enterprises in violation of New York law.

[Read More](#)

Attorney for Sean 'Diddy' Combs accusers sues law firm Quinn Emanuel

[reuters.com/legal/legalindustry/attorney-sean-diddy-combs-accusers-sues-law-firm-quinn-emanuel-2024-12-06](https://www.reuters.com/legal/legalindustry/attorney-sean-diddy-combs-accusers-sues-law-firm-quinn-emanuel-2024-12-06)

David Thomas

Legal Industry

By David Thomas

December 6, 2024 12:46 PM PST Updated 3 days ago

Metropolitan Museum of Art Costume Institute Gala - Rei Kawakubo/Comme des Garçons: Art of the In-Between - Arrivals - New York City, U.S. - 01/05/17 - Sean "Diddy" Combs. REUTERS/Lucas Jackson/File Photo Purchase Licensing Rights [↗](#), opens new tab

Dec 6 (Reuters) - A lawyer representing alleged victims of Sean "Diddy" Combs filed a lawsuit accusing U.S. law firm Quinn Emanuel Urquhart & Sullivan of harassing his colleagues, his clients and his family on behalf of an unidentified celebrity allegedly tied to the incarcerated media mogul.

Tony Buzbee and his Houston-based law firm sued Quinn Emanuel [↗](#), opens new tab in Harris County, Texas, district court on Thursday, accusing the firm of engaging in "outrageous litigation gamesmanship" on behalf of one of its clients to whom Buzbee sent a demand letter last month.

"The tactics used by Quinn Emanuel's shadowy investigators are abusive and out of control," Buzbee said in an email. "This conduct is egregious and unethical. We are asking the court to stop it."

A Quinn Emanuel spokesperson did not immediately respond to a request for comment.

Combs is facing federal criminal charges that he used his business empire, including his record label Bad Boy Entertainment, to sexually abuse women. Combs has denied the charges. Other celebrities also took part in the abuse, Buzbee has alleged.

Quinn Emanuel sued Buzbee and the Buzbee Law Firm last month [↗](#), opens new tab on behalf of an unnamed "celebrity and public figure" in Los Angeles who alleged he was falsely accused by Buzbee of raping minors who were drugged at Combs' parties.

The complaint in Los Angeles County Superior Court accused Buzbee and his firm of threatening to lodge "wildly false horrific allegations" against the celebrity in order to "extort exorbitant sums."

Buzbee's firm alleged in its lawsuit against Quinn Emanuel on Thursday that the firm used a team of private investigators to "intimidate, harass, malign and threaten" its employees and their family members and its current and former clients. Buzbee said his daughter has been

contacted by people looking for "controversial, salacious or disparaging information."

Buzbee is seeking a court order that would bar Quinn Emanuel and others from contacting anyone who has a connection to the law firm, as well as stopping them from surveilling the firm, its employees and their family members. Buzbee is also seeking unspecified monetary damages from Quinn Emanuel.

The Buzbee firm has filed 20 civil lawsuits against Combs accusing him of sexual misconduct, said David Fortney, a lawyer at the Buzbee firm.

Reporting by David Thomas

David Thomas
Thomson Reuters

David Thomas reports on the business of law, including law firm strategy, hiring, mergers and litigation. He is based out of Chicago. He can be reached at d.thomas@thomsonreuters.com and on Twitter [@DaveThomas5150](https://twitter.com/DaveThomas5150).

US whistleblower program generates hundreds of tips, DOJ official says

 [reuters.com/world/us/us-whistleblower-program-generates-hundreds-tips-doj-official-says-2024-12-06](https://www.reuters.com/world/us/us-whistleblower-program-generates-hundreds-tips-doj-official-says-2024-12-06)

Chris Prentice, Andrew Goudsward

A U.S. Justice Department logo or seal showing Justice Department headquarters, known as "Main Justice," is seen behind the podium in the Department's headquarters briefing room before a news conference with the Attorney General in Washington, January 24, 2023.

REUTERS/Kevin Lamarque/File Photo Purchase Licensing Rights , opens new tab

NEW YORK, Dec 6 (Reuters) - The U.S. Justice Department (DOJ) has fielded over 250 tips from whistleblowers about potential misconduct in the first several months of a pilot program, a top official said on Friday.

The program, which was launched in August, has already proven successful at generating new leads to root out corporate malfeasance, Principal Associate Deputy Attorney General Marshall Miller said on Friday.

"We've already received more than 250 tips, many of which appear to identify criminal conduct we didn't know about," he said in prepared remarks at a Practicing Law Institute event.

Miller, who has been at the Justice Department since 2022 and was previously a federal prosecutor in Brooklyn, plans to leave the DOJ at the end of next week.

Miller and others at the Justice Department under President Joe Biden helped to design and roll out a series of new policies aimed at whistleblowing, voluntary self-disclosure and compensation clawbacks.

Officials have said the whistleblower program was designed to dovetail with ones already in place elsewhere such as the Securities and Exchange Commission, which have had bipartisan support both at the agencies and on Capitol Hill.

Miller's remarks come weeks before Republican President-elect Donald Trump is set to return to the presidency, raising speculation that the new administration may adopt a different approach on policing corporate crime.

Reuters spoke with three defense lawyers who speculated that the whistleblower program may be among those likely to be killed under the upcoming Trump administration, after drawing criticism from corporate clients.

But Miller pushed back on that criticism, telling Reuters the program has been designed to encourage whistleblowers to come forward internally and to give firms a window to conduct their own internal inquiries and then report issues.

He described the program as designed to encourage companies to self-disclose misconduct with added urgency, adding: "I would be pretty certain the American public would consider that a feature, not a bug."

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Reporting by Chris Prentice; editing by Mark Heinrich

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Chris Prentice
Thomson Reuters

Chris Prentice reports on financial crimes, with a focus on securities enforcement matters. She previously covered commodities markets and trade policy. She has received awards for her work from the Society for Advancing Business Editing and Writing and the Newswomen's Club of New York.

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Comerica Bank Sued for Federal Benefit Card Service Failures (2)

By Evan Weinberger

- **COURT:** N.D. Texas
- **TRACK DOCKET:** [3:24-cv-03054](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-12-09T09:43:55958147373-05:00

Comerica Bank Sued for Federal Benefit Card Service Failures (2)

By Evan Weinberger 2024-12-06T09:42:14000-05:00

- **COURT:** N.D. Texas
- **TRACK DOCKET:** [3:24-cv-03054](#) (Bloomberg Law subscription)

Comerica Bank failed to provide adequate customer service and charged illegal ATM fees for recipients of Social Security and other federal benefits processed through debit cards, the Consumer Financial Protection Bureau said in a lawsuit.

Dallas-based Comerica, a subsidiary of Comerica Inc., operates the Direct Express card service that allows people who don't have bank accounts or are underbanked to get their Social Security and other federal benefits directly.

But Comerica improperly cut off about 24 million customer assistance calls and charged improper ATM fees to more than 1 million customers, the CFPB said in a lawsuit filed Friday in the US District Court for the Northern District of Texas.

"The CFPB is suing Comerica Bank for illegally harming disabled and older Americans who count on Social Security and other federal benefits," CFPB Director Rohit Chopra said in a statement. "By deliberately disconnecting millions of calls and harvesting illegal junk fees, Comerica boosted its bottom line at the expense of Americans living on a fixed income."

Comerica in a statement said it had cooperated throughout the CFPB's investigation by "sharing information and data to illustrate the unique nature of this program and the fact that we operate with the oversight of the Fiscal Service."

“Despite our good faith efforts to provide this critical context, the CFPB has consistently ignored our arguments and documentation,” a bank spokesman said.

Customer Service Lapses

Around 3.4 million Americans are Direct Express cardholders, many of them senior citizens, people with disabilities, and others who need assistance, according to the CFPB.

The cards allow people to make direct food, rent, gas, and other payments.

Comerica has partnered with the Treasury Department to administer the debit card program, including providing customer service, according to the complaint.

Customers whose calls weren’t cut off saw long wait times—sometimes lasting several hours—to stop unauthorized transactions, replace lost or stolen cards, and address other issues, the CFPB alleged.

Comerica’s customer service vendors often provided misleading information to benefit recipients about their cases and made it difficult to stop unauthorized transactions, in some cases requiring that an account be closed in order to do so, the CFPB said.

CFPB Authority

Comerica sued the CFPB in November to stop its investigation, arguing the agency’s probe into the Direct Express program exceeded its authority. That lawsuit, also in the Northern District of Texas, is still pending.

The CFPB’s action against Comerica isn’t the first time the agency has gone after a major bank for failures in processing federal benefits.

The CFPB and the Office of the Comptroller of the Currency fined Bank of America Corp. a combined \$225 million in July 2022 for problems with its management of prepaid cards for unemployment and other benefits.

Counsel information for Comerica in the CFPB’s lawsuit wasn’t immediately available. Paul Hastings LLP represents the bank in its lawsuit against the CFPB.

The case is Consumer Financial Protection Bureau v. Comerica Bank , N.D. Tex., No. 3:24-cv-03054, complaint filed 12/6/24 .

(Updates with comment from Comerica starting in fifth paragraph.)

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Accountancy

Accounting errors force US companies to pull statements in record numbers

'Concerning' rise in restatements of financial results raises questions about quality of auditing



In the first 10 months of this year, 140 public companies told investors that their previous financial statements were unreliable and had to reissue them © Doidam10/Dreamstime

Stephen Foley in New York 7 HOURS AGO



The number of US companies forced to withdraw financial statements because of accounting errors has surged to a nine-year high, raising questions about why mistakes are going unnoticed by auditors.

In the first 10 months of this year, 140 public companies told investors that previous financial statements were unreliable and had to reissue them with corrected figures, according to data from Ideagen Audit Analytics.

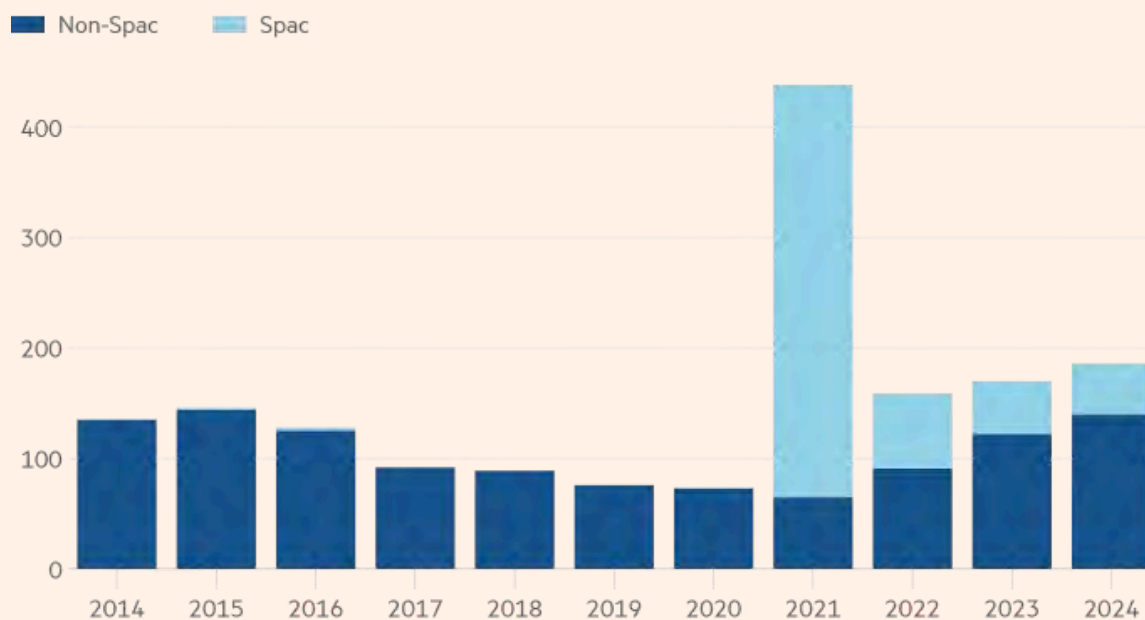
That is up from 122 in the same period last year and more than double the figure four years ago. So-called reissuance restatements cover the most serious [accounting](#) errors, either because of the size of the mistake or because an issue is of particular concern to investors.

A rise in restatements was “concerning”, said Sandy Peters, head of global advocacy at the CFA Institute, a professional body for investors. “Restatements tell you something about company management, and about a company’s internal controls.”

A number of high-profile companies have confessed to accounting mistakes in recent months. The retailer [Macy’s](#) said one of its accountants hid at least \$132mn by deliberately mischaracterising delivery expenses. [Archer Daniels Midland](#), the agricultural commodities merchant, ousted its chief financial officer after finding profits at its fast-growing nutrition business had been improperly inflated. [Symbotic](#), a warehouse software group backed by SoftBank and Walmart, restated its historic financial results not once but twice last month.

More companies go back to fix errors in their financial reports

Reissuance restatements, Jan-Oct



Source: Ideagen Audit Analytics

EY was the auditor with the most clients forced to reissue their financial statements in the first 10 months of 2024, according to Ideagen. The firm accounted for 26 such cases, including at the fast food group Shake Shack, which admitted in February that it had not properly calculated two years of income tax expenses.

For the past two years, EY has also had the highest rate of [deficiencies](#) among the Big Four accounting firms in inspections by the industry’s regulator, the Public Company Accounting Oversight Board. The group declined to comment.

Ideagen's figures exclude special purpose acquisition vehicles, which have had idiosyncratic accounting issues that forced hundreds to restate their accounts in recent years.

They also exclude less significant restatements, where companies are allowed to tweak previous-year figures in filings without having to go back and withdraw the earlier reports. Including these so-called revision restatements takes the tally this year so far to 304, up 7 per cent year on year to the highest level since 2020.

The Securities and Exchange Commission has been urging companies to withdraw and reissue erroneous financial reports when the mistakes are material, after criticism from investors that revision restatements were being used too often and amounted to "stealth restatements".

More than half the reissuance restatements this year cover financial periods beginning in 2022 or earlier. PCAOB inspectors found a jump in deficiencies in its inspections of audit work after the pandemic, and the agency toughened sanctions for the worst breaches of audit standards.

Jeffrey Johanns, a former PwC partner who teaches auditing at the University of Texas, said the reasons for an uptick in restatements could include the complexity of new accounting standards, including how to account for expected credit losses, and companies' increasing use of financial instruments not easily characterised as either equity or debt.

The rise of remote work in the post-Covid years could also be a culprit, he said. "Auditors need to sit across the table from the client, walk around the place, walk around the warehouse," he said. "So much work being done remotely could lead to poorer audit quality."

The PCAOB has argued that its tougher inspection regime since the pandemic will start to show results in future years.

"Our most recent inspections have seen significant improvement in the aggregate deficiency rates at the largest firms, which we expect to see reflected when the results are finalised next year," it said.

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Remote Work Heightens Risk of Audit Deficiencies, US Board Finds

By Jorja Siemons

- Culture of accountability helps audit quality, report says
- Review gathered feedback from six accounting firms

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Remote Work Heightens Risk of Audit Deficiencies, US Board Finds

By Jorja Siemons 2024-12-06T15:56:26000-05:00

- Culture of accountability helps audit quality, report says
- Review gathered feedback from six accounting firms

Remote work is among threats to audit quality at US firms because it has created training gaps among entry-level employees, a new audit watchdog report found.

While many firms have implemented return-to-office policies, employees told the US Public Company Accounting Oversight Board that more in-person learning is needed to build essential skills and restore firms' apprenticeship culture, a staff report published Thursday said. The PCAOB's findings are based on more than 150 interviews with leaders and engagement partners at Deloitte & Touche LLP, Ernst & Young LLP, KPMG LLP, PricewaterhouseCoopers LLP, BDO USA PC, and Grant Thornton LLP.

The report is part of an initiative PCAOB launched last year exploring whether accounting firms' culture had an impact on rising levels of audit deficiencies the board has observed since 2020.

"Culture is crucial at audit firms, since it lays the foundation for the work auditors perform in our capital markets," PCAOB Chair Erica Williams said in a statement.

The board's staff found that some firms haven't sufficiently evaluated the underlying reasons for audit deficiencies, revisions correcting financial statements, and violations of auditors' independence, the report stated. Firms also fail to attribute problems to specific employees, the board found. The PCAOB recommended firms promote a "culture of accountability."

Firms' focus on geography also could hinder audit quality because staffing is determined based on employee availability and proximity without proper consideration of expertise, an interviewee told the PCAOB.

The push for greater use of remote shared service centers to perform tasks is potentially depriving newer employees of basic skills as well, some respondents told the PCAOB.

"Our staff now will never see cash testing, as it is done offshore. We are going to see the impact of that when they are managers," one interviewee said, referring to the process of verifying the accuracy of clients' cash balances.

Deloitte, EY, KPMG, BDO, and Grant Thornton didn't immediately respond to requests for comment. PwC said it couldn't provide a comment immediately.

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Opinion **Business Insight**

Elon Musk vs Delaware: why the Tesla CEO might win his pay battle

Approval of remuneration package twice by shareholders could sway courts

SUJEET INDAP



Elon Musk has offered Tesla shareholders a voice, even if the Delaware judiciary is unimpressed so far with those efforts © AP

Sujeet Indap 6 HOURS AGO



Elon Musk's seemingly unbreakable bond with Tesla shareholders may be his superpower. That special relationship may very well be compelling enough to get him his \$56bn pay deal which was [rejected](#) by the Delaware Court of Chancery for a second time last week.

[Musk](#) has easily won two votes over the pay package, the second time this June even after an original scathing ruling in February from a trial court that held the Tesla board process around the original 2018 approval was tainted. Tesla's board has insisted that those successful votes cure any corporate governance defects. *Vox Populi, Vox Dei* indeed, as [inscribed](#) on a cake Musk said he was sending to the Delaware courts as a "parting gift", reminding them that "the voice of the people is the voice of the gods". Love him or hate him, Musk has offered Tesla shareholders a voice, even if the Delaware judiciary is unimpressed so far with those efforts.

Elon is, however, an increasingly rare proponent of shareholder democracy at big public companies with dominant shareholders. In another high-profile situation this year, Hollywood group Paramount decided that shareholders not affiliated with the Redstone family would not get the chance to weigh in on a [merger](#) with studio Skydance Media — the deal approval could close with the control stock the family held. Shareholders of Endeavor similarly got no vote in this year's go-private deal led by Silver Lake and Ari Emanuel. In both cases, the companies said independent directors negotiated a fair deal for minority shareholders. But undoubtedly some of those shareholders will sue, claiming the directors sold the company too cheaply in a sweetheart deal and that their denial of a vote is evidence of bad faith.

For years, companies successfully used the shield of successful shareholder votes to win such lawsuits. But the votes for most companies prove nail-biters that generate painful shareholder litigation anyway. And more importantly, the companies that eschew votes in order to force through deals quickly are increasingly winning in Delaware's court, anyway.



Paul Graham and Cathie Wood were among the prominent investors who last week complained that Delaware judges were inappropriately intruding on the prerogatives of shareholders and boards, citing the latest Musk pay decision. In fact, corporate law is quite hands-off on corporate decision-making.

The exception to that deference arises when there are companies with directors beholden to dominant shareholders — thus putting smaller shareholders at risk of being steamrolled. Self-interested transactions, like “squeeze-out mergers” where minority shareholders can be forced to sell, had long been subjected to tough judicial scrutiny, arising from the inherent risk of coerced deal terms.

But a decade ago, the billionaire Ron Perelman had an idea. When buying out minority shareholders in his conglomerate, Perelman first let independent directors set the deal terms and then the minority shareholders vote up or down on the deal. After that was approved by the Delaware Supreme Court, this has been a way to conduct transactions with dominant shareholders.

For the canny plaintiffs lawyers who sue companies, the game since has been to show the directors are not really independent or find some fact from the negotiations that was excluded from the proxy filing sent to shareholders before the vote. At the same time, hedge funds can buy up shares to muck up the vote in the hopes of securing a price bump.

However, more recently, companies have shifted course after Delaware courts let conflicted transactions that lacked shareholder protections, go forward without penalty. One case involved Howard Lutnick, the billionaire Donald Trump ally.

“Lately many controllers have decided not to take advantage of the shareholder vote, preferring to take the risk of judicial review,” said Dorothy Lund, a law professor at Columbia University.

One other big winner in recent years from that trend? None other than Musk. Dissident shareholders had challenged Tesla’s 2016 buyout of SolarCity, another Musk company, alleging it was a bailout of a company that was approaching bankruptcy. The Delaware judge in the case harshly criticised the independence of the Tesla board. But ultimately, he decided that the price paid was reasonable and that Tesla and Musk should face no sanction.

For all of the recent complaints Musk and friends have about Delaware, plenty of messy controller deals are surviving intense legal challenges. In the current pay deal fight, Musk has tried harder than many other tycoons to be friendly towards shareholders. There is a decent chance that is going to pay off for him when the Delaware Supreme Court considers his appeal.

This article has been amended to correct the spelling of Ron Perelman

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Tesla Inc

The 'Anti-Elon Tesla Club':

Musk's politics gives some owners second thoughts

Some customers are cooling on the best-known electric vehicle brand as the billionaire CEO cultivates close ties to Trump

Claire Bushey in Chicago 7 HOURS AGO



When Joe Sipher bought a Tesla in 2011, there were so few on the road when drivers passed each other they would wave. He had the car for eight years, loved it and never thought about Elon Musk.

Those days are in the past. Sipher, who replaced that first car with a Model Y two years ago, said when his lease ends in May he is unlikely to stick with the company. He recently put \$1,000 down on a Lucid Gravity, which he said would not have happened if Musk's support of president-elect Donald Trump had not disturbed him enough to explore other options.

Sipher, a San Diego resident, said he is not a person to take public political stands, and the very public stances taken by [Musk](#) — Tesla's divisive, love-him-or-hate-him chief executive — makes it impossible for him, a consumer, to keep his own views private.

“Owning a [Tesla](#) feels like wearing a Maga hat,” he said. “It doesn’t matter which political party I’m in, I don’t think companies should take sides . . . By him being this involved politically, it’s forcing a political statement on my car choice, and I don’t want that.”

Tesla is the best-selling electric vehicle brand in the US by far. Though EVs comprise just 10 per cent of the new cars sold in the country, Teslas make up about half of those. The company sold just under 655,000 cars in the US in 2023, according to Kelley Blue Book. General Motors, which had the next highest sales volume, sold just under 76,000.

Until recently, Tesla was viewed as a more “liberal” brand, because switching to greener energy sources is critical to combating climate change. But some consumers have cooled on the brand as Musk has adopted increasingly rightwing and conspiratorial positions on his social media platform, X, and [pumped more than \\$250mn](#) into Trump’s campaign.

Since the election Trump has appointed Musk to help run the so-called [department of government efficiency](#), a project to remove \$2tn from the federal budget.

Tesla sold just over 471,000 cars in the first three quarters of 2024, a 5 per cent decline compared to the same period a year earlier, as the company’s key products have aged and the market for EVs has become more crowded.

Musk’s image is a factor too — a positive one for some, and a negative for others. In August, car research group Edmunds surveyed vehicle owners who said they planned to buy a car in the next 12 months. Among those considering an EV, 36 per cent said Musk made them less likely to buy a Tesla, 37 per cent said he made them more likely to buy a Tesla and 27 per cent said he did not influence their opinion of the brand. Among all car shoppers, just 2 per cent said they had not heard of Musk.

Loren Repollo in Florida said she is unlikely to buy another Tesla unless [Musk’s public persona](#) swings back to promoting environmentalism. Repollo bought her Tesla in December 2021 — her first major purchase as an adult. She wanted an EV and was impressed by Tesla’s driving range. Though she assumed Musk was “out of touch” like other billionaires, she found his behaviour increasingly off-putting after he bought Twitter, which he rebranded as X, and that feeling intensified this summer as he began campaigning for Trump.

“Once he started getting more involved politically, I was like, ‘Oh my God, I need to sell my car,’” she said. “I can’t have any affiliation with him.”

Instead, she bought an “Anti-Elon Tesla Club” bumper sticker for the car, and also one for her mother.

Matthew Hiller is the man behind the bumper sticker. Hiller was considering buying a Tesla until Musk’s rightward shift changed his mind. But he figured there were plenty of Tesla owners who had made a purchase and might want to vent their displeasure. He was already churning out stickers of fish for his Etsy store, Mad Puffer Stickers, so he added his first bumper sticker: “I bought this before Elon went crazy.”



A bumper sticker on a Tesla reads: 'Anti Elon Tesla Club' © Michelle Bruzzese/FT

He sold 300 stickers the day after the election, his best sales day ever. He had previously averaged about 50 sales a day. Since November 6 it has been closer to 100 a day.

“People who are buying Tesla now, they know who he is,” he said. “So it’s absolutely going to affect his sales, because traditionally those were always liberal cars. So now what? . . . I don’t know how he’s going to make a play for his new base.”

Anna Wilk, who lives outside London, said she would have to think hard about whether to buy another Tesla. A self-described “Tesla head”, she has never been a fan of Musk but saw him as separate from the product his company made. She helped persuade several family and friends to buy the cars.

But as someone born in Poland, she is leery of how Musk and Trump might be influenced by their contact with Russia’s Vladimir Putin.

“There is huge disconnection on the values,” she said. “I am not sure, once my car lease runs out, what I’m going to do.”

“Mixing politics with business is not a good idea,” she added. “Something always goes wrong.”

Humaira Ahmed and her husband have discussed selling their Tesla, even if it is at a loss. A tech entrepreneur who respected Musk’s record of innovation, Ahmed said she was excited in 2020 to own the first Tesla in her area, Vancouver Island. Now she feels like driving it suggests she shares Musk’s political views, which she does not.

“We really enjoyed it, and we still do, and that’s the hardest part,” she said. “I don’t talk about the car any more. It used to be a source of pride.”

She is not the only Tesla owner who shies away from mentioning her vehicle. Four others declined to be interviewed for this story because they feared consequences for criticising Musk, notably an online backlash.

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December 7, 2024, 2:41 PM PST

Trump's Crypto-AI Czar Is Longtime Critic of Tech Regulation (1)

By Sarah McBride and Emily Nicolle

Bloomberg Law News 2024-12-09T09:41:25716463848-05:00

Trump's Crypto-AI Czar Is Longtime Critic of Tech Regulation (1)

By Sarah McBride and Emily Nicolle2024-12-07T17:41:20317-05:00

David Sacks, President-elect Donald Trump's surprise pick to guide policy on artificial intelligence and cryptocurrency, doesn't have deep ties to either industry or an extensive track record of investing in them. What he does have, though, is even more important in the eyes of technology investors — a tech-friendly worldview and a long history of skepticism about government regulation.

"He will ensure the United States is at the cutting edge of innovation," said Keith Rabois, who celebrated with Sacks at a private home in Miami Thursday night. Sacks will keep the country from falling behind China, and will protect "newly emerging tech from left-wing censorship and bias," Rabois said.

The appointment of Sacks, a major Trump fundraiser, was not widely anticipated in Silicon Valley. The VC has only made a handful of crypto investments, and isn't seen as a key player in the industry. He's also made relatively few AI bets, though he's a backer of xAI, the startup helmed by Elon Musk that has raised more than \$10 billion this year.

But Sacks has long been critical of too much government involvement in the affairs of private companies. The 52-year-old founder of VC firm Craft Ventures and member of the so-called PayPal Mafia has been one of the loudest right-leaning voices in the industry for years.

The pick is seen as a boon to the startup world, where AI and crypto executives view government intervention as a potential existential threat. US action against crypto companies has driven many startups overseas. And AI leaders have worried that overly burdensome regulations could stifle the fledgling industry in the name of safety.

Crypto supporters celebrated the selection, which Trump said would give startups regulatory clarity. "Crypto and AI are two of the United States' most pressing strategic priorities right now, and David Sacks is one of the only people in the world that is uniquely qualified to lead in this pivotal role," said Kyle Samani, a managing partner at Multicoin Capital, where Sacks is an investor. Sacks will be an "invaluable asset in shaping the nation's future," Samani said.



A cartoon image of US President-elect Donald Trump displayed in Hong Kong
Photographer: Justin Chin/Bloomberg

Startup competition

Trump has signaled that he'll take a friendly approach to both crypto and AI. Bitcoin has hit all-time highs since his election, and he has vowed to repeal President Biden's 2023 AI executive order that requires developers to safety-test new models. AI is also a focus for Musk, a key Trump ally and a longtime friend of Sacks.

Investor Marc Andreessen, whose firm invests heavily in both industries, was ebullient at Sacks' pick. "From the Wright Brothers to Starship With Chopsticks, in just a single election," Andreessen wrote on X on Thursday night, referencing SpaceX's latest achievement of landing re-usable starships.

OpenAI Chief Executive Officer Sam Altman also struck a celebratory note, writing on X, "congrats to czar @DavidSacks!"

But there's been some trepidation over Sacks' allegiances in the AI world. Sacks' Craft Ventures is an investor in Musk's xAI, and Sacks' ties to Musk have raised questions about how he would treat rival companies in the fiercely competitive industry. Sacks has previously spoken critically of OpenAI, a key xAI competitor.

In a now-deleted post on X, Sacks said, "I'm all in favor of accelerating technological progress, but there is something unsettling about the way OpenAI explicitly declares its mission to be the creation of AGI." AGI, or artificial general intelligence, refers to AI technology that can perform most tasks better than humans. Sacks did not respond to a request for comment on the post.

Sacks and Trump allies say that involvement in the industry is a prerequisite for understanding it, and that some perceptions of conflict of interest will be inevitable. "I think we should take people at their word," said Shaun Maguire, an investor at the prestigious Sequoia Capital, which has backed both xAI and OpenAI. Sacks "won't harm any competitors," he said.



Elon Musk

Photographer: Al Drago/Bloomberg

Sacks' other bets include BitGo and Bitwise in the crypto world. In AI, Sacks co-founded a startup called Glue that makes chat software for companies, and he's invested in developer startup Replit Inc. and AI writing tool CopyAI Inc. Sacks will not leave Craft, a spokeswoman said, and the new czar position will function as an advisory role, rather than a full-time government job. The appointment won't require Sacks to divest or publicly disclose his assets. Like Musk, Sacks will be a special government employee. He can serve a maximum of 130 days per year, with or without compensation.

However, conflict of interest rules apply to special government employees, and Sacks would be required to recuse himself from matters that could impact his holdings.

Tech-Friendly

There's a long history of technology officials taking advisory roles to the government, said Silicon Valley historian Margaret O'Mara. But the roles don't always have a clear mandate. "You can have a title, but if you don't actually have a budget or people reporting to you, it's something more ambiguous," O'Mara said, pointing out that Sacks would not be a White House staff member. "Sometimes it does morph into something that has some power to it."

Some industry observers would have preferred the crypto and AI czar positions to be separate — a move that might have telegraphed the importance of each, and reflected the different risks and rewards of both technologies.

"While I am very encouraged by the new administration's crypto-friendly focus, I would have preferred separate crypto and AI czars," said Campbell Harvey, finance professor at Duke University. "Both need urgent, dedicated attention," he said.

Sacks has forged a more wide-ranging career, rather than focusing on just AI or crypto. He first made a name for himself at PayPal, the payments company whose founders in the late 1990s included Musk and billionaire investor Peter Thiel. During a stint in Hollywood, he produced the 2005 satire *Thank You for Smoking*. At Craft, his venture firm with stakes in Musk-owned businesses including SpaceX, he has invested widely as well as serving as a host of the All-In podcast.

His comments about crypto on the podcast have not been universally positive, but he has discouraged attempts to penalize or control industry players. "The fact of the matter is you've got a lot of brilliant young entrepreneurs, computer scientists building this financial infrastructure of the future with crypto," he said in a podcast episode in 2021. "We don't necessarily want to interfere with that to the point where we break it."

He's also made significant money on crypto. Craft Ventures invested in Samani's Multicoon Capital in 2018, which in turn was an early investor in the Solana cryptocurrency. The token was worth less than a dollar when it launched in 2020, but notched a peak price of around \$250 in late 2021. "It will end up being about \$1 billion of Solana for us in terms of returns," Sacks said at the time.

More recently, in a November episode of the podcast after Trump's election, Sacks took aim at the Securities and Exchange Commission's aggressive positions on crypto under its chair, Gary Gensler. "The days of Gensler terrifying crypto companies — those days are about to be over."

(Updates with historian's comment in 15th paragraph.)

--With assistance from Shirin Ghaffary, Olga Kharif, Katie Roof and Jackie Davalos.

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Ex-Allianz Fund Manager Avoids Jail Over \$3 Billion Collapse (1)

By Bob Van Voris

- Gregoire Tournant sentenced to 18 months home confinement
- Prosecutors had asked for seven years in prison for Tournant

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Ex-Allianz Fund Manager Avoids Jail Over \$3 Billion Collapse (1)

By Bob Van Voris2024-12-06T13:16:48739-05:00

- Gregoire Tournant sentenced to 18 months home confinement
- Prosecutors had asked for seven years in prison for Tournant

A former Allianz SE hedge-fund manager avoided prison and will instead spend 18 months in home confinement for fraudulently inflating the value of funds that ultimately collapsed, resulting in \$3.2 billion in investor losses.

Gregoire Tournant, the former chief investment officer of the US-based Structured Alpha group of Allianz hedge funds, was sentenced Friday by US District Judge Laura Taylor Swain in Manhattan. The penalty, which also included three years of probation, was far below the seven years in prison sought by federal prosecutors.



Gregoire Tournant arrives at federal court in New York on Dec. 6.

Photographer: Yuki Iwamura/Bloomberg

Tournant pleaded guilty in June to two counts of investment adviser fraud. Prosecutors said the fraud had allowed Tournant to earn tens of millions of dollars in compensation, much of which was based on the funds' performance.

Swain said Friday that prosecutors failed to show that the billions in losses were directly tied to Tournant's lies to investors. The judge pegged the loss at zero for sentencing purposes. She additionally expressed concern about Tournant's ability to receive adequate medical care for severe health issues in prison.

Tournant's lawyers had raised health problems requiring "constant, complex and cutting-edge medical care in arguing for home confinement instead of prison.

'I'm Really Sorry'

Details of Tournant's health are redacted from public court filings, but he told the judge in June that he was being treated for multiple neurological issues and coughed throughout the proceeding. His lawyers said that prison for Tournant would be "overly punitive and life threatening."

Tournant coughed frequently during the sentencing hearing at which he expressed remorse for this actions.

"I'm really sorry for my conduct," Tournant said, occasionally stammering. "I was wrong. I failed to comply with the law. I'm committed to try to do better."

Tournant's sentencing comes after an Allianz unit agreed in 2022 to pay \$6 billion for misrepresenting the investment risk posed by Structured Alpha funds, as part of a plea agreement with the US Justice Department. The unit, Allianz Global Investors US, pleaded guilty to a single criminal charge of securities fraud in the deal.

Read More: Behind Allianz's \$4 Billion Fund Blowup, Red Flags and Fat Fees

Allianz sold 17 Structured Alpha funds to at least 114 pension funds and other institutional investors, according to the government. From January 2016 through March 2020, Tournant and two other managers made misleading statements about the funds' risks and provided phony financial data to investors.

Prosecutors said the funds, which managed more than \$11 billion at their height, lost about \$7 billion after the Covid-19 pandemic hit in early 2020. More than \$3.2 billion of that was lost principal. That amount should be attributed to Tournant's fraud, they said.

An expert paid by Tournant calculated that the amount of loss tied to his actions is zero and that the investor losses were caused by the market downturn during the pandemic and other factors outside his control. Determining loss amount is a key part of calculating federal sentencing guidelines and how much a defendant has to pay in fines, forfeiture and restitution.

Two executives who worked with Tournant, **Stephen Bond-Nelson** and **Trevor Taylor**, also pleaded guilty in the case and agreed to cooperate with prosecutors in hopes of leniency when they're sentenced in February.

The case is US v. Tournant, 22-cr-00276, US District Court, Southern District of New York (Manhattan).

(Updates with detail from hearing, background.)

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Boeing Shareholder Attys Intervene In Parallel Chancery Suit

By **Jeff Montgomery**

Law360 (December 6, 2024, 7:59 PM EST) -- Attorneys for two Boeing Co. stockholders pursuing derivative claims in Virginia federal court secured approval on Friday to intervene in a later filed case in Delaware's Court of Chancery, citing concerns that a "dilatatory" approach by the Delaware camp could jeopardize both suits.

Vice Chancellor Morgan T. Zurn approved the filing after noting that neither attorneys for Boeing nor for the Delaware derivative parties opposed intervention focused on a motion to expedite the Delaware complaint. Suits in both states seek massive damages from current and former directors and officers tied to plane crashes and alleged safety breaches and oversight failures.

In the mix is a federal lawsuit filed on July 9 in the Eastern District of Virginia by the Oklahoma Firefighters Pension and Retirement System, seeking damages on Boeing's behalf tied to production issues and multiple safety breaches involving 737 Max, 777 and 787 commercial passenger jets, including an in-flight Alaska Airlines door-plug blowout on a 737 Max in January.

The Ohio Public Employees Retirement System and the State Teachers Retirement System of Ohio moved to intervene in the Virginia case weeks later, while also seeking a stay in that court to permit a now-completed books and records review.

"On November 25, 2024, while proposed [Ohio] intervenors were busy drafting an expedited opposition to [Boeing-side] defendants' motion to dismiss over the Thanksgiving holiday weekend in the derivative EDVa Action, [Delaware] plaintiffs filed under seal a copycat derivative complaint and a motion to expedite" in the Court of Chancery, the Ohio funds said in the motion filed in Delaware on Thursday.

The Delaware parties likewise proceeded with their more than 230-page complaint without a books and records investigation in the Court of Chancery, "nor did they move to intervene in Ohio PERS and STRS' books and records action," the Ohio funds said.

Stockholder class attorney teams seeking damages in the Delaware case included Prickett Jones & Elliott PA, Hach Rose Schirripa & Cheverie LLP, Block & Leviton LLP and The Law Office of Kenneth T. Goldstein.

U.S. District Court Judge Leonie M. Brinkema rejected a motion from the Delaware team to stay the Virginia case pending completion of their books and records suit in Chancery Court.

The Ohio group cited Judge Brinkema's comment on Oct. 22 in the stay denial: "I think that the argument that I've heard so far, that allowing the intervention and then the continuation or basically putting this case on hold is not to anyone's advantage," particularly in light of the overhang from a related, ongoing direct stockholder damages suit. "I would think, from Boeing's standpoint, getting this resolved sooner than later is advantageous."

Judge Brinkema said in the same finding that if the court granted the motion to dismiss sought by Boeing, "it would be without prejudice, so that you could still perhaps bring another action."

In the intervention motion filed on Thursday, the Ohio funds argued those pursuing the new Chancery derivative case "have not been transparent with this court concerning the status of the derivative

EDVa action. This court should have complete and accurate information before deciding whether to expedite a substantially later-filed action bringing duplicative breach of fiduciary duty claims by investors with a materially smaller stake in Boeing."

Of concern, the Ohio group said, was a risk that Vice Chancellor Zurn would dismiss the Delaware case with prejudice under Chancery Court rules if the stockholders "stand on their complaint" rather than amending in response to a motion to dismiss.

Judge Brinkema, the Ohio stockholder attorneys said, has already indicated that if she granted a motion to dismiss in Virginia, the order would be without prejudice to file a new suit.

The Delaware suit was filed on behalf of the Construction and General Building Laborers' Local Union No. 79 General Fund, Central Laborers' Pension Fund and Walter E. Ryan Jr. Revocable Trust U/A.

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

Boeing's board of directors reached a \$237.5 million deal to end a shareholder derivative suit on Nov. 5, 2021, alleging it failed to adequately oversee development of its 737 Max jets, which were involved in a pair of deadly crashes that left 346 people dead.

The New York and Colorado pension funds that served as lead plaintiffs in the earlier, consolidated suit said that the award would be paid by the company's director and officer liability insurers. Also part of the settlement was a company agreement to shore up its corporate governance and compliance program.

The Ohio funds are represented by Derrick B. Farrell, Lesley E. Weaver, Robert B. Lackey and Javier Bleichmar of Bleichmar Fonti & Auld LLP,

Christine M. Mackintosh, Vivek Upadhya and Casimir O. Szustak of Grant & Eisenhofer PA and Geoffrey M. Johnson, Donald A. Broggi, Justin O. Relifor and Maxwell R. Huffman of Scott+Scott Attorneys at Law LLP.

The Oklahoma Firefighters Pension and Retirement System is represented by Charles L. Williams of Williams & Skilling PC and Geoffrey M. Johnson, Donald A. Broggi, Jing-Li Yu, Maxwell R. Huffman and Justin O. Reliford of Scott + Scott Attorneys at Law LLP.

Boeing is represented by Sharon L. Nelles, David M.J. Rein and Leonid Traps of Sullivan & Cromwell LLP and Benjamin L. Hatch of McGuireWoods LLP.

In the Delaware case, Construction and General Building Laborers' Local Union No. 79 General Fund is represented by Samuel L. Closic, David C. Skoranski and Christine N. Chappellear of Prickett Jones & Elliott PA and Daniel B. Rehns of Hach Rose Schirripa & Cheverie LLP.

The Central Laborers Pension Fund is represented by Kimberly A. Evans, Lindsay K. Faccenda, Daniel M. Baker, Robert Erikson and Jason M. Leviton of Block & Leviton LLP.

The Walter E. Ryan Jr. Revocable Trust U/A is represented by Kenneth T. Goldstein and Matthew Norgard of The Law Office of Kenneth T. Goldstein PLLC.

The Boeing parties are represented in the Delaware case by Blake Rohrbacher, Kyle H. Lachmund, Kevin M. Kidwell and Spencer V. Crawford of Richards Layton & Finger PA and Sharon L. Nelles, David M.J. Rein and Leonid Traps of Sullivan & Cromwell.

The case is Oklahoma Firefighters Pension and Retirement System v. Calhoun et al., case number 1:24-cv-01200, in the U.S. District Court for the Eastern District of Virginia.

The Delaware case is Construction and General Building Laborers' Local Union No. 79 et al., v. Uma M. Amuluru et al., case number 2024-1210, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.



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Judge Denies Publix Bid To Appeal Opioid Coverage Ruling

By **Carolina Bolado**

Law360 (December 6, 2024, 9:10 PM EST) -- A Florida federal judge on Friday rejected Publix's request for a judgment that would have allowed it to immediately appeal a decision that said seven of its insurance policies didn't provide coverage for opioid lawsuits the grocery chain is facing.

U.S. District Judge Charlene Edwards Honeywell denied Publix's unopposed bid for a final judgment on her October partial summary judgment because the request is broader than the findings of the October order.

Judge Honeywell said she **granted partial summary judgment** to insurers that issued seven policies in 2013, but Publix asked for a final judgment in favor of all 17 remaining defendants with respect to every policy covering the other 23 years alleged in the lawsuit.

Publix limited its motion for partial summary judgment to the 2013 policies, so the other policies were not before the court for the Oct. 29 order, and the finding that there is no coverage under the 2013 policies doesn't automatically extend to the other years, according to the judge.

"Publix's brief statement in its motion that all the policies 'contain language that the court ruled is functionally similar to that discussed in the court's order' is insufficient to permit the court to make the global determination Publix now requests," Judge Honeywell said.

She added that, "to avoid piecemeal judgments, a final judgment to this effect will be entered at the conclusion of this litigation."

Publix kicked off the coverage dispute in November 2022, seeking coverage for a raft of pending lawsuits consolidated in Ohio federal court that seek to recover damages for the economic cost of the opioid epidemic. All have been stayed pending the resolution of the bellwether cases in multidistrict opioid litigation against Publix and others.

In April 2023, Publix sought partial summary judgment against its various primary and excess insurers for the 2013 policy years, seeking a declaration that they had a duty to defend it in the underlying litigation. The 2013 insurers, along with a separate insurer, St. Paul Fire & Marine Insurance Co., filed oppositions to the motion.

The 2013 insurers are Liberty Mutual Fire Insurance Co., Ace Property and Casualty Insurance Co., Great American Insurance Co., Liberty Insurance Underwriters Inc., XL Insurance America Inc., The Ohio Casualty Insurance Co. and Hartford Fire Insurance Co.

Judge Honeywell denied Publix's summary judgment motion after finding that the damages sought are too far removed from particular bodily injuries caused "because of" opioid addiction, as required in Publix's policies. The judge said that, under Florida law, the phrase "because of" means a "direct causal connection" instead of but-for causation, which is wider in scope and corresponds to "arising out of" policy language.

Attorneys for the parties didn't immediately respond to requests for comment Friday.

Publix is represented by Kenneth H. Frenchman, Alexander M. Sugzda and Jason D. Meyers of Cohen Ziffer Frenchman & McKenna LLP, and Robert H. Friedman of Friedman PA.

ACE Property and Casualty is represented by Michael S. Shuster, Daniel M. Sullivan, Blair E. Kaminsky and Benjamin F. Heidlage of Holwell Shuster & Goldberg LLP, and Douglas E. Horelick, Robert Mangino and Susan Koehler Sullivan of Clyde & Co. LLP.

Liberty Insurance and Ohio Casualty are represented by Matthew J. Lavisky and Latasha Scott of Butler Weihmuller Katz Craig LLP, and Robert A. Kole and John C. Calhoun of Choate Hall & Stewart LLP.

Hartford Fire is represented by James P. Ruggeri and Annette P. Rolain of Ruggeri Parks Weinberg LLP, and Jorge A. Maza of Hinshaw & Culbertson LLP.

XL Insurance America is represented by Keith Moskowitz, Kathryn Guinn, Angel A. Cortiñas and Jonathan Kaskel of Dentons US LLP.

Great American Insurance Co. is represented by Ronald L. Kammer of Hinshaw & Culbertson LLC, and Adam H. Fleischer, Joshua A. Boggioni and Kevin F. Harris of BatesCarey LLP.

St. Paul is represented by James N. Hurley, Edward J. Briscoe and Chloe M. Horton of Fowler White Burnett PA, and Bryce L. Friedman and Joshua Polster of Simpson Thacher & Bartlett LLP.

The case is Publix Super Markets Inc. v. ACE Property and Casualty Insurance Co. et al., case number 8:22-cv-2569, in the U.S. District Court for the Middle District of Florida.

--Additional reporting by Ganesh Setty. Editing by Melissa Treolo.

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\$29.75M Deal Proposed To End Del. Latch Inc. SPAC Suit

By **Jeff Montgomery**

Law360 (December 6, 2024, 5:09 PM EST) -- Attorneys for investors who bought into Latch Inc.'s Tishman Speyer-led, \$1.5 billion take-public deal only to see their shares nosedive have tentatively settled consolidated class damage claims for \$29.75 million, according to a Delaware Court of Chancery filing.

Fishman Haygood LLP, Bragar Eigel & Squire PC and Grant & Eisenhofer PA led the settlement, reached after multiple mediation sessions and after Vice Chancellor Lori W. Will approved consolidation of the cases.

The suits all accused TS Innovation Acquisitions Inc., a special purpose acquisition company sponsored by developer Tishman Speyer, and its directors of misrepresenting information about Latch's business and prioritizing their own interests ahead of shareholders' by pursuing the June 2021 deal.

Latch develops and sells locks and other systems to manage, monitor and secure buildings. After it went public on June 7, 2021, at around \$11 per share, its stock rose to a high of around \$17 before starting a series of ups and downs that ended in a continuous slide. Its securities were suspended in August 2023 and the company was delisted in March 2024, with over-the-counter sales falling under 15-cents currently.

"The pre-merger registration statement materially misrepresented nearly every key business metric of legacy Latch," stockholder Phanindra Kilari said in a May 2023 complaint.

Kilari initially alleged false representation of the company's sales revenue, which according to the suit "was based primarily on bookings of non-binding letters of intent that in reality in no way could lead to the revenue" in company projections.

Those behind the deal grossly misrepresented the time expected for Latch to reach revenue targets and the "typical" timeline for moving from buyer interest to a sale, according to the complaint, as well as overstating international business and touting undeveloped technology.

SPAC boosters also were accused of failing to disclose that the deal was far worse for public stockholders than liquidation at an assured \$10 per share or more for selling back the SPAC shares before closing of the take-public process.

Attorneys for the stockholders and those named in the suit met for voluntary mediation on Jan. 8 before David M. Murphy of Phillips ADR Enterprises, followed by a second session on June 28, which also ended without a deal. Talks continued to July 2, when an agreement in principle was reached and a mediator's proposal on the settlement amount was tentatively accepted.

Under the proposed settlement, \$750,000 would be reserved for notices and other costs of seeing the agreement through. Allocations for attorney fees and costs in the litigation had not yet been docketed.

The suit names as defendants the SPAC's board of directors, Tishman Speyer Properties LP, the real estate company's CEO Robert J. Speyer and co-founder Jerry Speyer, and other entities connected to the deal.

According to the complaint, the pre-merger registration statement put out by the SPAC's board of directors was riddled with misrepresentations that incorrectly boosted Latch's financial outlook, including false revenue projections and inflated sales numbers.

Roughly a year after the deal, Latch disclosed that the board of directors' audit committee investigated the company's business metrics and found that "revenue recognition errors occurred," and the startup would be restating its financial statements for 2021 and 2022, according to the complaint.

Latch eventually disclosed in a filing to the U.S. Securities and Exchange Commission that the company's statements for 2019 and 2020 were also unreliable, Kilari said. The same filing also noted that the company appeared before a Nasdaq hearings panel the month before to appeal the stock exchange's determination to delist Latch's securities because the startup wasn't filing quarterly reports on time, according to the complaint.

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

The proposed stockholder class is represented by Christine M. Mackintosh, Kelly L. Tucker and Edward M. Lilly of Grant & Eisenhofer PA, Brent B. Farriere and Kaja S. Elmer of Fishman Haygood LLP and Lawrence P. Eigel, Marion C. Passmore and J. Brandon Walker of Bragar Eigel & Squire PC.

TS Innovation Acquisitions Sponsor LLC, Robert J. Speyer, Jerry I. Speyer, Tishman Speyer Properties LP, Tishman Speyer Properties Inc., Paul A. Galiano and Jenny Wong are represented by Kevin G. Abrams and J. Peter Shindel Jr. of Abrams & Bayliss LLP and Matthew A. Schwartz, Julia A. Malkina, Casey A. Dennis, William S.L. Weinberg and Rose G. Garber of Sullivan & Cromwell LLP.

The case is In re: TS Innovation Acquisitions Sponsor LLC Stockholder Litigation, case number 2023-0509, in the Court of Chancery of the State of Delaware.

--Additional reporting by Charlie Innis. Editing by Marygrace Anderson.



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Barclays Investors Get Initial OK For \$19M Overissuance Deal

By **Katryna Perera**

Law360 (December 6, 2024, 7:16 PM EST) -- A New York federal judge Friday granted the first green light to a \$19.5 million settlement for a class of investors who bought Barclays PLC securities and then claimed the banking giant misled them about its internal controls before selling more than \$17.6 billion in securities over its maximum registered amount.

U.S. District Judge Katherine Polk Failla issued an **order** stating that she found the settlement to be fair, reasonable and adequate, and the proposed class meets all the requirements for certification.

The proposed class includes all individuals who purchased Barclays PLC American depository shares between Feb. 18, 2021, and Feb. 14, 2023.

A **memo** seeking preliminary approval, filed by the investors Tuesday, states that class counsel and the lead plaintiffs have adequately represented the class and that the settlement will provide immediate relief, given the continued risks of litigation.

"Although the court denied, in part, defendants' motion to dismiss, lead plaintiff and the class would have faced significant hurdles at summary judgment and at trial in connection with ultimately proving falsity and materiality, which are necessary for their Exchange Act claims," the memo states.

"Defendants would likely reargue that the over-issuance of Barclays securities was an 'oversight' that resulted from mismanagement, from which, they would argue, scienter cannot be established," the memo further states.

The memo also states that class counsel from Labaton Keller Sucharow LLP will seek an award of attorney fees worth no more than 29% of the settlement fund, or roughly \$5.6 million. Lead counsel will also seek repayment of litigation expenses of no more than \$300,000 and a service award for the lead plaintiffs, according to the memo.

The suit, **filed in 2022** by two South Florida retirement plans, alleged that Barclays failed to inform investors about the weaknesses of its internal financial reporting system, which led to the error resulting in the \$17.6 billion securities overissuance and subsequent enforcement action from the U.S. Securities and Exchange Commission.

Just a few days after the suit was filed, Barclays **agreed to pay \$200 million** in civil penalties and \$161 million in disgorgement and prejudgment interest to put the SEC's enforcement action to rest.

In previous years, Barclays was a "well-known seasoned issuer" of securities, meaning it could issue securities by filing an open-ended shelf registration statement. Whenever the bank wanted to issue securities, it just had to pay the registration fee and file the correct papers, without any SEC review, according to the suit.

However, Barclays lost this status after it **agreed to pay \$97 million** to settle SEC claims in May 2017 for investment client overcharges.

In February, Judge Failla **trimmed the suit**, saying some of the investors' claims "stretch too far" related to statements made by the defendants after the overissuances were discovered. However, she also found that the suit adequately pled that Barclays did not disclose that it had not implemented

any internal controls to prevent the overissuance of securities and that the individual defendants knowingly misled investors about the bank's compliance with securities laws and purposefully disregarded the lack of internal controls.

By the time Barclays disclosed the overissuance in March 2021, the bank said it expected to see a £450 million (\$489 million) loss from it. After the disclosure, the investors say, the price of Barclays' American depository receipts fell 10.6%, from \$9.05 on March 25 to \$8.09 on the next trading day, March 28.

Then, that July, Barclays issued quarterly financial results and announced that it had also overissued unregistered securities under a second registration statement, according to the suit. Barclays said it would buy back \$17.6 billion of the securities issued in error beginning Aug. 1.

At the news of more overissued securities, the price of Barclays ADRs dropped another 5.2%, according to the suit.

Ex-Barclays CEO James E. Staley, who stepped down in November 2021, current CEO C.S. Venkatakrishnan and former group finance director Tushar Morzaria are all named in the suit.

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

The investors are represented by Lauren A. Ormsbee, Christine M. Fox, James M. Fee, Lisa Strejlau and Charles J. Stiene of Labaton Keller Sucharow LLP.

Barclays and the other defendants are represented by Jeffrey T. Scott, Matthew J. Porpora and Julia A. Malkina of Sullivan & Cromwell LLP.

The case is In re Barclays PLC Securities Litigation, case number 1:22-cv-08172, in the U.S. District Court for the Southern District of New York.

--Editing by Jay Jackson Jr.



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Two Firms To Rep CVS Investors In Benefit Unit Losses Suit

By **Emilie Ruscoe**

Law360 (December 6, 2024, 6:44 PM EST) -- Bernstein Litowitz Berger & Grossmann LLP and Bleichmar Fonti & Auld LLP will co-lead a proposed class of investors in consolidated litigation alleging CVS Health Corp. hurt investors as it announced its benefit unit's unanticipated losses.

In a **Thursday order** in Manhattan federal court, U.S. District Judge Margaret M. Garnett appointed a trio of pension funds to co-lead the proposed class of CVS investors and appointed their two-firm legal team to represent the class, finding the institutional investors had the largest financial interest in the litigation with alleged losses of nearly \$2.5 million.

With the lead plaintiff appointment, the Louisiana Sheriffs' Pension and Relief Fund, Southeastern Pennsylvania Transportation Authority and City of Miami Fire Fighters' and Police Officers' Retirement Trust beat out a competing bid filed by Lancaster Partner LLC. Lancaster Partner alleged losses of nearly \$786,000 and earlier conceded it apparently didn't have the largest financial interest in the suit.

The three funds will litigate claims from two suits consolidated in October accusing CVS and three of its executives of allegedly providing misleading statements about its healthcare benefits division.

Both suits have alleged the company failed to adequately forecast its benefit segment's costs, resulting in overstated profitability of its healthcare segment.

Both suits also claim that "contrary to defendants' assurances, the revenues generated from [CVS'] other primary segments were insufficient to offset the negative financial impact of the increasing expenditures within the health care benefits segment" during the matter's proposed class period.

The suit that was filed first was brought in July by CVS investor Ivy Nixon, who said CVS' private health insurance pricing is calculated ahead of a plan's policy period and is based on analyses of the company's historical data and forecasts of the segment's costs.

Those cost forecasts are "dependent on the company's ability to accurately model, among other things, medical cost trends and health care utilization patterns," Nixon said in her suit, adding that when unanticipated costs arise during a policy period, the company ultimately bears those costs.

As a result, "the profitability of the health care benefits segment is particularly sensitive to the accuracy of its cost forecasts," Nixon alleged.

During the proposed class period, Nixon said, the company concealed that it "was likely to incur significant expenses to cover cost increases that were not accounted for in the company's forecasts and thus not covered by plan premiums."

Starting in August 2023 and continuing through May 2024, Nixon said, the company's financial statements acknowledging the impact of its forecasting prompted declines in the trading price for its shares.

The final such announcement included an earnings miss, a downward revision of its full year financial guidance and a steep quarterly operating income decrease of \$1.2 billion, or 34.1%, Nixon said.

Following that news, the investor claimed, trading prices for CVS shares fell from nearly \$68 to \$56.31, representing a decline of 16.84%.

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

The co-lead plaintiffs are represented by Javier Bleichmar, Erin H. Woods and Ross Shikowitz of Bleichmar Fonti & Auld LLP, Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP, Robert D. Klausner and Stuart A. Kaufman of Klausner Kaufman Jensen & Levinson, and John A. Kehoe of the Kehoe Law Firm PC.

CVS and its executives are represented by William D. Savitt and Lauren M. Kofke of Wachtell Lipton Rosen & Katz.

The consolidated case is Nixon v. CVS Health Corp. et al., case number 1:24-cv-05303, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Lakshna Mehta.

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Wall Street Giants Can't Beat Stock Loan Class Cert. Bid

By **Katryna Perera**

Law360 (December 6, 2024, 6:39 PM EST) -- A New York federal judge on Friday overruled objections from a group of major banks to certify a class of investors, with a slightly extended class period, in a suit alleging the banks colluded to avoid modernizing the stock loan market.

U.S. District Judge Katherine Polk Failla issued an **opinion and order** adopting a report and recommendation published by a magistrate judge in 2022 stating that the class should be certified. However, Judge Failla extended the end of the class period from what the magistrate judge had recommended.

According to Friday's order, U.S. Magistrate Judge Sarah L. Cave recommended that certification be granted to a class period that runs from Jan. 1, 2012, until Aug. 16, 2017, when the initial complaint in the suit was filed.

Judge Failla, on Friday, extended the end of the class period to Nov. 17, 2017, the date on which the amended, operative complaint was filed, saying the evidence presented by investors runs through that period.

She declined to grant the plaintiff's request to have the class period extended even further, through 2021, because it would affect discovery, which has already taken place, and she stated that if the investors want to seek supplemental productions to update damage calculations to align with the new class period, they will have to submit a separate motion to the court.

Regarding class certification, the banks — which include Goldman Sachs, Morgan Stanley, JPMorgan, UBS and EquiLend — argued that Judge Cave erroneously concluded that the class satisfied the adequacy, predominance and superiority requirements.

Judge Failla rejected all these claims on Friday. According to the order, the banks first argued that there are fundamental conflicts of interest between two of the subclasses because they comprise lenders and borrowers, who "stand on opposite sides of the stock-lending market."

The judge said such an opposition does not necessarily create a fundamental conflict, and this, in turn, defeats all the banks' other adequacy arguments.

Regarding predominance, the banks argued that Judge Cave erred in finding that the Foreign Trade Antitrust Improvements Act does not bar certification because individual inquiries will be needed to determine which transactions must be excluded from Sherman Act liability under the FTAIA.

"The FTAIA states, in relevant part, that the Sherman Act does 'not apply to conduct involving trade or commerce ... with foreign nations,'" the order states. "However, the FTAIA contains two exceptions: 'the import exclusion, which applies to 'conduct involving ... import trade or import commerce,' and the domestic effects exception, which applies to other foreign conduct that has a direct, substantial, and reasonably foreseeable effect on import or domestic commerce and that gives rise to a Sherman Act claim[.]'"

According to Friday's order, when either exception applies, the Sherman Act applies. In the current action, Judge Failla noted that the allegations point to a domestic conspiracy involving the U.S. stock loan market, and the class includes individuals who entered into U.S. stock loan transactions with the

U.S.-based entities of the defendants.

"None of plaintiffs' claims arises from [over-the-counter] transactions where the plaintiffs transacted with a foreign desk of a defendant or from OTC transactions arising from transactions conducted on a foreign exchange," the order states. "Further, even if some of the transactions involved foreign conduct, the domestic effects exception would apply to them."

The judge also states that the investors have shown that litigation of the case as a class action is superior to other methods of adjudication and, therefore, the defendants' remaining objections fail.

Friday's order comes after the **banks settled** in August 2023 for nearly \$500 million. In September, class counsel from Quinn Emanuel Urquhart & Sullivan LLP and Cohen Milstein Sellers & Toll PLLC were **awarded \$102 million** in attorney fees.

The case dates back to 2017 and alleged that large middlemen banks in the stock loan market worked to prevent the emergence of more competitive electronic exchanges that could have offered the investors better pricing.

Counsel for the investors declined to comment on Friday, and counsel for the banks did not immediately respond to requests for comment.

The investor plaintiffs are represented by Quinn Emanuel Urquhart & Sullivan LLP and Cohen Milstein Sellers & Toll PLLC.

Goldman Sachs is represented by Paul Weiss Rifkind Wharton & Garrison LLP.

Morgan Stanley is represented by Cravath Swaine & Moore LLP.

JPMorgan is represented by Covington & Burling LLP.

UBS is represented by Katten Muchin Rosenman LLP.

EquiLend is represented by Cleary Gottlieb Steen & Hamilton LLP.

The case is Iowa Public Employees' Retirement System et al. v. Bank of America Corp. et al., case number 1:17-cv-06221, in the U.S. District Court for the Southern District of New York.

-- Correction: A previous version of this story contained incorrect counsel information for one defendant. The error has been corrected.



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Life Insurance Investments Aren't Securities, 9th Circ. Told

By **Bonnie Eslinger**

Law360 (December 6, 2024, 8:42 PM EST) -- Agents who sold interests in life insurance policies for Pacific West Capital Group — which struck a \$64 million SEC deal to end investment fraud claims — urged the Ninth Circuit on Friday to reverse an order requiring them to pay back some of their commissions, saying the deals weren't investment contracts.

The long-running case brought by the U.S. Securities and Exchange Commission resulted in Pacific West Capital Group Inc. **agreeing in 2018** to disgorge \$57.4 million in profits and pay \$6.3 million in prejudgment interest to end claims in California federal court that it defrauded investors with its sales of fractionalized interests in universal life insurance policies.

The SEC also filed claims against Pacific West sales agents Brenda Barry, Eric Cannon and Caleb Moody, and a federal judge subsequently found on summary judgment that the three defendants violated securities and broker-dealer requirements because the insurance policy deals were investment contracts under the U.S. Supreme Court's test from its 1946 decision in **SEC v. W.J. Howey Co.**, which set the parameters of what counts as a security.

The sales agents' lawyer, Igor Timofeyev of Paul Hastings LLP, urged the appellate court on Friday to reverse the district court's decision.

"The court erred in finding that the life settlement arrangements at issue were securities under Howey, even though the investment success depended primarily on forces outside the promoters' control," Timofeyev said.

According to filings with the court, the deals involved personal life insurance policies sold by the insured to a third party for a higher amount than what would be offered by the life insurance companies.

Pacific West purchased life insurance policies and then offered interests for sale to investors. It aimed to buy policies that would mature within four to seven years after purchase and were owned by insureds who were "75 years of age or older with health complications," according to the individual defendants' opening brief to the Ninth Circuit. Investors would hold the policies until the insured passed away and collect the face value of the policy.

"The life settlement policies here are not securities," Timofeyev told the panel. "Here, the expected profit from the investment depended primarily on the lifespan of the insured, not on any managerial effort by the Pacific West."

And contrary to the court's finding that Pacific West's involvement in the investments included managerial efforts that the Howey test says indicate a security, those activities — paying policy premiums, monitoring the insured and delivering the eventual policy payment to investors — were "ministerial," not managerial, the lawyer said.

The investors' called the shots, including selecting the policies they would invest in, Timofeyev said.

U.S. Circuit Judge Richard Clifton noted that the investors chose from policies offered to them by the sales agents.

"When a broker calls me and offers different mutual funds, I get to choose among them," the judge said. "That doesn't change their status as securities."

The lawyer said a better analogy would be an art consultant or a gallery offering an investor a selection of paintings from which to purchase.

"Those paintings would be selected based on whom the artist is, based on that artist's potential to appreciate in value," Timofeyev said.

Pacific West shared with investors data about the insured's age, medical history and family medical history, he said.

"They could consult the policies themselves, and at that point, the investors could make their decisions," Timofeyev said.

U.S. Circuit Judge Gabriel P. Sanchez asked the lawyer what the court was to make of the fact that the investors were only sold fractional interests in the policies.

Timofeyev said that while some courts have said the analysis could be affected by a fractional interest versus an investment in a whole life insurance policy, that didn't apply in this case because the selection criteria was made apparent to all.

Judge Sanchez said prior circuit opinions have considered whether the buyer of the policies adds value by negotiating the price.

"Investors aren't doing that," the judge said. "So why doesn't that put that into the realm of securities?"

Timofeyev said there is case law supporting that "pre-purchase activities," such as the selection of policies, should be given very little consideration.

"It doesn't tell whether the expectation of profit derives from the efforts of others," the lawyer said. "It is divorced from the expectation of profit."

Judge Clifton asked if Pacific West's system for paying the premium on the policies could be considered managerial.

The lawyer said Pacific West was merely performing contractual duties.

Timofeyev also argued that the lower court judge was wrong to impose disgorgement and civil penalties in a case not involving any fraud or investor harm by the sales agents. The lawyer said there's no evidence of pecuniary harm or out of pocket losses suffered by the investors as a result of the actions of the sales agents.

SEC lawyer Kerry Dingle told the appellate panel that Pacific West promised investors it would maximize their profits by using their expertise to select policies that would pay out in four to seven years and managing the ongoing premium payments.

Disgorgement of a portion of the sales agents' commissions is appropriate and relates to a defendant's unjust enrichment, not the victims' loss, the SEC lawyer said.

And while the appellants don't have fraud charges against them, Pacific West did, she added.

Judge Clifton noted that the lower court judge didn't find scienter — knowledge of wrongdoing.

"Why is it that these individuals are expected to know better ... when God knows, we've spent a lot of time and read a lot of pages trying to figure out whether this is an investment contract," the judge said.

The SEC sued the Pacific West and its owner in 2015 over its sale of "life settlements." According to the SEC's complaint, Pacific West Capital Group and its owner, Andrew B. Calhoun IV, used proceeds

from the sale of new life settlements to continue funding the investments they sold in previous years.

Under the deal Pacific West struck with the SEC in 2018, the company also agreed to pay \$750,000 in civil penalties under the Securities Exchange Act of 1934 and the Securities Act of 1933, without admitting or denying the allegations, according to the judgment filed with the court.

U.S. Circuit Judges Ronald M. Gould, Richard R. Clifton and Gabriel P. Sanchez sat on the panel for the Ninth Circuit.

The SEC is represented by Megan Barbero, Jordan A. Kennedy, Michael A. Conley and Kerry J. Dingle.

Brenda Christine Barry, Eric Christopher Cannon and Caleb Austin Moody are represented by Nicolas Morgan of Investor Choice Advocates Network and Igor V. Timofeyev and Alyssa K. Tapper of Paul Hastings LLP.

The case is U.S. Securities and Exchange Commission v. Barry et al., case number 23-2699, in the U.S. Court of Appeals for the Ninth Circuit.

--Additional reporting by Dave Simpson. Editing by Rich Mills.

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Evenflo Nears Settlement In Booster Seat MDL

By **Elliot Weld**

Law360 (December 6, 2024, 3:14 PM EST) -- Baby product maker Evenflo said Friday that it has reached an agreement in principle to settle multidistrict litigation alleging it made deceptive statements about the safety of its Big Kid booster seats.

Counsel for Evenflo and the class told a Massachusetts federal judge in a joint filing that they were finalizing the terms of a settlement and would submit it to the court for preliminary approval within 45 days.

An attorney for the class declined to comment Friday.

Counsel for Evenflo did not immediately respond to requests for comment Friday.

The class alleges the company made misleading claims about the booster seat's performance during side-impact collisions, especially for children under 40 pounds. Evenflo, according to the class, advertised the seats as having been safety tested for children weighing 30 to 110 pounds, but no federally approved booster-seat safety tests exist for children under 40 pounds, or for side-impact collisions.

Evenflo has previously argued its marketing claims were supported by its own testing.

The class is represented by Mark Chalos and Christopher Coleman of Lieff Cabraser Heimann & Bernstein LLP, Martha Geer of Milberg Coleman Bryson Phillips Grossman PLLC and Steve Berman and Shayne Stevenson of Hagens Berman Sobol Shapiro LLP.

Evenflo is represented by Stephen Hansen, Tristan Duncan and Daniel Rogers of Shook Hardy & Bacon LLP.

The case is In re: Evenflo Co. Inc. Marketing, Sales Practices and Products Liability Litigation, case number 1:20-md-02938, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Julie Manganis. Editing by Janice Carter Brown.

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Google Must Face Trimmed BIPA Suit Over IBM Dataset

By **Hailey Konnath**

Law360 (December 6, 2024, 8:28 PM EST) -- A California federal judge on Thursday permitted Illinois residents to proceed with a pared-down version of their proposed class action accusing Google of violating biometric privacy laws with facial data collected by IBM, ruling they've adequately alleged a violation of the Illinois Biometric Privacy Act.

U.S. District Judge Beth Labson Freeman granted in part and denied in part Google's latest motion to dismiss the case by Steven Vance and Tim Janecyk. Judge Freeman preserved their claim that Google violated BIPA by collecting their biometric information without consent. She also refused to toss their claim for unjust enrichment under Illinois law, but only to the extent that they seek injunctive relief, the order said.

"The court finds that plaintiffs have pled enough facts from which reasonable inferences can be drawn to establish a plausible BIPA violation," the judge said.

At the same time, Judge Freeman dismissed, for good, one of the plaintiffs claims under BIPA, holding that Vance and Janecyk haven't alleged facts to demonstrate Google "otherwise profited" from the biometric data. "At best," they've alleged a theory that Google improved the effectiveness of its facial recognition products using the IBM dataset and then profited from those improvements. But that's not enough to sustain the claim, the judge said.

"Indeed, plaintiffs have failed to allege how defendant used the ... dataset if at all in the Pixel smartphone," Judge Freeman said.

In the 2020 suit, Vance and Janecyk alleged IBM created the dataset by scanning 100 million images from [Flickr](#) and making it publicly available to for-profit entities by request. Google then applied for that dataset, which the men claimed was used to bolster its facial recognition technologies and products, such as Google Photos, Google Nest Hub Max, Google Pixel smartphones and its Cloud Vision API.

In a ruling **earlier this year**, Judge Freeman threw out the case but allowed Vance and Janecyk to amend their complaint. Notably, at that time, she found the claims didn't establish Google's alleged violations took place in Illinois.

On Thursday, Judge Freeman held the plaintiffs have now pled sufficient facts to establish the alleged BIPA violations happened "primarily and substantially" in Illinois. Vance and Janecyk alleged the Pixel smartphones underlying the suit were engineered in Chicago, and the dataset obtained by Google included photographs of Illinois residents, according to the order.

"While defendant correctly points out that plaintiffs do not allege where defendant obtained or 'otherwise profited' from the DiF dataset, the court finds that those facts alone 'would not necessarily be dispositive,'" Judge Freeman said.

As for unjust enrichment, Judge Freeman said Vance and Janecyk have adequately pled such a claim. However, the judge said they haven't established that they lack an "adequate remedy at law" when it comes to their claims for restitution or disgorgement because they failed to allege "any specific facts showing that the restitution or disgorgement they seek would exceed the legal remedies available to them under BIPA."

Still, they aren't barred from seeking equitable relief in the form of an injunction "to the extent their claims are based on alleged future harm," Judge Freeman said.

Janecyk also sued IBM in Illinois state court in early 2020, claiming it **gathered his and others' facial data** without their consent in violation of BIPA. A few months later, **two nearly identical actions** were initiated in California against Google and face-matching software company FaceFirst Inc. Another two were launched against Amazon and Microsoft in Washington state.

Judge Freeman stayed the case against Google in **February 2021** while awaiting the results of the other pending actions. More than two years later, the parties agreed to restart the case.

Google and counsel for the plaintiffs didn't immediately respond to requests for comment Friday.

The plaintiffs are represented by Gary F. Lynch of Lynch Carpenter LLP, Scott R. Drury of Drury Legal LLC, Todd D. Carpenter of Lynch Carpenter LLP and Katrina Carroll of Lynch Carpenter LLP.

Google is represented by Bobbie J. Wilson, Sunita Bali, Susan D. Fahringer, Lauren J. Tsuji and Anna Mouw Thompson of Perkins Coie LLP.

The case is Steven Vance et al. v. Google LLC, case number 5:20-cv-04696, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins, Celeste Bott, Lauraann Wood, Allison Grande, Gina Kim and Bonnie Eslinger. Editing by Drashti Mehta.

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Allianz Exec Avoids Prison For \$7B Investor Fraud

By **Stewart Bishop**

Law360, New York (December 6, 2024, 10:29 PM EST) -- A New York federal judge on Friday declined to sentence a former portfolio manager for Allianz SE's U.S. unit to any time in prison for lying to investors about the riskiness of a group of private investment funds that lost over \$7 billion when the COVID-19 pandemic hit.

Chief U.S. District Judge Laura Taylor Swain in Manhattan sentenced Gregoire Tournant to three years of probation, with 18 months of that time to be served on home confinement, in light of his severe neurological illness and a finding that his dishonesty wasn't the cause of investors' losses.

Manhattan federal prosecutors accused the former executive of Allianz, a Munich-based financial services and insurance company, of orchestrating a scheme to defraud institutional investors in a series of private so-called Structured Alpha funds by falsely claiming the investment vehicles were sufficiently hedged against a market crash.

Tournant and others also are accused of conning investors about the level of Allianz's oversight of the Structured Alpha funds' investment strategy, and of fraudulently altering documents given to investors by Allianz Global Investors. Additionally, following the March 2020 losses, Tournant tried to obstruct an investigation into the ordeal by the U.S. Securities and Exchange Commission, according to the government.

The funds lost over \$7 billion when the COVID-19 pandemic took hold in March 2020.

During an hourslong sentencing hearing, Judge Swain said that despite the agency's assurances to the contrary, she concluded that the Federal Bureau of Prisons could not adequately care for Tournant's serious health problems.

"The court is not convinced," Judge Swain said.

Tournant, 57, a naturalized U.S. citizen who lives in Colorado, also agreed to forfeit \$17.5 million and was fined \$250,000 following his guilty plea in June to investment adviser fraud charges.

In May 2022, Allianz agreed to resolve the allegations for over \$6 billion, and AGI U.S. pled guilty to securities fraud, as did former AGI managing directors Stephen Bond-Nelson and Trevor Taylor, among other charges. In the wake of the charges, Allianz said it was transferring AGI U.S.' investment management activities to Voya Financial, its partner in the U.S.

Prosecutors had pushed for Tournant to serve a prison term of no less than seven years, three years below the statutory maximum, claiming he had caused investors to lose \$3.2 billion of the principal amount of their investments.

Assistant U.S. Attorney Nicolas Roos told Judge Swain that investors had been fraudulently induced to put their money into the Structured Alpha funds based on false information provided by Tournant and others.

The victims "would not have invested or would have withdrawn [their] investments" had they known about Tournant's deception, Roos said.

Tournant's counsel Seth Levine of Levine Lee LLP countered that any misrepresentation by Tournant was not the cause of investors' losses. Levine said Tournant was out sick for most of March 2020, and

when the funds tanked amid the market volatility brought on by the pandemic, others at AGI U.S. decided to liquidate the funds "at rock bottom prices."

"The driver of the loss ... was the remarkable, unprecedented events of the [COVID-19] crisis," Levine said.

Judge Swain ultimately sided with the defense, saying the government had failed to prove that the lost \$3.2 billion in investors' principal was "not the result of Mr. Tournant's lies."

With a loss amount of zero, the judge found the applicable sentencing guidelines range for Tournant to be six to 12 months in prison.

In a brief statement to the court, Tournant was apologetic.

"I'm really sorry for my conduct, I failed to comply with the law," he said.

In handing down the sentence, Judge Swain called Tournant's conduct serious and systemic, "which undermines the legal requirements of accurate disclosures in the market," but expressed concern for his "unique and serious medical condition."

In a statement after the hearing, Levine and Tourant counsel Daniel R. Alonso of Orrick Herrington & Sutcliffe LLP said they are "deeply appreciative to the court for imposing this just sentence and recognizing that incarceration was not appropriate in this case."

Representatives for the U.S. Attorney's Office for the Southern District of New York did not immediately respond to a request for comment Friday.

The government is represented by Thomas Burnett, Sarah Mortazavi and Nicolas Roos of the U.S. Attorney's Office for the Southern District of New York.

Tournant is represented by Seth Levine, Alison Bonelli and Julie-Irene Nkodo of Levine Lee LLP and Daniel R. Alonso and Olivia Rauh of Orrick Herrington & Sutcliffe LLP.

The case is U.S. v. Tournant, case number 1:22-cr-00276, in the U.S. District Court for the Southern District of New York.

--Editing by Michael Watanabe.