

Judge in Musk pay case is backed by law profs and plaintiffs' lawyers in letter to bar group

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Alison Frankel



Chancellor Kathaleen McCormick, Delaware Court of Chancery, speaks during the gathering of top global M&A advisors at the 35th Annual Tulane Corporate Law Institute in New Orleans, Louisiana, U.S., March 23, 2023. REUTERS/Kathleen Flynn/File Photo Purchase Licensing Rights , opens new tab

Dec 10 (Reuters) - Dozens of prominent law professors and plaintiffs' lawyers have signed a letter , opens new tab calling on the Delaware bar association to defend the top Chancery Court judge from “deeply unfair attacks” made by Elon Musk, the Tesla CEO whose \$56 billion pay package the judge refused earlier this month to reinstate.

The letter, which is expected to be sent on Tuesday evening to the Delaware State Bar Association committee tasked with issuing public statements, said that in the wake of Chancellor Kathaleen McCormick’s Dec. 2 decision denying Tesla’s bid to restore Musk’s pay package after shareholders voted anew to approve it, Musk has shared “vicious” criticism of the judge with his 206 million followers on X, the social media platform he owns.

Those attacks, the letter noted, called McCormick — who was appointed to the top Chancery Court job after a stint as a partner [↗](#), opens new tab at the renowned corporate law firm Young Conaway Stargatt & Taylor — “corrupt” and “a radical far left activist cosplaying as a judge.”

Delaware’s judicial ethics rules preclude McCormick from speaking out against these “dangerous, defamatory and one-hundred-percent false” accusations by “one of the most powerful men in the world,” the letter said.

In such circumstances, the letter said, “We believe that the bar has an obligation to speak in her defense.”

The list of letter-signers is loaded with law professors. Among the scholars whose participation I was able to confirm are John Coffee, Eric Talley and Dorothy Lund of Columbia University; Michael Klausner of Stanford University; John Coates of Harvard University; and Charles Elson, a retired professor from the University of Delaware who submitted an amicus brief in the Tesla case that asserted views McCormick adopted in her ruling earlier this month.

“It was an easy decision,” Coffee said by email. “Defending a judge who has been unfairly attacked is really a duty that falls on all admitted lawyers.”

Coates said by email that he signed the letter to assure that Delaware “remains best for incorporation and resolution of corporate law disputes.”

Many partners from plaintiffs' firms with busy Delaware dockets also signed the letter. The firms include Block & Leviton; Equity Litigation Group; Friedlander & Gorris; Grant & Eisenhofer; Kessler Topaz Meltzer & Check; Labaton Keller Sucharow; Robbins Geller Rudman & Dowd; Saxena White; and Scott + Scott.

“Elon Musk's conduct here is appalling and we should all stand together as lawyers to call it out,” said Lee Rudy of Kessler, via email. “Without a strong and bi-partisan response, many of [Musk’s] fan boys will likely blindly agree with (and echo) him, which causes further erosion in our faith in a court system we all rely on.”

I sent a draft of the letter — which I obtained through a social media post by a law professor who did not end up signing the petition — to Tesla and several of the firms that represented various defendants in the Musk pay case: Quinn Emanuel Urquhart & Sullivan; Cravath, Swaine & Moore; and DLA Piper. Neither the company nor defense counsel responded.

I wasn’t able to ascertain who initially drafted the letter to the bar group, but it appears to have circulated widely among corporate law professors and plaintiffs' lawyers. Some signers told me they did not necessarily agree with every sentence in the letter. Others said the letter should not be construed as support for all of McCormick’s rulings as chancellor.

But all of the eight signers I spoke with, either on the phone or by email, said they support the core message that the legal community should not countenance attempts to bully judges.

"It is unacceptably corrosive to democracy and our judicial system," said Columbia's Talley. "It's really as simple as that."

No lawyers who signed onto the letter disclosed an affiliation with a defense firm, as of mid-afternoon on Tuesday when I last reviewed the list of electronic signatures. (Aside from academics and plaintiffs' lawyers, signers included a handful of Delaware officials and lawyer-journalists from The Chancery Daily.)

That could be because of conflicts: Many of Delaware's big corporate firms were involved in the Musk compensation litigation, in which Tesla, its board of directors and the lone director who recommended a second shareholder vote on Musk's pay all had their own Delaware counsel. (The plaintiffs' firms in the Musk compensation case, led by Bernstein Litowitz Berger & Grossmann, also did not sign the letter.) It's also possible, noted Harvard professor Coates, that defense lawyers were not aware of the letter.

But regardless of the reasons for the defense bar's silence, said Coffee of Columbia, those lawyers may have missed an opportunity: "They have a strong personal interest in praising a judge that they may appear before in the future (and given the small size of the Chancery Court it is inevitable in Delaware)."

The Delaware bar previously issued a statement in January 2024, criticizing a dissatisfied litigant who has spent a nearly a decade attacking Chancery Court judges. In response to television ads by the litigant earlier this year, the bar's Committee on Response to Public Comment posted a statement on the bar's website that was headlined, "The Delaware Bar stands with Chancellor McCormick."

The statement, which is still prominently displayed on the committee's homepage, said McCormick "is guilty of nothing other than doing her job, and doing it well."

Read more:

Tesla bet on shareholder 'ratification' to save Musk's pay package. It lost the bet.

Delaware judge rejects Musk's \$56 billion Tesla pay - again

Who is Kathaleen McCormick, the judge who slashed Elon Musk's pay package? [↗](#), opens new tab

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Reporting By Alison Frankel

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Bloomberg Law News 2024-12-11T12:19:39147652605-05:00

Musk's Attacks on Delaware Judiciary Prompt Defense From Bar

By Jennifer Kay and Mike Leonard 2024-12-11T12:03:40000-05:00

- Attorneys, law professors demanded response to Musk's attacks
- Bar has made similar statements about TransPerfect's owner

Elon Musk's attacks on the Delaware judge who's twice denied him a \$56 billion pay package for being Tesla Inc.'s CEO have pushed the state bar association to publicly defend the judiciary from "constant antagonism."

"Joining a disturbing trend emerging across the US, Delaware's judges have been unjustly attacked with increasingly polarized rhetoric that goes far beyond any scholarly critique of their rulings and written opinions," the bar said in a [statement](#) posted online late Tuesday.

Musk [blasted](#) Chancellor Kathaleen St. Jude McCormick's [Dec. 2 ruling](#), reinforcing her previous decision to void the package because Tesla's board was too beholden to him, as "absolute corruption" and "lawfare" on his social media platform, X. Some of his supporters posted similar criticism calling McCormick—who also refused to let Musk out of his \$44 billion bid to buy the platform then known as Twitter in 2022—"insane" and an "activist judge at its worst."

"It is extraordinary that in this State (and Nation) of democratic laws that these words must be said, but it is perhaps a symptom of the constant antagonism and conflict that now permeate all facets of modern American life," the bar said. It added that it "seeks to uphold the time-honored tradition of civility and cooperation among our ranks, and in our courts, for litigants and lawyers alike."

Greg Varallo, who [led](#) the Bernstein Litowitz Berger & Grossmann legal team that challenged Musk's pay package, wrote "Congrats Delaware State Bar Association!" under the bar's LinkedIn post.

The statement follows a [letter](#) urging the bar to rise to McCormick's defense against Musk's "vicious and deeply unfair attacks." It's signed by roughly 100 attorneys and law professors.

"We believe that the expert, hard-working, and outstanding members of the Court of Chancery as well

as other members of the Delaware judiciary deserve vocal support from the bar when they are the subjects of unfair attack," it said. It also said Musk's public criticism was "dangerous, defamatory, and one-hundred-percent false."

It's not the first time the bar has stepped in to defend the court against a rich, unhappy litigant. Bar leaders have [repeatedly called out](#) TransPerfect Global Inc. owner Phil Shawe by name about his [attempts](#) to discredit a 2017 Chancery order for the company's sale.

One of the letter's signatories, Charles Elson, founding director of the Weinberg Center for Corporate Governance at the University of Delaware, had applauded McCormick's most recent ruling against Musk.

"The facts were really very problematic, and she responded to them in an appropriate way," he said. He called McCormick "a person of great courage and integrity, and that's what Delaware needs to be known for in the end."

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Delaware Corporate Law Debate Feeds a Robust and Balanced System

- *Univ. of Delaware expert assesses state's lead in business law*
- *Separation, distribution, and balance are its strengths*

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Delaware Corporate Law Debate Feeds a Robust and Balanced System

By Lawrence Cunningham2024-12-11T04:30:03000-05:00

- *Univ. of Delaware expert assesses state's lead in business law*
- *Separation, distribution, and balance are its strengths*

Critics often see internal discord in opponents as a time to pounce. But in situations where intellectual debate is valuable, such discord is a strength. That's certainly the case when Delaware's corporate law establishment is seen as internally divided.

Delaware insiders differ sharply on one of the grandest debates the state's business law engenders: One side argues that a Delaware court was correct earlier this year to disallow insider control of a corporate board, while the other says the legislature was right to overrule that opinion within four months of its publication.

Both sides have a point, and this debate, far from questioning Delaware's leadership in corporate chartering and law, illustrates its appeal.

Delaware counts on all elements of its sovereignty and citizenry to produce the most attractive corporate law structure in the world, especially its judicial and legislative branches. Both branches rely on a pool of experienced corporate lawyers plying the complementary trades of legislation and adjudication. Neither dominates, but each checks the other.

Delaware courts have long been widely revered with good reason. The judges are pulled from among the best Delaware corporate lawyers and are required by the state constitution to be drawn equally from both major political parties.

They are sophisticated, work without juries, pay close attention to facts, and establish equitable jurisprudence that balances contending interests, particularly in shaping the norms that govern the relationships among corporate directors, officers, and shareholders.

Equally important, but less heralded, is the Delaware legislative process for corporate law. Since its enactment, the state's corporate statute—the Delaware General Corporation Law—has been deliberately flexible, offering a menu of options to corporations rather than imposing legislative mandates by fiat. The state bar association crafts the legislation, not politicians, and that's kept updated with regular annual revisions, often in response to judicial opinions.

This balance between judicial and legislative powers isn't merely theoretical; it plays out in real time, where swift legislative responses and ongoing public debate reflect Delaware's adaptive process.

Since 1967, the Delaware legislature has expressly altered judicial outcomes on at least 45 occasions. The speed of the legislative process varies—averaging 7.5 years after the triggering court case with a median response time of 1.75 years.

It's often swift—on a dozen occasions, amendments were passed less than a year after an opinion appeared. These topics have stoked intense debate within and outside Delaware.

In 1985, the Delaware Supreme Court in *Smith v. Van Gorkom* held directors personally liable for staggering money damages for mere haplessness. Sixteen months later, Delaware's general corporation law was amended to authorize corporate charters to exculpate directors for precisely such liability.

In 2009, the Delaware Supreme Court in *CA, Inc. v. AFSCME* held that a bylaw requiring the corporation to reimburse stockholder expenses for soliciting proxies in support of director nominees is invalid unless it permitted the board to refuse reimbursement if it determined that fiduciary duties so required. Eight months later, the state's general corporation law was amended to explicitly authorize such bylaws without including the fiduciary out.

In 2014, the Delaware Supreme Court in *ATP Tour, Inc. v. Deutscher Tennis Bund* upheld fee-shifting bylaws of a nonstock membership corporation—requiring losing plaintiffs to pay all legal fees in a case. Thirteen months later, after extensive internal debate and changes of position, the corporation law was amended to prohibit any such fee shifting in stock corporations.

One of the latest examples of this dynamic occurred earlier this year. In February, the Delaware Chancery Court in *West Palm Beach Firefighters v. Moelis* invalidated terms in a corporation's contract with its founding shareholder that delegated to the shareholder certain powers usually reserved to boards of directors, including the board's size and composition. Within four months, the general corporation law was amended to validate such clauses.

Related debate, including public disputes among prominent sitting and retired judges and lawyers, was intense. This is partly because it arose in a perfect storm implicating the balance between three pairs of primary Delaware corporate values: freedom of contract versus fiduciary duty, the allocation of power between boards and shareholders, and the rights among different shareholders within a corporation.

It's not surprising that passionate and convincing arguments are made for and against each of these positions in this multi-level debate.

What's surprising is that so few stress that such debate intensity is healthy and reflects the value of Delaware corporate law. Such debates reflect the push and pull of the process of Delaware law production that struggles with polarities that are inherent, essential, and valuable, starting with the separation of powers and divisions of labor between branches of government.

Courts can't promulgate rules in advance but only resolve disputes before them; legislators rarely resolve individual disputes but rather promulgate rules in advance. The inherent limitations in each role can prevent either branch from achieving the optimal balance.

The only way to approach optimal is the endless iteration between them. Many examples appear—from director exculpation to fee-shifting bylaws.

The tension between private ordering through freedom of contract and social control through fiduciary duty is often at the heart of these debates. Judges contend with that tension frequently, and the legislature is permitted to readjust it as well.

Whether this adjustment is optimal for Delaware corporate law can and should be debated—but the process of judicial and legislative balance of powers is central to the exercise.

As Delaware law evolves, it reflects the relationship between boards and shareholders, and the often-complex dynamics among different shareholder groups—such as common versus preferred or controllers and/or founders versus others. This tension is not only a matter of fiduciary duties owed to shareholders collectively, but also of the competing interests of those shareholders, each with different expectations and levels of influence.

Ultimately, debates over corporate governance in Delaware aren't signs of dysfunction but markers of a dynamic, responsive legal system. All robust legal systems contain tensions, and Delaware's are no exception.

The dialogue between judicial interpretation and legislative adjustment ensures the productive evolution of corporate law, balancing competing interests.

These debates, whether internal or external, are essential to Delaware's process and demonstrate its unique capacity for adaptation. Corporate law is central to Delaware's identity, and it receives unparalleled attention—both judicial and legislative—that no other jurisdiction provides. This responsiveness makes Delaware's corporate law a model of strength and resilience.

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

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Nvidia Challenge to Investor Suit Spurned by Supreme Court (1)

By Greg Stohr2024-12-11T11:30:26636-05:00

- Investors can press suit stemming from crypto-mining revenue
- Court dismisses its second securities-fraud case this term

The US Supreme Court dismissed an appeal by Nvidia Corp., leaving it to face a lawsuit that accuses the company of misleading shareholders about its reliance on crypto-mining revenue in the run-up to a market crash.

The dismissal came four weeks after several justices questioned whether the case presented the type of broad legal issue that would warrant a Supreme Court ruling. Nvidia, the world's most valuable company, contended the shareholders' lawsuit lacked enough specificity to go forward to the evidence-gathering stage of litigation.

"I'm not actually sure what rule we could articulate that would be clearer than our cases already say," Justice Sonia Sotomayor said during the Nov. 13 argument.

As is its usual practice, the court didn't provide any explanation for dropping the case, saying only that it was being "dismissed as improvidently granted."

It's the second securities-fraud case the justices have scrapped in a term that is only two months old. The court last month dismissed an appeal by Meta Platforms Inc., leaving it to face accusations of misleading shareholders about the data-harvesting scandal involving political consulting firm Cambridge Analytica.

A ruling favoring Nvidia might have helped other companies win early dismissal of shareholder suits and avoid the expense of mounting a full-scale defense. The case centered on the protections Congress gave companies in the 1995 Private Securities Litigation Reform Act, which requires lawsuits to make key allegations "with particularity."

Lawyers for Nvidia and the shareholders didn't immediately respond to requests for comment.

Crypto Sales

The Nvidia shareholders say that in 2017 and 2018 Chief Executive **Jensen Huang** hid the fact that record revenue growth was being driven by mining-related sales of the company's flagship GeForce GPU product, rather than by sales for gaming. The chipmaker's products have become key computer components used to complete the complex calculations to extract cryptocurrencies.

The investors say crypto market volatility put the company in a precarious spot when the market crashed in 2018. The company said in November 2018 that it had missed its revenue projections, sending shares tumbling more than 28% over two days. Huang at the time said a "crypto hangover" was to blame.

The San Francisco-based 9th US Circuit Court of Appeals said the lawsuit could go forward in a federal district court in Oakland, California.

The investors are led by a unit of Swedish institutional investor E. Ohman J:or AB.

Nvidia in 2020 agreed to pay \$5.5 million to settle related allegations by the Securities and Exchange Commission.

The case is Nvidia v. E. Ohman J:or Fonder, [23-970](#).

(Updates with attempts to reach lawyers. An earlier version corrected the headline to clarify that suit will continue in lower court.)

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US Supreme Court tosses case involving securities fraud suit against Nvidia

[reuters.com/legal/us-supreme-court-tosses-case-involving-securities-fraud-suit-against-nvidia-2024-12-11](https://www.reuters.com/legal/us-supreme-court-tosses-case-involving-securities-fraud-suit-against-nvidia-2024-12-11)

John Kruzel

A smartphone with a displayed NVIDIA logo is placed on a computer motherboard in this illustration taken March 6, 2023. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights , opens new tab

- Lower court let suit led by Swedish firm proceed
- Nvidia accused of concealing the impact of cryptomining

WASHINGTON, Dec 11 (Reuters) - The U.S. Supreme Court sidestepped on Wednesday a decision on whether to allow shareholders to proceed with a securities fraud lawsuit accusing artificial intelligence chipmaker Nvidia (NVDA.O) , opens new tab of misleading investors about how much of its sales depended on the volatile cryptocurrency market. The justices, who heard arguments in the case on Nov. 13, dismissed Nvidia's appeal of a lower court's ruling that allowed a 2018 class action - litigation led by the Stockholm, Sweden-based investment management firm E. Ohman J:or Fonder AB - to move forward.

The Supreme Court opted not resolve the underlying legal dispute, determining that the case should not have been granted. Its action leaves the lower court's decision in place. The Supreme Court's dismissal came in a one-line order that provided no explanation.

At issue was whether the plaintiffs cleared the heightened legal bar for bringing private securities fraud suits set under a 1995 federal law called the Private Securities Litigation Reform Act that aimed to screen out frivolous litigation.

The plaintiffs accused Nvidia and its CEO Jensen Huang of violating a 1934 federal law called the Securities Exchange Act by making statements in 2017 and 2018 that falsely downplayed how much of Nvidia's revenue growth came from crypto-related purchases.

Beginning in 2017, as the price of certain cryptocurrencies rose, Nvidia's chips became increasingly popular for cryptomining, a process that involves performing complex math equations in order to secure cryptocurrencies such as bitcoin and ether.

By late 2018, amid a decline in crypto profitability, Nvidia's revenue fell short of its projections, leading its stock price to fall in early November of that year.

The plaintiffs accused Nvidia and its top officials of concealing the impact of cryptomining on its business. The suit seeks unspecified monetary damages in part to recoup the lost value of the Nvidia stock held by the investors.

Nvidia in 2022 agreed to pay \$5.5 million to U.S. authorities to settle charges that it did not properly disclose the impact of cryptomining on its gaming business, but without admitting or denying the findings of federal regulators.

A federal judge dismissed the lawsuit but the San Francisco-based 9th U.S. Circuit Court of Appeals subsequently revived it. The 9th Circuit found that the plaintiffs had adequately alleged that Huang made "false or misleading statements and did so knowingly or recklessly," allowing their case to proceed.

Nvidia argued to the Supreme Court that the plaintiffs had failed to adequately show that the disputed corporate statements were false, or the company had intentionally or recklessly misled investors, as required by law.

The plaintiffs countered that their lawsuit contained strong enough allegations - gleaned from former employees, market analysis and expert opinion - to survive Nvidia's request for dismissal and proceed to the discovery stage of litigation.

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

The Nvidia dispute was one of two cases to come before the Supreme Court in November involving the right for private litigants to hold companies to account for alleged securities fraud. The other one, involving Meta's (META.O) [link](#), opens new tab Facebook, was argued on Nov. 6 and similarly dismissed by the justices on Nov. 22.

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Reporting by John Kruzel; Editing by Will Dunham

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Supreme Court dumps Nvidia brawl against fraud by hindsight suit

 [courthousenews.com/supreme-court-dumps-nvidia-brawl-against-fraud-by-hindsight-suit](https://www.courthousenews.com/supreme-court-dumps-nvidia-brawl-against-fraud-by-hindsight-suit)

Kelsey Reichmann, Ryan Knappenberger

The justices weighed whether to find errors in a lower court ruling that Nvidia warned would lead to a flood of fraud by hindsight lawsuits.

Visitors stop by the booth of Nvidia at the Apsara Conference, an annual cloud service technology forum hosted by Alibaba Group, in Hangzhou in eastern China's Zhejiang province Tuesday, Oct. 19, 2021. (Chinatopix Via AP)

WASHINGTON (CN) — The Supreme Court on Wednesday said it erred in taking up Nvidia's fight against shareholders' securities fraud lawsuit, forcing the chip giant to face claims that it misled investors about sales revenue from crypto miners.

Nvidia asked the high court to short circuit the class action connected to the 2018 cryptocurrency crash. Shareholders claimed that Nvidia CEO Jensen Huang misled investors about the company's sales revenue, suggesting the build of its profits came from gaming instead of the more volatile crypto market.

The chipmaker argued that an appeals court ruling upholding the class action would encourage fraud by hindsight claims, violating the fraud standard in the Private Securities Litigation Reform Act.

Neal Katyal, an attorney with Hogan Lovells representing Nvidia, said the Ninth Circuit provided a roadmap to evade the law, suggesting shareholders could easily procure experts to contradict supposed company records with public statements.

When the court heard arguments in November, however, several justices felt the issue would have been better suited for a lower court. Justice Sonia Sotomayor, a Barack Obama appointee, said, unlike lower federal courts, the Supreme Court doesn't normally do error correction.

The Private Securities Litigation Reform Act requires investors to show that Huang reviewed internal reports and chose to make public statements to the contrary. Nvidia argued shareholders hadn't met a high enough bar.

The shareholders urged the justices to resist taking on the role of a lower court, suggesting that the Private Securities Litigation Reform Act required a contextual, not categorical, rule.

Nvidia's case mirrored a similar appeal from Meta, which faces disclosure law violations for not telling investors about the Cambridge Analytica scandal. The social giant's challenge fell flat, however, with the justices ruling after hearing oral arguments that they shouldn't have agreed to hear Meta's appeal in the first place.

This is a developing story and will be updated.

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Supreme Court allows investors' class action to proceed against microchip company Nvidia

 [law.com/therecorder/2024/12/11/supreme-court-allows-investors-class-action-to-proceed-against-microchip-company-nvidia](https://www.law.com/therecorder/2024/12/11/supreme-court-allows-investors-class-action-to-proceed-against-microchip-company-nvidia)

The Associated Press

What You Need to Know

- Nvidia allegedly misled investors about cryptomining.
- A Swedish group filed suit in 2018 after Nvidia's value fell on lower revenue
- A federal appeals court in San Francisco said the class action should proceed.

WASHINGTON (AP) — The Supreme Court is allowing a class-action lawsuit that accuses Nvidia of misleading investors about its past dependence on selling computer chips for the mining of volatile cryptocurrency to proceed.

The court's decision Wednesday comes the same week that China said it is investigating the the microchip company over suspected violations of Chinese anti-monopoly laws. The justices heard arguments four weeks ago in Nvidia's bid to shut down the lawsuit, then decided that they were wrong to take up the case in the first place. They dismissed the company's appeal, leaving in place an appellate ruling allowing the case to go forward.

At issue was a 2018 suit led by a Swedish investment management firm. It followed a dip in the profitability of cryptocurrency, which caused Nvidia's revenues to fall short of projections and led to a 28% drop in the company's stock price.

Nvidia had argued that the investors' lawsuit should be thrown out because it does not measure up to a 1995 law, the Private Securities Litigation Reform Act, that is intended to bar frivolous complaints. A district court judge had dismissed the complaint before the federal appeals court in San Francisco ruled that it could go forward. The Biden administration backed the investors at the Supreme Court.

In 2022, Nvidia, which is based in Santa Clara, California, paid a \$5.5 million fine to settle charges by the Securities and Exchange Commission that it failed to disclose that cryptomining was a significant source of revenue growth from the sale of graphics processing units that were produced and marketed for gaming. The company did not admit to any wrongdoing as part of the settlement.

Nvidia's recent performance has been spectacular. Even after the news of the China investigation, its share price is up 180% this year.

Nvidia has led the artificial intelligence sector to become one of the stock market's biggest companies, as tech giants continue to spend heavily on the company's chips and data centers needed to train and operate their AI systems.

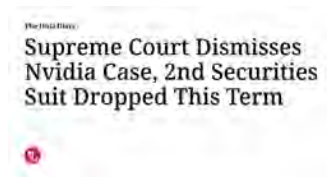
The lawsuit is one of two high court cases that involved class-action lawsuits against tech companies. The justices also dismissed an appeal from Facebook parent Meta that sought to end to a multibillion-dollar class action investors' lawsuit stemming from the privacy scandal involving the Cambridge Analytica political consulting firm.

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Supreme Court Dismisses Nvidia Case, 2nd Securities Suit Dropped This Term

[dandodiary.com/2024/12/articles/securities-litigation/supreme-court-dismisses-nvidia-case-2nd-securities-suit-dropped-this-term](https://www.dandodiary.com/2024/12/articles/securities-litigation/supreme-court-dismisses-nvidia-case-2nd-securities-suit-dropped-this-term)

December 11, 2024



By Kevin LaCroix on December 11, 2024

Posted in Securities Litigation



At the outset of the current U.S. Supreme Court term, corporate and securities law observers and commentators were excited that the Court had agreed to take up two securities law cases that had significant potential to provide insights about securities lawsuit pleading standards and processes. However, as noted here, in November, the court dismissed the Facebook Cambridge Analytica case, one of the two cases the Court was to take up this term. Now, in a terse, one-line December 11, 2024, order, the Court dismissed the Nvidia case, the second of the two cases it had agreed to take up, meaning that instead of addressing two securities law cases this term, it will now not consider *any* securities cases. A copy of the Court's December 11, 2024, order can be found here.

Background

Nvidia made GPUs intended for gaming applications. In or about 2017, cryptocurrency companies began using its GPUs for crypto mining operations. Sales of its GPUs reached record levels in 2017 and most of 2018 and the company told investors it was working hard to meet demand. However, when the company learned of excess supply of certain of its GPUs in certain distribution channels, it disclosed the excess supply of the GPUs, its share price declined, and plaintiff shareholders filed securities class action lawsuits against the company and certain of its directors and officers.

In their complaint, the plaintiff shareholders alleged that Jensen Huang, the company's CEO, knowingly understated the extent to which demand for certain of the company's GPUs was being driven by cryptocurrency miners (as opposed to demand from gamers). In their complaint, the plaintiffs did not, for example, cite internal documents reflecting GPU demand by crypto miners as opposed to gamers; rather, plaintiffs relied on an expert witness to analyze public data about activities of the crypto mining companies, using assumptions about the amount of computing power needed to facilitate the disclosed activities, and from that estimating the number of GPUs needed for the activity and what percentage of those

GPUs would have been NVIDIA's. From this "chain of assumptions," the expert purported to determine what percentage of NVIDIA's revenue was derived from crypto miners, the basis on which the plaintiffs alleged that the company's actual dependence on crypto miners differed from the company's disclosures.

The District Court granted the defendants motion to dismiss. However, the Ninth Circuit, in a split opinion, written over the dissent of Judge Gabriel Sanchez affirmed in part and reversed in part the lower court's dismissal.

NVIDIA filed a petition for a writ of certiorari to the U.S. Supreme Court. In their petition, NVIDIA said that the case presents two questions:

1. Whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with particularity the contents of those documents.
2. Whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact.

In a June 17, 2024, order, the Court granted the company's petition for a writ of certiorari. The case, which was docketed for the current U.S. Supreme Court term, had been fully briefed, and indeed, on November 13, 2024, the Court heard oral argument. According to press reports of the argument, the Court seemed very skeptical, and several individual justices seemingly were questioning why the case was before the court. Indeed, as reported here, Justice Elena Kagan said, with respect to the Nvidia case, that "it becomes less and less clear why we took this case" rather than simply allowing the Ninth Circuit's decision to stand.

Then on December 11, 2024, the U.S. Supreme Court entered an order dismissing the case on the grounds that the writ of certiorari was improvidently granted. As usual when this happens, the Court provided no explanation for the dismissal. A dismissal on these grounds means that the Court has decided that it should not have agreed to review the case. A dismissal of this type typically occurs when the Court realizes, upon further examination, that the case does not meet the criteria for Supreme Court review or that there was some procedural or substantive issue that makes the case unsuitable for their consideration. (More background on a dismissal on this ground can be found here.)

Discussion

The practical effect of the Supreme Court's dismissal is that the Ninth Circuit's ruling in the case will stand, meaning that the appellate court's overturning of part of the district court's dismissal of the case is operative, and the portion of the case that the Ninth Circuit revived by overturning the district court's dismissal will now go back to the district court for further proceedings.

The Supreme Court's dismissal of the case also means that the Court now will not weigh in on the interesting and important issues that the case presented. The question of what a plaintiff relying on internal documents in support of a securities law claim must plead is a recurring one. The question of the extent to which a plaintiff can rely on expert witness testimony to support the sufficiency of a securities law claim also is recurring. The lower courts must now deal with these questions without Supreme Court guidance on the issue, and in that regard must deal with the split in the circuit on these issues that Nvidia has cited in support of its petition for the writ of certiorari.

The split in the circuits, usually of such significant concern to the Supreme Court, is a particularly noteworthy concern with respect to these questions; Nvidia had argued in its petition for the writ that the positions of the Second and Ninth Circuits on these issues diverge, meaning that, with diverging positions in the two Circuits with the greatest volume of securities litigation activity, resulting in potentially diverging case outcomes.

Based on the media reports of oral arguments in this case, it appears that the Court was skeptical of the pleading standard for which Nvidia argued, expressing concern that requirements that Nvidia urged could raise impossible barriers for claimants at the pleading stage. Some justices also questioned how the expert witness's report could be questioned at the motion to dismiss stage of the proceedings.

In any event, it is now the case that in a Supreme Court term in which it looked as if the Court would be weighing in on the pleading standards in securities suits in two different cases, the Court will now not be saying anything on U.S. securities law issues this term. You would also think that the court might be more restrained in agreeing to take up further securities law cases, at least in the near term.

Kind of feels like showing up for a wedding ceremony, with everyone all dressed up and the witnesses gathered and the music playing, and instead of nuptials, the guests are treated to an abrupt and unexpected announcement that the wedding has been cancelled.

THL's \$2.5 Billion Agiliti Buyout Draws Wave of Legal Challenges

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1251](#)

Bloomberg Law News 2024-12-11T10:03:42606402424-05:00

THL's \$2.5 Billion Agiliti Buyout Draws Wave of Legal Challenges

By Mike Leonard 2024-12-10T14:16:57000-05:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1251](#)

Thomas H. Lee Partners LP exploited the inside track at Agiliti Inc. to squeeze out public investors with an unfair \$2.5 billion deal, according to an unsealed lawsuit.

A pension fund is suing THL and Agiliti board members linked to the buyout firm, saying they gave minority investors no voice in the \$10-per-share transaction that took the medical equipment maker private in May. The “myriad process failures” overseen by a conflicted financial adviser and a CEO who prioritized his own perks led to a lowball price, according to the court complaint made public Monday.

The suit is part of a wave of litigation over transactions that allegedly let influential insiders wield controlling stakes to extract value at the expense of other shareholders. Delaware’s Chancery Court—the leading US forum for merger fights and other corporate cases—has spent recent years cracking down on self-dealing, but innovative deal architects have kept its specialized judges on their toes.

The state supreme court last year issued a landmark ruling upholding heightened scrutiny of most transactions involving conflicts of interest on the part of controlling stockholders. But more and more dealmakers are now choosing to take their chances on court approval rather than condition a merger on onerous protections for minority investors, such as a shareholder vote, that can yield a higher upfront price.

"Controlling stockholders have determined to use the court's resources for financial gain based on a calculation that the court will not protect minority stockholders to the same extent that stockholders can protect themselves," the lawsuit says. "This case exemplifies that troubling trend."

THL declined to comment through a spokesperson Tuesday. Eden Prairie, Minn.-based Agiliti didn't immediately respond to a separate request for comment.

'Weaponized'

According to the lawsuit, Agiliti CEO Thomas Leonard rejected a buyout at the same price months earlier following the collapse of side talks over payout and equity terms for himself and senior management. Leonard, who was spearheading the company's turnaround plan, knew THL wanted to keep him on as chief executive, information he "weaponized by threatening to walk away" unless he got the terms he wanted, according to the complaint.

There were allegedly multiple other circumstances suggesting Leonard and Agiliti's board thought the price was inadequate on its face. For one thing, they failed to conduct a market check after THL's offer despite having turned down previous indications of interest in the \$16 to \$20 range, the suit says.

They also pursued a round of buybacks in late 2023 when the shares were trading above \$10, indicating they thought the company was worth more, according to the complaint. And they stood aside while THL timed its offer to front-run positive developments that led Agiliti's share price to rise, the lawsuit says.

It points to alleged conflicts affecting financial adviser Centerview Partners LLC and the special transaction committee set up by the Agiliti board—in both instances, connections to THL. And the structure of Centerview's unspecified fee likewise gave it a powerful incentive to get a deal done, according to the complaint.

The suit was originally filed under court seal Dec. 4 by the SEIU Pension Plans Master Trust. Several separate complaints filed by other Agiliti investors remained under seal Tuesday.

The pension fund is represented by Bernstein Litowitz Berger & Grossmann LLP, Saxena White PA, and Kessler Topaz Meltzer & Check LLP.

The case is SEIU Pension Plans Master Trust v. Thomas H. Lee Partners LP , Del. Ch., No. 2024-1251, complaint unsealed 12/9/24 .

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Bristol-Myers Squibb Sued for \$450 Million Over Drug Acquisition

By Mike Leonard

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1246](#)

Bloomberg Law News 2024-12-11T10:01:47296388638-05:00

Bristol-Myers Squibb Sued for \$450 Million Over Drug Acquisition

By Mike Leonard 2024-12-10T15:10:11000-05:00

- **COURT:** Del. Ch.
- **TRACK DOCKET:** [No. 2024-1246](#)

Bristol-Myers Squibb Co. plotted to rip off investors in a 2016 acquisition through legal gamesmanship aimed at evading a \$450 million payment, according to a lawsuit unsealed Tuesday.

The pharmaceutical giant's "convoluted and dishonest" scheme involved using regulatory "sleight of hand" to avoid handing over post-deal payments totaling roughly 75% of what it agreed to pay for Padlock Therapeutics Inc. so it could commercialize a potential autoimmune drug, according to the complaint filed by former Padlock stockholders.

The case echoes a recurring theme in Delaware's Chancery Court, the leading US forum for merger fights, where jilted ex-shareholders often claim corporate acquirers are trying to wriggle out of "earnout" payments tied to post-transaction milestones. The allegations have become especially common in the biotech sector, where acquisitions are often geared toward early-stage therapies that could require years of costly research—at best—to reach their blockbuster potential.

"BMS decided to renege on the deal and claim all of the benefits of Padlock's discoveries for itself," the suit says.

The New York-based pharmaceutical company didn't immediately respond to a request for comment Tuesday.

The heavily redacted lawsuit blacks out most of the details of the alleged “duplicitous patent prosecution scheme,” but it appears to have involved a series of new legal filings meant to undermine provisions of the agreement that defined certain development milestones and approvals as payment triggers.

When the former Padlock investors learned BMS was running a UK clinical trial that should have resulted in an earnout, BMS “refused and even repudiated its obligation to pay any future milestone payments,” the suit says.

The 45-page complaint was originally filed under seal Dec. 4 by Shareholder Representative Services LLC, a litigation representative.

The Padlock ex-investors are represented by Abrams & Bayliss LLP and Dechert LLP. BMS hasn’t yet made a court appearance.

The case is S’holder Rep. Servs. LLC v. Bristol-Myers Squibb Co. , Del. Ch., No. 2024-1246, 12/10/24 .

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December 10, 2024, 1:27 PM PST

Asset-Poor Enochian Bio Settles Investor Suit for \$2.5 Million

By Martina Barash

Bloomberg Law News 2024-12-11T10:04:15883627761-05:00

Asset-Poor Enochian Bio Settles Investor Suit for \$2.5 Million

By Martina Barash 2024-12-10T16:27:46000-05:00

Enochian Biosciences Inc. has agreed to pay investors \$2.5 million to settle claims that the drug developer failed to disclose its co-founder's alleged involvement in a murder, according to a federal court filing.

The deal is fair, reasonable, and adequate in light of Enochian's "precarious" financial position, which dropped to about \$220,000 in cash and cash equivalents in November, the investors told the US District Court for the Central District of California on Monday. "In short, Enochian's financial condition and the real prospect of a near-term bankruptcy materially heightened the complexity and risk of further litigation," the investors said.

- The investors alleged Enochian's stock price dropped about 37% when Serhat Gumrukcu was arrested in 2022 on murder conspiracy charges involving the death of a man who had accused him of fraud, and later dropped another 28%
- The settlement amount represents 5.3% of the lead plaintiff's \$47 million estimate of recoverable damages, the investors said in requesting preliminary approval
- The company—now known as Renovaro Biosciences—is embroiled in litigation in Delaware state court over claims that it breached a securities-sale agreement with its former majority owner

Bleichmar Fonti & Auld LLP is lead counsel for the investors. Cooley LLP represents Enochian.

The case is *Chow v. Enochian Biosciences Inc.*, C.D. Cal., No. 8:22-cv-01374, motion 12/9/24 .

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December 10, 2024, 2:07 PM PST

Window Rock, Integrity Bank Still Must Face Securities Lawsuit

By Sam Skolnik

- The complaint 'adequately alleges' Window Rock's scienter
- State securities claim remains because federal claim survives

Bloomberg Law News 2024-12-11T10:10:4043152138-05:00

Window Rock, Integrity Bank Still Must Face Securities Lawsuit

By Sam Skolnik 2024-12-10T17:07:33000-05:00

- The complaint 'adequately alleges' Window Rock's scienter
- State securities claim remains because federal claim survives

Window Rock Residential Recovery Fund LLC couldn't escape securities fraud claims from a group of investors who say that the company knowingly painted a false, "rosy" picture of their investments, causing them to lose \$1.3 million.

The 15 investors' federal securities fraud claims survived in part, and their state-law claims for securities fraud, common law fraud, and negligent misrepresentation also remain, Judge Manish S. Shah said Monday in an opinion for the US District Court for the Northern District of Illinois.

The plaintiffs had invested in a Window Rock fund through Integrity Bank & Trust. After they lost the \$1.3 million, they brought claims under the Securities Exchange Act of 1934 against Chief Financial Officer Cordell Rogers and Managing Director Patrick Cardon, as well as the other Window Rock and Integrity defendants

The plaintiffs state a claim for federal securities fraud against Window Rock and Cardon, but not Rogers, Shah said. While their complaint "adequately alleges Window Rock's scienter apart from the Integrity defendants, it does not plead CFO Cordell Roger's scienter with particularity," the judge said, referring to the mental state that indicates a person acted with knowledge of their illegality or wrongdoing.

Cardon's statements establish that he had "personal knowledge and responsibility" over quarterly reports that purposefully withheld information about fund performance, "which supports an inference of individual scienter and Window Rock's corporate scienter," the judge said.

Shah dismissed all claims, except for claims of negligent misrepresentation, in a November 2023 opinion, but also gave the plaintiffs another chance to plead their dismissed claims. The investors filed an amended complaint, which the defendants moved to dismiss for failure to state a claim.

Shah, here, dismissed the control-person liability claim against Rogers but said the similar claim against Cardon remains because Cardon's statements establish that he had personal knowledge and responsibility over misleading quarterly reports from at least 2018 to 2019. But "there are no similar allegations as to Cordell Rogers," Shah said.

Because plaintiffs state a claim for federal securities fraud, the claim under the Illinois Securities Act also survives, Shah said. The investors additionally meet the heightened pleading requirements for securities fraud under the Private Securities Litigation Reform Act, so they also state a claim for common law fraud, Shah said.

The investors say they shared a financial adviser who recommended the fund after they received promotional materials about it alongside information about seven other Window Rock asset pools, according to the court. After they invested in the fund, Integrity sent them Window Rock quarterly reports with positive data about the fund. But they didn't receive other financial reports that showed it was "in fact cratering," they say.

The investors allegedly lost about two-thirds of their investment amounts when the fund closed in February 2020. The fund's managing director admitted in a video call with the investors' adviser after the closure that Window Rock's "written communications were not clearly communicating what was really going on in the fund."

Roeser Tanner & Graham LLC and Levenfeld Pearlstein LLC represent the plaintiffs. Ellis Law PC represents Window Rock. Polsinelli Law Firm represents Integrity.

The case is *Magnuson v. Window Rock Residential Recovery Fund LP*, 2024 BL 449231, N.D. Ill., No. 1:22-cv-01010, opinion 12/9/24

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Ohio Justices' Opioid Ruling Shows Deals Were Based on 'Nothing'

By Eric Heisig 2024-12-11T09:07:29000-05:00

- Ruling obliterates principle underpinning many lawsuits
- The effect of the courts' opinion remains an open question

Drug companies have paid billions to settle allegations they contributed to the opioid epidemic based on a legal theory that they contributed to a public nuisance, harming cities, counties, and states—a legal theory that, at least in Ohio, is now considered faulty.

That's because the Ohio Supreme Court on Tuesday likely obliterated [a \\$650 million judgment](#) obtained by two counties against CVS Pharmacy Inc., Walgreens Boots Alliance Inc., and Walmart Inc. when it found the public-nuisance claims against the pharmacy megachains weren't viable.

Per plaintiffs' lawyers, nearly \$60 billion has been spent by major drug manufacturers, distributors, and pharmacies to settle thousands of common-law public-nuisance claims, with relatively few ever going to trial. Still, while it was no doubt an expensive endeavor to get to the court's [5-2 ruling](#), Case Western Reserve University law Professor Andrew S. Pollis said it was a gamble that paid off.

It also showed that "you have all these cases that settled for so much money on the strength of, at least with respect to Ohio, a principle that has now been kind of eradicated," Pollis said.

"It means that the whole settlement is built on what might be a foundation of nothing," he added.

Public Nuisance

The Ohio Supreme Court said the law as written does away with product-liability claims, "including product-related public-nuisance claims seeking equitable relief." Such claims arise when entities allegedly exposed a broad community to a certain kind of risk.

The ruling likely upends [the judgment](#), which a federal judge set up to abate problems associated with

the epidemic by requiring CVS, Walgreens, and Walmart to pay for programs for things such as treatment and training first responders in the two counties that brought their public-nuisance claims to trial.

Ohio's justices, who issued their ruling at the request of the US Court of Appeals for the Sixth Circuit, aren't alone in their assessment of common-law public-nuisance claims and their relationship to the opioid litigation.

The Oklahoma Supreme Court, in throwing out a \$465 million award against Johnson & Johnson in 2021, [said](#) a trial judge misconstrued that state's public-nuisance law when he ruled that the pharmaceutical giant's marketing of its painkillers helped fuel the opioid epidemic.

Other courts across the country have also ruled on the issue at various points during the years of litigation surrounding the opioid epidemic, though they've been inconsistent, said Adam Zimmerman, a law professor at the University of Southern California.

The immediate effect of the Ohio Supreme Court's ruling will be felt in opioid cases filed by Buckeye State cities and counties against companies that haven't yet settled, both professors said. However, its full reach depends in part on how much other state high courts look to the Ohio justices for guidance.

And that may be a tough sell.

The ruling isn't likely to influence judges and justices in other states, because it's specific to Ohio, Pollis and Zimmerman said. It focuses on specific amendments to Ohio law from the early 2000s that were designed to limit public-nuisance lawsuits against gun manufacturers.

Pollis said its usefulness outside Ohio will depend on whether another state has an analogous product-liability law. That's "unlikely," he said, because Ohio's law was amended and the history of changes appears important to how it's interpreted.

'50 States, 50 Opportunities'

The extent of how the ruling will affect the opioid litigation beyond the public-nuisance claims

advanced by the two counties at issue is also unclear. Senior US District Court for the Northern District of Ohio Judge Dan Aaron Polster, who issued the judgment in 2022 after [a jury found](#) the pharmacies liable for exacerbating the epidemic, ruled that the trial would only focus on the public-nuisance claims.

Other claims by the counties that obtained the judgment were put on hold for later discovery and trial, the judge wrote in [a 2020 order](#).

Other cities and counties also continue to pursue lawsuits against players in the drug industry, though a pending lawsuit count wasn't immediately available.

And while Tuesday's ruling takes a tool away from the plaintiffs, it may not be a very big one.

"We have 50 different states and 50 different opportunities for outcomes, to the extent these claims haven't settled," Zimmerman said. But as for Ohio, the ruling "closes the door on those types of claims."

The justices' decision didn't seem to deter the cities and counties, though, at least not completely.

"It's a real pity for Ohio citizens who will have to pay the price while in every other state the culprits are paying," W. Mark Lanier of Lanier Law Firm, who represented the two counties at trial, said in an email. "Great for big business and pharma, but really a punch in the gut for citizens of Ohio."

He continued, "in the future, for Ohio plaintiffs I guess we will need to try a RICO case against the defendants."

CVS is represented by Munger, Tolles & Olson LLP. Walgreens is represented by Sullivan & Cromwell LLP. Walmart is represented by Jones Day. The counties are also represented by Kellogg, Hansen, Todd, Figel & Frederick PLLC, Plevin & Gallucci Co., Thrasher, Dinsmore & Dolan, Napoli Shkolnik PLLC, and Spangenberg Shibley & Liber LLP.

The case is [In re: Nat'l Prescription Opiate Litig.](#) , Ohio, No. 2023-1155, 12/10/24 .

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Next in Baltimore's opioid case: \$5 billion to rectify drugs' harm

 [thebaltimorebanner.com/politics-power/local-government/baltimore-opioid-trial-abatement-7OUCY2BNVFAMXGJCJNRGFCNT4](https://www.thebaltimorebanner.com/politics-power/local-government/baltimore-opioid-trial-abatement-7OUCY2BNVFAMXGJCJNRGFCNT4)

Madeleine O'Neill

December 10, 2024

(Tanja Ivanova/Getty Images)

After winning more than \$266 million at a trial against opioid distributors last month, the city of Baltimore will return to court this week to ask for an even bigger pot of money.

Baltimore is seeking more than \$5 billion at a second trial phase, known as an abatement hearing, that begins Wednesday and could last for several days. A judge, not a jury, will decide how much money the drug distributors have to pay during this phase. The city believes the money would help address chronic problems caused by substance abuse.

The drug companies say the city's request should be rejected entirely.

A jury of six Baltimoreans already found the companies, McKesson and AmerisourceBergen, primarily responsible for a public nuisance caused by the misuse of prescription opioids in Baltimore. The \$266 million in damages is intended to cover the money Baltimore has already spent, or will spend in the next few years, on specific problems linked to the opioid crisis.

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Abatement is different. It forces defendants to clean up their mess going forward, often by paying money or taking other steps ordered by a court.

"Damages are really for what happened in the past," said Bruce Poole, an attorney in Hagerstown who helped handle opioid lawsuits for several Western Maryland communities. "Abatement is: 'Make it stop.' "

The city has submitted a 90-page abatement plan that includes proposals in three categories: harm reduction, opioid use disorder treatment, and prevention. In all, the city is requesting about \$5.2 billion to pay for the plan over a period of 15 years.

Baltimore initially requested about \$11 billion, but cut that number down significantly after the jury verdict to account for the percentage of people whose opioid use disorder was caused by prescription opioids, as opposed to illicit drugs, and to exclude people who have not yet been exposed to opioids.

The 15-year period “represents the lower bound necessary to address the opioid epidemic, and the interventions that I propose would remain efficacious and justified for longer,” wrote Susan Sherman, the city’s abatement expert and a professor at the Johns Hopkins Bloomberg School of Public Health.

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“Even after 15 years, the opioid epidemic will continue to impact those who have lost family members to opioid overdoses, survivors whose lives have been altered, and communities that have experienced significant impacts,” she wrote. “Prevention of new cases of opioid addiction and fatalities will require continued investments.”

In Ohio, a federal judge in 2022 granted two counties only about 20% of their original abatement request against a group of pharmacies in one of the only examples of an abatement hearing in an opioid lawsuit nationwide. The sum was still significant: while the counties sought more than \$3 billion, U.S. District Judge Dan A. Polster ordered the pharmacies to pay about \$650 million.

Polster found the pharmacy chains responsible for about a third of total abatement costs to account for other pharmaceutical companies’ roles in the opioid supply chain. Public-nuisance lawsuits have accused drug companies of manufacturing and shipping out millions of opioids without doing proper due diligence, contributing to a massive oversupply of addictive painkillers.

Drug companies have challenged whether they can be forced to pay abatement costs. In Ohio, the pharmacies refused to provide their own abatement plan, even after the judge ordered them to do so. An appeal of the \$650 million award is pending before the Ohio Supreme Court.

A federal judge in West Virginia rejected an abatement proposal in 2022 aimed at remediating the “downstream harms” of the opioid epidemic. Other courts have also expressed skepticism about abatement in opioid cases, creating a gray area that the drug companies are likely to seize on in Baltimore.

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In the Ohio case, the judge emphasized the difficulty of calculating and assigning blame for a problem as complex as the opioid crisis: “All of this brings us to the present moment, where the undersigned must do something no federal judge in history has had to do: determine in equity the scope and cost of the measures necessary to address a small piece of a terrible and tenacious and escalating national tragedy.”

Fletcher-Hill will face a similar challenge.

Baltimore's lawsuit argued that the influx of opioids shipped into the area by drug distributors created a new population of people experiencing opioid use disorder; after prescription painkillers became more difficult to access amid federal crackdowns, users turned to illicit street drugs like heroin and fentanyl, which fueled a deadly overdose crisis.

The city's abatement plan includes a wide range of proposals, including mobile treatment services, rapid overdose response teams, transportation assistance to help people with opioid use disorder get to treatment, reentry services, supportive housing and support for children whose parents are living with opioid use disorder.



The city wants to spend the money on mobile treatment services, like this one operated by Behavioral Health Leadership Institute. (Kaitlin Newman/The Baltimore Banner)

In the Ohio case, Polster limited the proposed abatement strategies to those that seemed likely to reduce the number of people experiencing opioid use disorder. Other proposals, such as grief counseling for the families of overdose victims, were rejected as too distant from the public nuisance.

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Baltimore's request may seem high, but considering the enormity of the devastation wrought by the opioid crisis, it's a low price tag, said Kristen Pendergrass, the vice president of state policy at Shatterproof, a nonprofit dedicated to reversing the addiction crisis in the United

States.

“On a practical level, money is going out into communities, and these programs need these funds,” Pendergrass said. “It’s incredibly helpful to provide more services, to provide more resources, to provide infrastructure, but in the grand scheme of things, it’s really not that much.”

Poole, the Hagerstown attorney, said he expects a large abatement award in the Baltimore case because of the deep-rooted problems associated with opioid addiction and the expense of treating opioid use disorder. The money likely won’t cover everything Baltimore needs, he said.

“Just because you can’t fix everything doesn’t mean you shouldn’t go out and fix a lot of things,” he said.

Madeleine O’Neill is a Baltimore-based freelance journalist.

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MORE FROM THE BANNER

Amid Growing Litigation Volume, Don't Expect UnitedHealthcare to Change Its Stripes After CEO's Killing

[law.com/2024/12/10/amid-growing-litigation-volume-dont-expect-unitedhealthcare-to-change-its-stripes-after-ceos-killing](https://www.law.com/2024/12/10/amid-growing-litigation-volume-dont-expect-unitedhealthcare-to-change-its-stripes-after-ceos-killing/)

Charles Toutant

What You Need to Know

- UnitedHealthcare and its parent company, UnitedHealth, removed a flurry of contract cases to federal courts in Alabama, New Jersey and New York in the last week.
- This action followed the high-profile, fatal shooting of UnitedHealthcare CEO Brian Thompson last week.
- Litigation by hospitals and other health care providers against health insurance companies over nonpayment for services has ballooned in recent years, but the killing won't have a major impact on such suits, one legal authority said.

After the killing of its CEO and the manhunt for the suspect recedes from the public's attention, UnitedHealthcare will still face a heavy load of lawsuits over its reimbursement practices.

Some who followed the murder and its aftermath might have felt sadness and sympathy for UnitedHealthcare CEO Brian Thompson's family and colleagues, while others felt the gunman gave a voice to their outrage over denied claims. Litigation by hospitals and other health care providers over nonpayment for services has ballooned in recent years, but the high-profile killing won't have a major impact on such suits, one legal authority said.

The health insurance industry showed signs that it would put on a kinder, gentler face after Thompson was killed on a Manhattan street, said John Aloysius Cogan Jr., a professor at the University of Connecticut School of Law. But any such reaction is likely to be short-lived, since the health care insurance industry is insulated from any backlash from those who criticize its reimbursement policies, according to Cogan.

Cogan cites an announcement by another health insurance provider, Anthem Blue Cross Blue Shield, that it would limit reimbursement for anesthesia during surgery and other medical procedures in Connecticut, Missouri and New York. The company's Nov. 1 announcement drew widespread criticism from anesthesiologists and politicians. But on Dec. 5, the day after Thompson's killing, Anthem said it was withdrawing the policy change.

Cogan said that before the anesthesia policy was retracted, he saw social media posts referencing the policy along with the home address of Anthem's CEO and her photo.

"Was this due to the uproar about denying claims? I don't know," Cogan said. "But if it was, here's what I think is going to happen: Anthem is going to reassert this policy in six months, or, if they think they are losing money, they'll figure out another way to address whatever issue they have. My speculation is that Anthem may have reacted, but it's not going to be long-term."

And the same goes for the way United and other health insurance companies approach litigation by hospitals and doctors. These companies are accustomed to being unpopular with the public, and the killing of Thompson won't result in any big changes to their litigation strategy, Cogan said.

"These companies don't care that much about what people think," Cogan said. "Really harsh thing to say. There's not going to be a change in their behavior because of this. And as far as public sympathy or public reaction to the bad behavior of insurers, it may get a little traction. I suspect that Anthem retracted its policy, at least in part, because of what happened to the CEO of United. But at the end of the day, these are for-profit companies. They're very good at making money, and I don't think it's going to change their behavior. And I think any sort of publicity effects will wear out over time. I think the extent to which it affects any litigation may be short-lived."

Some people reacted to the shooting of Thompson by saying he was a killer because he was denying claims and people were dying as a result, but the "moral equivalence" there is not the same as a person being shot in the street, Cogan said. But Thompson and the people who deny claims for medical treatment are not in the hospital room or looking face-to-face at the patient whose claim they deny, he said.

"There's a long sort of psychological distance between what this guy was doing and what all the United people are doing, and their effect on people. They don't see it. And I think that has an effect on the way insurance companies operate," he said.

UnitedHealthcare and its parent company, UnitedHealth, removed a flurry of contract cases to federal court in the last week. The company removed at least 12 breach-of-contract lawsuits from state court to federal courts in Alabama, New Jersey and New York, all of which seek reimbursement for medical services rendered.

This action was surfaced by Law.com Radar.

In Alabama, King & Spalding brought two suits against UnitedHealthcare over its failure to reimburse hospitals at the allowable rate for drugs administered to Medicare patients. A suit on behalf of three hospitals in Montgomery, Alabama, was removed to the U.S. District Court for the Middle District of Alabama on Dec. 2, and another suit on behalf of the University of Alabama Hospital was removed to the U.S. District Court for the Northern District of Alabama on Dec. 6.

The Alabama suits claim UnitedHealthcare continues to violate a 2022 U.S. Supreme Court ruling, *American Hospital Association v. Becerra*, which said that a federal policy reducing certain drug reimbursements violates the Medicare act and frustrates a law intended to ensure that hospitals serving low-income patients, including the plaintiffs, are adequately subsidized.

Alston & Bird and Butler Snow represent UnitedHealthcare in both cases.

UnitedHealthcare removed seven cases to the U.S. District Court for the District of New Jersey between Dec. 2 and Dec. 5. All were brought by Maggs, McDermott & DiCicco of Wall, New Jersey, on behalf of The Plastic Surgery Center of Shrewsbury, New Jersey. In each of the cases, the plaintiff, which is an out-of-network provider for UnitedHealthcare, says the company went back on agreements to pay the in-network rate for performing breast reconstruction surgery on patients who had undergone mastectomies due to breast cancer. Robinson & Cole in New York represents UnitedHealthcare in those cases.

In addition, UnitedHealthcare removed three cases to the U.S. District Court for the Eastern District of New York on Dec. 4 and 5 on behalf of neurologist Jeffrey Farkas. Farkas, represented by Gottlieb & Greenspan of Fair Lawn, New Jersey, claims he performed various procedures after United promised to reimburse those charges based on the plaintiff's billed charges or an amount that was agreed on between the doctor and United, so that the patient would be held harmless for the remainder. Robinson & Cole represents UnitedHealthcare in the New York cases.

These actions were surfaced by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. Click here to get started and be among the first to act on opportunities in your region, practice area or client sector.

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A New Era of Enforcement on 10b5-1 Trading Plans: Implications of United States v. Peizer

[law.com/newyorklawjournal/2024/12/11/a-new-era-of-enforcement-on-10b5-1-trading-plans-implications-of-united-states-v-peizer](https://www.law.com/newyorklawjournal/2024/12/11/a-new-era-of-enforcement-on-10b5-1-trading-plans-implications-of-united-states-v-peizer)

Joshua Newville and Hadassa Waxman

This past June the U.S. Department of Justice (DOJ) secured its first insider trading conviction relating to the defendant's use of a Rule 10b5-1 trading plan. The jury's verdict in *United States v. Peizer* marks a major milestone in securities law enforcement. In particular, the *Peizer* case puts pressure on the defense that 10b5-1 plans provided corporate insiders. Separately, the verdict suggests a new era of enforcement priorities and tactics, and provides instructive insights for practitioners and professionals.

Background on Rule 10b5-1 Trading Plans

Adopted by the Securities and Exchange Commission (SEC) in 2000, Rule 10b5-1 provides corporate insiders the opportunity to establish pre-arranged trading plans for buying or selling company stock. Trading under a 10b5-1 plan – which are effectively contracts between insiders and brokers – serves as an affirmative defense to violations of Rule 10b-5, which precludes the purchase or sale of securities while an individual is in possession of material non-public information (MNPI). In short, these plans disclose and regulate the purchase and sale of securities through a pre-arranged trade protocol. For example, trading plans lay out when and how much of a stock is set to be purchased or sold.

In December 2022, the SEC amended to Rule 10b5-1. In the SEC's Release of the Final Rule, it noted that courts, commentators, members of Congress, and academic studies had identified enforcement gaps in the 10b5-1 rule scheme that had emerged over the first twenty years of its institution. For example, courts have noted that “[a] Rule 10b5–1 trading plan may give rise to an inference of scienter because ‘a clever insider might ‘maximize’ their gain from knowledge of an impending price drop over an extended amount of time, and seek to disguise their conduct with a 10b5–1 plan.’” *Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 200 (S.D.N.Y. 2010) (collecting cases) (citations omitted). As a result, the SEC adopted changes in an attempt to “modernize” the rule.

The new amendments aimed to address the kind of conduct of a “clever insider” that courts had identified. Specifically, the amendments formally adopted a cooling-off period – which many brokers and companies had informally required – before trading could begin for individuals other than issuers.

The new rules also require that at the time directors and officers enter into a new plan or modify a previous plan, they must certify that they are not aware of any material nonpublic information about the issuer or the securities, and also that they are adopting the plan in

good faith and not as part of a plan or scheme to evade the prohibitions of Rule 10b-5. The new amendments became effective Feb. 27, 2023. See Press Release, SEC Adopts Amendments to Modernize Rule 10b5-1 Insider Trading Plans and Related Disclosures (Dec. 14, 2022).

The Case

Terren Peizer was the founder and first CEO of Ontrak, a healthcare company. At the time of the conviction, Peizer was Ontrak's Executive Chairman and Chairman of the Board of Directors. In that role and his prior position, Peizer had access to Ontrak's confidential information, including information about its relationships with customers.

Relevant here was information the Peizer received about Cigna – Ontrak's largest client – and its potential renegotiation or termination of its contractual relationship with the company. As noted in the indictment, Peizer would have been aware of the impact of the loss of a large customer, as Ontrak's stock price had previously dropped significantly after its then largest customer (Aetna) cut ties with the organization.

Two weeks before a meeting with Cigna, Peizer attempted to set up a 10b5-1 trading plan to sell Ontrak's stock. This marked only the third time Peizer had sold Ontrak stock since he founded the company. The broker Peizer contacted to set up the 10b5-1 plan required a cooling-off period for the plan, and after learning this, Peizer declined to set up a plan with this broker. He then contacted another broker – who did not require, but strongly suggested a cooling-off period. The Indictment reflects that Peizer told the second broker that no cooling off period was legally required to trade the securities.

Peizer entered into the Rule 10b5-1 plan at issue on May 10, 2021, in which he specifically represented that it was not entered into after receiving MNPI. Peizer began selling stock the next day. Eight days later, Cigna privately communicated to Ontrak's CEO that it intended to terminate its contract by the end of the year, the CEO relayed this information to Peizer.

After receiving additional updates on Cigna in the following months, Peizer then began the process of entering into a subsequent 10b5-1 plan on Aug. 13, 2021, after learning earlier in the day that Cigna intended to formally terminate its relationship with Ontrak, likely during an upcoming call on Aug. 18. From Aug. 16 (the day the plan was finalized) to Aug. 18, Peizer sold approximately 45,000 shares of Ontrak stock yielding \$900,000. In total, the Indictment estimated that Peizer's two 10b5-1 plans helped him avoid nearly \$12.5 million in losses.

On Feb. 24, 2023, the DOJ filed its indictment against Peizer, charging him with securities fraud under 18 U.S.C. §1348(1); insider trading under 15 U.S.C. §§78j(b), 78ff and 17 C.F.R. §240.10b-5, and civil and criminal forfeiture under 18 U.S.C. §981(a)(1)(C), 28 U.S.C. § 2461(c), respectfully. See First Superseding Indictment, ECF No 105, *USA v. Peizer*, Docket No. 2:23-cr-00089 (C.D. Cal. Feb 24, 2023).

The court subsequently denied Peizer's motion to dismiss. There, the court rejected the argument that the DOJ had not adequately proved scienter, find the indictment adequately supported its claims of Peizer's nefarious intent. The court also rejected defendant's argument that the DOJ had not adequately pled that he used MNPI, pointing to Ontrak's public disclosures around the time of the trades. The court also rejected this argument, finding it adequately pled. Peizer was then tried and convicted on all counts on June 21, 2024.

Legal Implications & Takeaways

Peizer's fact pattern and conviction raises a few interesting questions for practitioners and professionals. First, the 10b5-1 plan at issue in the case was entered into *prior* to the new rule change. Yet the conviction suggests that the concepts underlying the new rules (particularly the formal cooling-off requirement) can be applied retroactively to challenge trades executed under historical 10b5-1 plans.

Second, the Peizer fact pattern raises interesting questions about new standards for scienter and attempt crimes. Specifically, could Peizer have been charged with attempted insider trading based off his engagement and subsequent rejection of the first broker? The Title 18 securities fraud statute criminalizes "attempts to execute" a scheme to defraud in connection with a security, as well as consummated schemes. While courts have focused on the "clever insider" and their potential abuse of the 10b5-1 system, it is not yet clear what facts would be necessary to demonstrate an attempted bad faith effort to subvert 10b5-1's safeguards.

Third, Peizer's conduct prior to trading raises important compliance questions for companies evaluating 10b5-1 plans. The company itself wasn't charged with violations by the SEC or DOJ, and the government alleged that Peizer violated the company's insider trading policy through his trading.

However, Peizer argued at trial that the company's preclearance of his 10b5-1 trading plans during open trading windows constituted a good faith defense, essentially confirming that he was allowed to trade. In order to reduce risk, companies should consider the rigor with which they evaluate and approve 10b5-1 plans, particularly as to whether the executive or director might be in possession of information. These concerns are heightened in light of the updated rules.

This spring's series of creative convictions under insider trading laws could reflect a new era of enforcement of the enforcement of securities laws. In addition to the DOJ's conviction in *Peizer*, the SEC also obtained a verdict against executive Matthew Panuwat under a novel "shadow trading" theory.

There, Panuwat used confidential information regarding the future acquisition of his then-current employer to purchase options connected to a different company, whose performance was connected to the news. See Press Release, Statement on Jury's Verdict in Trial of Matthew Panuwat (April 5, 2024). Together, these two verdicts serve as new fronts on enforcement actions, and reminders to draft insider trading and 10b5-1 policies to avoid similar actions in the future.

Joshua Newville and **Hadassa Waxman** are partners at *Proskauer Rose*. **Peter Angelica**, an associate with the firm, assisted in the preparation of this article.

Meta accuses states of violating discovery orders in MDL

[dailyjournal.com/articles/382353-meta-accuses-states-of-violating-discovery-orders-in-mdl](https://www.dailyjournal.com/articles/382353-meta-accuses-states-of-violating-discovery-orders-in-mdl)

Civil Litigation

Dec. 11, 2024

Meta claimed it made meaningful concessions to the state plaintiffs, but their delays have left negotiations over search terms unresolved with 25 of the 32 states.



Meta accused nearly 30 states involved in the social media multidistrict litigation in the Northern District of California of violating court orders, according to a lengthy discovery letter filed Monday.

In the letter, Meta claimed it made meaningful concessions to the state plaintiffs, but their delays have left negotiations over search terms unresolved with 25 of the 32 states.

But the state attorneys general said that Meta's insistence that the state agencies conduct "one-size-fits-all document searches" was unduly burdensome and not relevant to the "current letter brief." Meta and the state attorneys general filed the letter jointly.

At the Nov. 21 discovery management conference, several state attorneys general raised concerns regarding their agencies' ability to meet the discovery deadlines due to insufficient funding, staffing and technological capabilities.

In turn, Meta claimed that multiple state agencies refused to provide "hit reports."

U.S. Magistrate Judge Peter H. Kang urged the parties to negotiate in a prompt and transparent manner and to identify reasonable search terms and custodians, and to exchange hit reports.

The coordinated action combines lawsuits from hundreds of individual plaintiffs, school districts and 35 states seeking to hold some of the world's largest tech companies liable for allegedly designing their products to be addictive despite knowing the physical, psychological and societal effects social media addiction allegedly has on youth. Those companies include Snap Inc., Meta Platforms Inc. and TikTok Inc.

The first bellwether trial is scheduled for next fall, led by Lieff Cabraser Heimann & Bernstein LLP and Motley Rice LLC. In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, 422-md03047 (N.D. Cal., filed Oct. 6, 2022).

The discovery from the multi-district litigation is also critical for a consolidated action in Judge Carolyn B. Kuhl's courtroom in Los Angeles County Superior Court.

In those cases, parents and school districts claim that the social media companies designed their platforms to get minors addicted to using their products. The plaintiffs also claimed that the platforms promoted bullying and child sexual abuse. Social Media Cases, JCCP5255 (L.A. Super. Ct., filed Oct. 24, 2022).

The plaintiffs are led by attorneys at Panish Shea Ravipudi LLP; Beasley, Allen, Crow, Methvin, Portis & Miles PC; and Morgan & Morgan.

The social media companies are defended by Munger, Tolles & Olson LLP, Gibson Dunn & Crutcher LLP, and Covington & Burling LLP.

Kuhl ruled in October 2023 that the plaintiffs had sufficiently alleged claims for negligence. One month later, U.S. District Judge Yvonne Gonzalez Rogers similarly rejected the social media companies' bid to dismiss the federal case on grounds that the lawsuit violated the First Amendment and Section 230 of the Communications Decency Act. Social media companies have often successfully cited Section 230 to block lawsuits involving the posting of third-party content.

In January, Los Angeles County Superior Court Judge Lawrence P. Riff mostly overruled but sustained, in part, Snap's demurrer to a lawsuit accusing it of causing thousands of teenagers to die from fentanyl drug overdoses due to the ease with which drug dealers can approach minors on Snapchat and later delete the evidence.

The 216-page lawsuit asserts 16 causes of action and seeks to hold Snap accountable under product liability theory rather than Section 230 of the Communications Decency Act. Snap had demurred to all the plaintiffs' causes of action under Section 230, saying that the alleged harms flowed from third-party content exchanged by third parties on Snap's social media platform.

The case was stayed when Snap filed a petition for a writ of mandate with the 2nd District Court of Appeal. That petition was denied last week. Neville et al. v. Snap Inc., 22STCV33500 (L.A. Super. Ct., led Oct. 13, 2022).

The 2nd District Court of Appeal last week also denied Meta's petition for a writ of mandate in the consolidated cases in Kuhl's court.

Cognizant opposes class counsel's \$26M interim fee request

[dailyjournal.com/articles/382351-cognizant-opposes-class-counsel-s-26m-interim-fee-request](https://www.dailyjournal.com/articles/382351-cognizant-opposes-class-counsel-s-26m-interim-fee-request)

Labor/Employment

Dec. 11, 2024

The motion followed a unanimous jury verdict in October for a plaintiffs' class who claimed Cognizant - founded in India - had corporate practices in place that terminated their job applications because they were not of Indian descent.



Attorneys defending information technology company Cognizant from an unsuccessful race discrimination jury trial this year argued a class counsel's request for \$26 million in interim attorney fees was unwarranted because liability has not yet been determined by the judge.

The company's defense team, led by Gibson Dunn & Crutcher LLP partner Michele L. Maryott, disagreed with the plaintiffs' fees motion in an opposition brief on Monday. The motion followed a unanimous jury verdict in October for a plaintiffs' class who claimed Cognizant - founded in India - had corporate practices in place that terminated their job applications because they were not of Indian descent.

A separate motion for judgment as a matter of law, filed by Cognizant, is also pending before U.S. District Judge Dolly M. Gee. Cognizant is asking Gee to reverse the jury's verdict on grounds the jurors were not given sufficient statistical evidence to reasonably find the company had clear hiring practices that deliberately discriminated against non-Indian job applicants. *Palmer et al. v. Cognizant Technology Solutions Corporation et al.*, 2:17-cv-06848 (C.D. Cal., filed Sept. 18, 2017).

The plaintiffs' counsel, led by Kotchen & Low LLP partner Daniel L. Low, argued in their motion that the fees - over \$12 million with a 2.0 multiplier enhancement - were reasonable at this stage to compensate for the seven years of "protracted and contentious" litigation. This included more than 14 pretrial motion briefings, two jury trials and an extensive discovery process, the motion stated.

The claims were first tried last year, which resulted in a mistrial after a jury could not reach a unanimous decision.

In Cognizant's opposition, Maryott argued the plaintiffs' contention that they were the rightful prevailing party at this stage of the litigation was inaccurate and premature.

"After two attempts, plaintiffs have secured only a rebuttable presumption that they take to Phase Two, where individual liability determinations will be made. Cognizant may yet successfully rebut that presumption for every single claim plaintiffs try. This case is not over, and plaintiffs have not prevailed," Maryott wrote in the company's opposition.

Additionally, Maryott argued the first failed trial, plus a rejected class certification motion from the plaintiffs that would have included a hiring class of over 160,000 people, was not the company's burden to bear.

"Last June, plaintiffs took their shot at a Phase One trial and couldn't secure the unanimous verdict they needed. They now ask for the fees they expended on the rejected classes and their failed trial attempt. Cognizant should not have to foot any part of the bill, much less the portions that relate to plaintiffs' many failures," Maryott wrote.

In the plaintiffs' motion, Low argued his team was the rightful prevailing party because they proved Cognizant to be a wrongdoer.

"In the context of a Teamsters' discrimination class action, when a plaintiff prevails at the liability stage, 'it is clear ... plaintiffs are prevailing parties' able to recover attorneys' fees, even before any damages or injunctive relief are adjudicated in the remedial phase of the case," Low wrote in the motion. "Here, the jury found that Cognizant engaged in a pattern or practice of intentional discrimination, and that Cognizant's conduct meets the standard for punitive damages."

In the referenced case, *Teamsters v. U.S.*, 431 U.S. 324 (1977), a district and appellate court held that the employer wrongfully engaged in a pattern and practice of employment discrimination against Black and Spanish-surnamed Americans.

Maryott, in Cognizant's opposition, argued the *Teamsters* case did not address when a plaintiff could be considered a prevailing party or when an award of interim fees might be appropriate.

"Plaintiffs do not cite a single case where a plaintiff in a similar procedural posture was declared a prevailing party. Nor could they, since awarding fees at this stage in a pattern and practice case would be completely unprecedented," Maryott wrote. "Prevailing party status requires a definitive victory that entitles plaintiffs to relief and cannot be undone by this court. Plaintiffs have not accomplished that."

Gee is scheduled to hear the parties on the fees motion on Jan. 10. A hearing for Cognizant's separate judgment motion is scheduled before Gee on Friday.

#382351

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Judge awards PFAS lawyers almost \$100M from Tyco, BASF settlements

 legalnewsline.com/stories/666890148-judge-awards-pfas-lawyers-almost-100m-from-tyco-basf-settlements

December 11, 2024

Federal Court

Richard Gergel | wikipedia.org

CHARLESTON, S.C. (Legal Newsline) - It's nearly \$100 million for lawyers pushing PFAS lawsuits on behalf of public water systems, as a federal judge has approved their request for fees from settlements with BASF and Tyco.

South Carolina federal judge Richard Gergel had already given approval to the settlements for plaintiffs represented by lawyers from Douglas & London, Baron & Budd, Napoli Shkolnik and Motley Rice.

PFAS are a group dubbed "forever chemicals" because they persist in groundwater and human tissue for years. They are found in firefighting foam and consumer products.

The federal government has set a maximum contaminant level for PFAS, even as groups call the move premature. Much of the research regarding their effect on the human body is disputed.

Gergel is presiding over a multidistrict litigation proceeding designed for claims from water districts and personal injury plaintiffs. Consumer class actions have also sprouted up around the country, with varying levels of success so far.

BASF's settlement is valued at \$316.5 million, while Tyco's is \$750 million. Plaintiff lawyers asked for 8% from both, plus millions in costs.

Gergel gave them \$60 million from the Tyco settlement and \$25,320,000 from the BASF agreement. He tacked on more than \$10 million in costs to be reimbursed.

Noting how large the settlements are, Gergel added, "the settlements provide timely relief to thousands of PWS facing PFAS contamination. The results obtained - including the allocation procedures in both settlement agreements - are finely tuned to the present and future needs of class members."

Plaintiff lawyers in the MDL claim to have spent more than 430,000 hours pursuing the cases. BASF said considering 3M manufactured 90% of the PFOA in the world, it would be nearly impossible to tell whether its PFOA products were contaminating water districts.

Water sampling was conducted ahead of bellwether trial dates, with plaintiff lawyers claiming "it became readily apparent to BASF that it faced significant risk should either of the cases proceed to trial."

DuPont is paying \$1.185 to settle claims in the South Carolina MDL, while 3M is set to pay at least \$10.5 billion. Lawyers will make around \$1 billion in fees from those two settlements.

Defendants still face lawsuits by individuals and others over PFAS, which is found in products like nonstick pans and cosmetics.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the District of South Carolina

Bloomberg Law News 2024-12-11T11:46:31485390151-05:00

Reddit to Defeat Advertiser Class Action Over Fraudulent Clicks

By Isaiah Poritz 2024-12-10T16:12:05000-05:00

- Platform says billing based on internal click measure
- Reddit failed to verify clicks came from users, suit says

Reddit Inc. is poised to escape a proposed class action from digital advertisers who alleged the social media platform charged them for fraudulent clicks on ads.

Judge William H. Orrick at a Tuesday hearing said he will grant Reddit's motion to dismiss the suit from advertiser Levelfields Inc., an AI financial tech company, which alleged breach of contract and unfair competition claims.

"Reddit is doing what was promised," Orrick said of the advertising platform's terms. "It wasn't required to use reasonable means to prevent" click fraud.

"I'm thinking that this case may be at an end," the judge said, but didn't specify if he would give Levelfields an additional opportunity to amend its complaint.

The advertiser sued Reddit in the US District Court for the Northern District of California in May, accusing the platform of charging for clicks on ads that weren't from Reddit users going to the advertiser's website. Many of these fraudulent clicks come from software programs that automatically click on ads even when there is no potential customer behind the click, the complaint said.

Levelfields said Reddit defined billable clicks as any click that takes a user to the advertiser's website, but refused to provide Levelfields with a log of clicks with corresponding IP addresses to verify .

But Orrick agreed with Reddit's argument that the Reddit Ad Platform's terms state that its click metrics "shall be the controlling measurement" for billing purposes.

Orrick had previously dismissed the suit in August, citing the same contract issues, but he gave

Levelfields an opportunity to amend its complaint.

Haffner Law PC and Koppelman Law Firm represent Levelfields. Wilson Sonsini Goodrich & Rosati represent Reddit.

The case is Levelfields Inc. v. Reddit Inc., N.D. Cal., No. 3:24-cv-02760, 12/10/24 .

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Big Tech and Internet Companies Slammed With Consumer Class Actions in December

 [law.com/2024/12/11/big-tech-and-internet-companies-slammed-with-consumer-class-actions-in-december-](https://www.law.com/2024/12/11/big-tech-and-internet-companies-slammed-with-consumer-class-actions-in-december-)

Kat Black

What You Need to Know

- GoodRx, an online telemedicine provider, was hit with two antitrust class actions that accused it of fixing prices paid by pharmacy benefit managers to independent pharmacies for generic prescription medications.
- Amazon was named in two consumer protection class actions for failing to disclose junk fees and providing shoddy delivery service.
- Google and Apple were slapped with a class action that claims they profit from illegal online gambling operations.

A flurry of class actions pummeled the tech industry last week, targeting companies such as Amazon, Google, Apple, GoodRx and mobile gaming platforms for alleged "junk fee" and pricing infractions; consumer protection and antitrust violations; and illegal gambling. At least five lawsuits that accused Big Tech businesses of deceiving or misleading customers spanned federal courts on both coasts between Dec. 3 and Dec. 6.

This trend was surfaced by Law.com Radar.

GoodRx, an online health care and telemedicine platform that tracks prescription prices, was hit with two federal antitrust class actions in the U.S. District Court for the District of Rhode Island and the U.S. District Court for the Central District of California, Western Division. Both cases, filed by McIntyre Tate, Dicello Levitt and Grabar Law Office and HGT Law and Safirstein Law, respectively, contend that the company violates Section 1 of the Sherman Act by unlawfully conspiring to fix prices paid by pharmacy benefit managers to independent pharmacies for generic prescription medications.

Two class actions filed in the U.S. District Court for the Western District of Washington in Seattle and the U.S. District Court for the Southern District of California name Amazon.com, Inc. as a defendant. The claims assert that two of the e-commerce conglomerate's branches—Amazon Fresh and Amazon Prime—breach state consumer protection laws by not disclosing additional charges and providing shoddy delivery service to customers in underserved areas, respectively.

Washington Injury Law and Houston-based Ellzey Kherkher Sanford Montgomery represent plaintiffs in the suit filed in Washington, which claims the Seattle-based online retail giant violated the Washington Consumer Protection Act by "inducing" customers to enroll in its Amazon Prime service, then failing to deliver packages within the expedited windows that Prime guarantees to members for \$14.99 a month.

According to the complaint, Amazon has, since 2022, "covertly" contracted with third-party delivery services such as UPS or USPS to deliver packages to Prime members living in "specific underserved ZIP codes," resulting in significant delays that Amazon allegedly attributed to "natural fluctuations in shipping circumstances." Subscribers living in zip codes "excluded" from Amazon's in-house delivery service in the District of Columbia, where the plaintiffs reside, only received their Prime packages within a two-day time frame 24% of the time, as compared with a 75% rate in the rest of the country, it said.

"Unbeknownst to these consumers, Amazon has collectively charged them millions of dollars for a service they do not receive," wrote attorneys for the plaintiffs.

Similarly, the suit filed in California by the Swigart Law Group alleges that Amazon effectively swindled its customers into paying more than they bargained for by clandestinely tacking service fees onto purchases made on Amazon Fresh, its grocery delivery service. In doing so, it said, Amazon violated the Honest Pricing Law, an amendment made to California's Consumer Legal Remedies Act that went into effect this July. SB 478, also known as California's "Hidden Fees Statute," prevents companies from engaging in "drip pricing," or advertising goods with "bait-and-switch" prices that do not include all required fees or charges associated with the transaction.

Joshua Swigart, who is representing the plaintiffs, said in an interview that tech companies tend to be the "worst offenders" when it comes to misleading customers about "junk fees." He emphasized that California law simply mandates price transparency—it does not dictate how much companies can charge consumers.

He said it is "shocking" to him that tech companies do not comply with the statute, given how much of a "hot-button" issue it is in the legal industry.

"I think it's willful noncompliance, because when you take a look at the big actors, say, the Ticketmasters of the world ... every single one of those has found a way to comply," he said. "... Why tech companies, mostly in the delivery space, have just not wanted to comply—I don't know. But it's very interesting that that space, particularly, seemed to make a decision that they're going to run the risk of violating the law ... The law is not that hard to comply with. Again, there's nothing wrong with charging the fees. You just have to disclose it to the consumer because that's fair, honest, transparent pricing."

He added it is likely that Big Tech will continue to write off this litigation as a "cost of business" because most of these "drip pricing" cases are brought on an individual basis and not as class actions. "It's going to take private right-of-actions for these companies to make the decision to comply with the law," he said.

The action against Google and Apple, filed in the U.S. District Court for the Southern District of New York by Justin Meyers of the Law Offices of G. Martin Meyers, also names internet casino platform VGW Holdings, Ltd. and its subsidiaries as co-defendants. According to the complaint, Google and Apple both receive up to 30% of the revenue generated by sales through their Play Store and App Store, including in-app purchases, of apps that allegedly conduct illegal gambling operations online.

According to Justin Meyers, the online casino defendants—doing business as "Chumba Casino," "Luckyland Slots" and "Global Poker"—operate websites and apps that claim to be "typical social casinos where people can pay for virtual coins that allow them to play games of chance." After the players run out of those coins, he said, the defendants start "enticing them with sweepstakes coins" that are redeemable for monetary value, including cash, gift cards and Bitcoin.

"So the link between playing games of chance and actually receiving an arbitrary financial award ... is so tight that it makes it completely indistinguishable from traditional gambling," he said. "As a matter of fact, our position is that it's the very definition of gambling. And of course, these ... online casinos are not licensed ... And I have come to learn that Google and Apple are actually very much involved in the development of the apps, such that they should have been aware that what these online casino defendants are actually pushing is outright [gambling]." Additionally, he said, both Google and Apple process payments to these online casinos via their mobile payment services, Google Pay and Apple Pay.

Meyers noted that the suit mirrors similar arguments made in concurrent multidistrict litigation in the U.S. District Court for the Northern District of California, *In Re Google Play Store Simulated Casino-Style Games Litigation*, which also accuses Apple and Google of facilitating illegal gambling by processing transactions for "social casino" apps.

To add insult to injury, the online casinos frequently do not deliver the promised awards to customers, he added. "I have actually encountered some individuals who tell me they've lost hundreds of thousands of dollars playing," he said.

A VGW spokesperson said in an emailed statement, "We have full confidence in our compliance with all laws and regulations where we operate, and remain confident about the future. We continue to offer our free-to-play games across most of North America, as we

have for more than a decade, creating not only great games, user experiences and entertainment, but also ensuring this is done safely, responsibly and at the highest level of standards.”

Representatives for Amazon, GoodRx, Apple and Google did not immediately respond to requests for comment.

This action was surfaced by Law.com Radar, which delivers artificial intelligence-enhanced case summaries and daily case reports from more than 2,200 state and federal courts. Click here to get started and be among the first to act on opportunities in your region, practice area or client sector.

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Trending

Litigation Surge - Automotive | Patent

Patent cases surged in the automotive sector in Texas on Tuesday, according to Law.com Radar. The platform detected five patent suits in Texas Eastern District Court targeting entities on Radar's sector watchlist including General Motors, Hyundai, Kia, Mazda, Nissan and Volvo. All five cases were brought by Infogation Corp. and allege that navigation and infotainment systems in the defendants' vehicles infringe the plaintiff's patents. Infogation is backed by Garteiser Honea PLLC.

[Read More](#)

New Suit - Patent

Petpace LLC was hit with a patent infringement lawsuit on Dec. 11 in Massachusetts District Court. The court action, filed by Lambert Shortell & Connaughton on behalf of Social Positioning Input Systems, asserts a single patent pertaining to the storage of

Molina Healthcare, Whistleblower Settle Nursing Home Fraud Suit

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Litigation

Molina Healthcare of Illinois Inc. and a whistleblower have reached a settlement in a False Claims Act suit alleging that the company misrepresented to Medicaid its performance of a skilled nursing facility services contract, a federal district court said.

The suit filed by whistleblower Thomas Prose in 2017 is dismissed in its entirety, Judge Virginia M. Kendall, of the US District Court for the Northern District of Illinois, said in a Tuesday order.

- The US government and Illinois will receive \$1.2 million under the settlement, with Prose receiving a \$324,000 share or 27%, a Dec. 6 court filing said
- The US Court of Appeals for the Seventh Circuit in a 2021 split decision revived the suit, after Kendall dismissed it; the US Supreme Court rejected Molina's petition challenging that decision in 2022
- Counsel for the parties didn't immediately respond to a request for comment

Howard Law LLC; Clark Hill PLLC; DiCello Levitt LLP; and Funkhouser Vegosen Liebman & Dunn Ltd. represented Prose. King & Spalding LLP and Skadden, Arps, Slate, Meagher & Flom LLP represented Molina.

The case is United States ex rel. Prose v. Molina Healthcare of Ill. Inc. , N.D. Ill., No. 17-cv-6638, 12/10/24 .

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Ex-FirstEnergy exec pleads the Fifth about bribery scandal, daughter's business

 1.next.westlaw.com/Document/l423df1b0b7ee11efaabd81aafe4f18a1/View/FullText.html

NewsRoom

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December 11, 2024

Ex-FirstEnergy exec pleads the Fifth about bribery scandal, daughter's business

A former FirstEnergy executive wouldn't answer questions about company's pay-to-play scandal or a conflict of interest with his daughter's business.

Jessie Balmert, Cincinnati Enquirer

A former FirstEnergy executive wouldn't answer questions about the company's pay-to-play scandal or a conflict of interest with his daughter's business – instead invoking the Fifth Amendment right to avoid self-incrimination.

FirstEnergy's former Senior Vice President Dennis Chack was one of three executives fired in October 2020 – shortly after former Ohio House Speaker Larry Householder and four others were arrested for a quid pro quo scheme that traded FirstEnergy's money for a nuclear plant bailout in House Bill 6.

In the years since, FirstEnergy admitted to bribing Householder and former Public Utilities Commission of Ohio Chairman Sam Randazzo and paid a \$230 million penalty. Householder was sentenced to 20 years in federal prison. The other two fired executives, former CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling, now face criminal charges for a \$4.3 million payment to Randazzo, who died by suicide in April. They have pleaded not guilty.

Chack, who oversaw product development, marketing and branding, has not been accused of any crime. He was deposed Wednesday as part of an Ohio Consumers Counsel probe into how FirstEnergy's bribery scandal impacted Ohioans' electric bills.

FirstEnergy documents shared as part of that deposition alleged Chack failed to disclose more than \$500,000 paid by Cleveland restaurateur Tony George, a FirstEnergy vendor and intermediary with Householder, to Chack's daughter's consulting business, "purportedly for providing advertising and billboard services." Chack's daughter, Denise Angerstien, is trained as a registered nurse.

At the time, Chack was in charge of approving payments to George as a FirstEnergy vendor, according to the document from October 2021 – a year after Chack's firing.

"After receiving direction from the Company to preserve information on his Company-issued computer, Chack deleted documents from his Company-issued computer, including documents related to Angerstien," according to the document titled "Misconduct Overview: Failure to Disclosed Related Person Transactions and Document Deletion."

During the deposition, Chack did not answer any questions about his daughter's business, why he was fired or FirstEnergy's pay-to-play scandal.

"On the advice of my counsel, I assert my rights to not testify under the Fifth Amendment to the United States Constitution and Section 10, Article 1 of the Ohio Constitution and therefore I decline to answer that question," Chack said when asked when he last spoke to a former FirstEnergy lobbyist. He then reiterated that right by declining to answer dozens of other questions.

Ohio Attorney General Dave Yost has said that the state's investigation into the pay-to-play scandal is ongoing.

Jessie Balmert covers state government and politics for the USA TODAY Network Ohio Bureau, which serves the Columbus Dispatch, Cincinnati Enquirer, Akron Beacon Journal and 18 other affiliated news organizations across Ohio.

This article originally appeared on Cincinnati Enquirer: Ex-FirstEnergy exec pleads the Fifth about bribery scandal, daughter's business

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NewsRoom

Ohio Ratepayers Are Subsidizing Coal Plants. Report Says Owners Long Knew They Warmed the Globe

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Marty Schladen, The Ohio Capital Journal

FunksBrother/Wikipedia

Kyger Creek Power Plant

Duke Energy is among the companies enjoying massive subsidies from 2019's corrupt-but-still-not-fully-repealed Ohio House Bill 6.

And while ratepayers are propping up two aging, uncompetitive coal plants, a new report says Duke and its predecessor companies have known for 40 years that burning coal causes climate change. It said the companies then tried to misinform the public about the threat. Then they promoted unproven, likely impractical technologies as a workaround.

Now the utility giant acknowledges the overwhelming scientific consensus around climate change — while working behind the scenes to stifle competition from renewable sources such as solar, the report said.

In “Duke Energy Knew: Documenting Duke Energy’s Early Knowledge and Ongoing Deception About Climate Change,” the Energy and Policy Institute traced how positions on whether fossil fuels caused global warming shifted over time at Duke and its predecessor companies — Cincinnati Gas & Electric, Public Service Indiana, Duke Power and Carolina Power & Light.

The town of Carrboro, N.C., last week sued Duke, making similar claims.

“We are in the process of reviewing the complaint,” the company said in an email when asked to comment on the Energy and Policy Institute Report. “Duke Energy is committed to its customers and communities and will continue working with policymakers and regulators to deliver reliable and increasingly clean energy while keeping rates as low as possible.”

More violent storms, corrupt legislation

The utilities’ shifting claims about fossil fuels seem especially relevant now, after Hurricanes Helene and Milton smashed into the Florida coast in quick succession this year, doing billions in damage in Georgia, the Carolinas and Tennessee. In an attribution study, scientists said climate change made both storms worse than they otherwise would have been.

Duke is also a shareholder in the Ohio Valley Electric Cooperative, or OVEC, which owns two 70-year-old coal plants — Clifty Creek and Kyger Creek — that are among the 100 most polluting power plants in the United States.

As part of 2019's scandal-plagued House Bill 6, Ohio ratepayers so far have been required to pay more than \$400 million to subsidize the plants, prompting the observation that because of public corruption in Ohio, ratepayers are being forced to finance global warming.

Akron-based FirstEnergy put up \$60 million to be the biggest beneficiary of the \$1.3 billion bailout that resulted from the bribery scheme that sent former Ohio House Speaker Larry Householder, R-Glenford, to federal prison for 20 years. Testimony during his 2023 trial indicated that the OVEC subsidies were meant to gain the support of utilities that were heavily invested in OVEC.

At 9%, Duke is the third-largest shareholder in the cooperative. So that means Ohio ratepayers have given it \$36 million so far to finance the old, dirty plants — including Clifty Creek, which is in Indiana, not Ohio, according to OVEC's website.

Recognizing the problem

Two generations ago, Duke's predecessor companies and some other utilities were publicly agreeing with the emerging consensus that fossil fuels such as coal were spewing heat-trapping molecules into the atmosphere in amounts that would change the climate, with all the consequences that would entail.

However, they might have had an ulterior motive. Many were investing heavily in nuclear power when in 1979 a reactor partially melted down at the Three Mile Island Nuclear Generating Station near Middletown, Pa.

In 1983, Cincinnati Gas & Electric was trying to resist proposals to convert its perennially troubled William H. Zimmer Power Station in Moscow, Ohio, from nuclear to coal so it could open. CG&E President William Dickhoner played the environmental card, saying, "With coal you have acid rain and the greenhouse effect," the Energy and Policy Institute report said.

It was part of a pattern.

"During the 1980s, what are now Duke Energy-owned utilities — including Duke Power, Carolina Power & Light (CP&L), Cincinnati Gas & Electric (CG&E), and Public Service Indiana (PSI) — all proposed addressing the looming climate crisis by expanding the use of nuclear power," the report said.

Changing tunes

But as the sun set on the era of building big nuclear plants, the utilities began telling a different story about the potential harm from the fossil-fuel generators they were left with. It was a story they knew was untrue, the report said.

“Despite having publicly recognized the climate risks of burning fossil fuels, these same utilities would soon play a leading role in disinformation campaigns like the Global Climate Coalition that denied the human causes of climate change as part of broader efforts to oppose national and international limits on greenhouse gas emissions from their coal and gas-burning power plants,” the report said.

For example, in 1991 the Edison Electric Institute — an industry group to which the Duke predecessors belonged — began a campaign to “reposition global warming as theory (not fact),” according to leaked documents. A request for comment has been sent to the Edison Electric Institute.

One campaign supported by the industry group operated in Bowling Green, Ky., where CG&E owned Union Light, Heat & Power Company. It financed newspaper and radio ads, one of which said, “The most serious problem with catastrophic global warming is – it may not be true,” the report said.

Adjustment

According to the Energy and Policy Institute report, Duke and other utilities again shifted positions on climate change as the scientific consensus behind it became overwhelming in the early 2000s.

They then began to promote unproven technologies such as “clean” coal and carbon sequestration, and to focus blame for greenhouse-gas emissions on other sectors. The real goal was to forestall the day they would have to retire their fossil fuel-fired generators, the report said.

It cited a peer-reviewed study by researchers and the University of California at Santa Barbara.

“After 2000, (climate-change-denying) front groups were largely shut down, and utility organizations shifted to arguing for delayed action on climate change, by highlighting the responsibility of other sectors and promoting actions other than cleaning up the electricity system,” the study said. “Overall, our results suggest that electric utility industry organizations have promoted messaging designed to avoid taking action on reducing pollution over multiple decades. Notably, many of the utilities most engaged in communicating climate doubt and denial in the past currently have the slowest plans to decarbonize their electricity mix.”

The same study said the industry group is guilty of duplicity.

“By the 2010s and early 2020s, (the Edison Electric Institute’s) public messaging recognized the reality of climate change and the need to transition to cleaner sources of electricity, including renewable energy sources like wind and solar,” it said. “At the same time, EEI focused its political efforts on blocking competition its members faced from the growing rooftop solar industry.”

Still a heavy polluter

Even though its predecessor utilities were warning of the dangers of global warming due to fossil fuels way back during the Reagan administration, Duke continues to be one of the biggest carbon emitters among utilities.

“According to its latest report to (the Carbon Disclosure Project), Duke Energy in 2022 emitted 78.8 million metric tons of carbon dioxide equivalent to the atmosphere,” the Energy and Policy Institute report said. “An analysis of companies’ self-reported 2021 emissions data by the Political Economy Research Institute at the University of Massachusetts Amherst found that Duke Energy was the third-largest greenhouse gas polluter in the United States overall, surpassed only by two other electricity generators: Southern Company based in Atlanta, and Vistra based in Irving, Texas.”

Even if Duke keeps its promises to reduce emissions, it might be too little, too late.

“The company doesn’t plan to achieve net-zero carbon emissions until 2050, by which time the climate crisis could cause an additional 14.5 million deaths and \$12.5 trillion in economic losses worldwide,” the report said.

Originally published by the Ohio Capital Journal. Republished here with permission.

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Javcon117/FlickrCC

Boneless wings. Or are they?

The Ohio Supreme Court has denied a request to reconsider their ruling earlier this year that boneless chicken wings can have bones.

“It is the rare exception, rather than the rule, for this court to grant motions for reconsideration,” Justice Patrick Fischer wrote in the majority opinion denying the request.

Fischer went on to say that even when he disagrees with a majority opinion in a case, he would vote to deny a motion for reconsideration that “merely reargues a case.”

But the justice also used the denial to call out “problems” with the release of the decision.

Macy's Warns of Material Weakness in Internal Control

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Securities Law

December 11, 2024, 4:22 AM PST

Chakradhar Adusumilli

Bloomberg News



Macy's reported "material weakness" in the company's internal control over financial reporting involving manual journal entries over delivery expenses and certain other non-merchandise expenses.

- Material weakness was the result of deficiencies in the design of controls over delivery expense and certain other non-merchandise expenses, and the related accrued liabilities, whereby the design of the controls did not consider the potential for employee circumvention of these controls
- Committed to addressing the material weakness and has begun to implement changes designed to improve its internal control over financial reporting and to remediate the material weakness
- Re-evaluating the risk of employee circumvention of controls, including risks surrounding the completeness of delivery expense and certain other non-merchandise expenses
- Re-designing process level control activities that are responsive to the risk of employee circumvention of controls
- As the company evaluates and enhances its internal control over financial reporting, it may take additional measures
- NOTE:
- Shares are down 8.5% in early trading

To view the source of this information click

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BUSINESS | RETAIL

Macy's Probe Found Employee Acted Alone in \$151 Million Accounting Scandal

Shares slide after retailer trims profit goals for fiscal year

By *Suzanne Kapner*

Updated Dec. 11, 2024 10:19 am ET



Macy's has been closing weaker stores to focus on its top locations. PHOTO: KAMIL KRZACZYNSKI/GETTY IMAGES

Macy's **M -5.80%** ▼ has completed its investigation into accounting problems and found that a single employee's mistake—and subsequent coverup—created \$151 million in false bookkeeping entries, according to a person briefed on the probe.

The discovery of the accounting errors prompted the retailer in November to postpone reporting its quarterly financial results for two weeks, triggering a selloff of Macy's shares. The stock dropped another 10% Wednesday after the company cut its profit targets for the year, saying it expected shoppers to continue to pull back on discretionary spending.

The employee told investigators about having mistakenly understated the amount of small parcel delivery expenses in late 2021, the person briefed on the probe said. Macy's has said that the employee had responsibility for small package delivery expense accounting, but declined to provide further information about the employee.

To hide the error, the employee continued to intentionally make erroneous accounting entries and falsify underlying documentation until the misstatement was discovered this fall, the person briefed on the probe said. The employee, who has since been terminated, didn't act out of personal or financial gain, the person added.

Macy's declined to comment on whether it had referred the case to any law-enforcement or regulatory authorities.

Macy's said on Wednesday that the employee hid roughly \$151 million of cumulative delivery expenses from the fourth quarter of 2021 through the third

quarter of 2024. Macy's had previously estimated that the erroneous entries obscured between \$132 million and \$154 million in delivery expenses.

"We've concluded our investigation and are strengthening our existing controls and implementing additional changes designed to prevent this from happening again," Macy's Chief Executive Officer Tony Spring said in a press statement.

Macy's didn't say how it uncovered the erroneous entries or how they went undetected by the company's auditor, KPMG. Macy's paid KPMG about \$12.8 million in audit fees from 2021 through 2023.

The accounting irregularities delayed the release of Macy's financial results during a period when investors eagerly look for clues to how retailers are performing as they head into the important year-end holiday season.

Macy's CEO Tony Spring said the company is strengthening controls and making other changes 'to prevent this from happening again.' PHOTO: BRYAN ANSELM FOR WSJ

On Wednesday, Macy's lowered its fiscal-year forecast for adjusted earnings per share to a range between \$2.25 and \$2.50, down from the previous goal of between \$2.34 and \$2.69. The company said it lowered its profit guidance in part because of incremental delivery expenses from the accounting error.

Macy's executives said sales in the current quarter have improved but they remain cautious and are bracing for steeper discounting across the industry through the rest of the holiday shopping season.

Macy's net sales fell 2.4% to \$4.7 billion for the three months that ended Nov. 2, compared with the same period last year. Sales at stores open at least a year declined 2.4%.

At the 50 top stores where the company has been investing in extra staffing, visual displays and other enhancements, comparable-store sales grew 1.9%, the company said. Macy's is now adding additional staffing, mainly to the shoe and handbag departments, to 100 more stores.

Macy's said it raised \$66 million from asset sales in the period, more than double what it had projected. The company has been closing and selling weaker stores to focus on its top locations. There are currently about 475 Macy's stores.

The company has come under pressure from activist investors, who want it to do more to unlock value from its real estate.

Macy's now expects to close 65 stores this year, up from a previous estimate of 55. Macy's finance chief said the company is seeing "really good dealmaking," with sale prices at or above its expectations.

Barington Capital has built a position in Macy's and is pushing the department-store operator to make changes to boost its slumping stock, including the creation of a separate real-estate unit within the company and the possible sale or spinoff of Bloomingdale's and Bluemercury, which cater to more upscale shoppers.

In July, Macy's ended talks with two investors—Arkhouse Management and Brigade Capital Management—that had offered to buy the company for about \$6.9 billion.

Write to Suzanne Kapner at suzanne.kapner@wsj.com

We Want to Hear From You

What has changed about how you buy your holiday gifts this year? *

Macy's Shares Fall After Profit Hit by Accounting Error (2)

By Jeannette Neumann2024-12-11T09:33:38184-05:00

- CEO says company is strengthening its internal controls
- Employee plot will have \$79 million impact on full-year profit

Macy's Inc. trimmed its profit outlook after concluding its investigation into an employee plot to hide millions of dollars in expenses.

The misstatement of delivery expenses, which Macy's has said was linked to a former employee who intentionally hid costs, will have a full-year impact of \$79 million on gross margin and adjusted earnings per share, according to a statement on Wednesday. Most of the impact will be recorded in the fourth quarter.

As a result, Macy's reduced its earnings outlook to \$2.25 to \$2.50 per share from a previous range from August that topped out at \$2.90. It also lowered its projected gross margin rate.

Macy's shares fell 11% when the market opened in New York, the most since August 21. Through Tuesday, the stock had fallen 17% this year.

Macy's said the investigation concluded that there was "no material impact or restatements" to its previously filed financial statements. The company reiterated that the probe didn't uncover evidence of missing cash or unpaid vendors and instead points to accounting errors by a former employee who hid approximately \$151 million in delivery expenses from the fourth quarter of 2021 through the third quarter of this year.

The company said it will publish revised financial information for those fiscal years on Wednesday.

"We've concluded our investigation and are strengthening our existing controls and implementing additional changes designed to prevent this from happening again," Chief Executive Officer **Tony Spring** said in the statement. He later told analysts on an earnings call that the ex-employee acted alone and didn't hide the expenses for personal gain.

During the past several years, Macy's has focused on reducing its delivery expenses and other costs to increase profitability. The company's chief financial officer mentioned delivery expenses in all but one of the 16 quarterly earnings calls that he's participated in since joining the retailer in 2020.

Investigators were told by the employee that, initially, a mistake was made in accounting for delivery expenses, according to a person familiar with the investigation who asked not to be named disclosing information that hasn't been made public. After that initial mistake, the employee intentionally made erroneous accounting entries to hide the mistake, the person added. The employee no longer works at Macy's, the retailer has said.

"This was not theft," CFO **Adrian Mitchell** told analysts on Wednesday. "There was no impact to revenues and there was no impact to cash or inventories as all vendors were fully paid."

Macy's said in a regulatory filing published on Wednesday that it found "material weakness" in its internal controls over manual entries of delivery costs and other expenses. The company added that the former employee also falsified underlying documentation.

The department-store operator said it has begun to implement changes to improve its internal controls including "re-evaluating the risk of employee circumvention of controls."

Macy's also said that an opinion published in March by its auditor, KPMG LLP, about the effectiveness of its internal financial reporting controls "should no longer be relied upon" because of the material weakness uncovered. A KPMG spokesperson declined to comment.

Macy's raised its outlook for full year sales. It now sees net sales in a range of \$22.3 billion to \$22.5 billion, up from the prior view of \$22.1 billion to \$22.4 billion. Same-store sales at owned and licensed locations are expected to be flat to down 1% versus the previous year. The company previously expected that measure to decline as much as 2%.

"I see a consumer that — although remaining choiceful and looking for value — is interested in shopping," Spring told analysts.

The department-store operator delayed the reporting of its full third-quarter earnings last month when it revealed the accounting problem and instead released preliminary numbers.

Activist Pressure

Macy's is under pressure from Barington Capital Group and Thor Equities LLC, who are urging the company to form a separate real estate unit while cutting its capital expenditures. They're also calling on Macy's to consider spinning off its higher-end Bloomingdale's and Bluemercury chains.

Barington and Thor want seats on Macy's board and would encourage the retailer to create an internal subsidiary for its real estate that would include all of the company's owned and leased properties, including its stores and distribution centers. Macy's would then pay rent to the subsidiary.

Barington owned 650,000 Macy's shares, or a 0.2% stake, according to a Sept. 30 regulatory filing. That was an increase from the 100,000 Macy's shares it owned as of June.

Macy's has said it will maintain its current strategy, which focuses on improving results at the company's most-profitable locations.

(Updates with executive comments from analyst call and share performance.)

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Top Regulator Signals 'Significant' Improvement in Audit Quality

By Jorja Siemons

Bloomberg Law News 2024-12-11T10:12:42364348476-05:00

Top Regulator Signals 'Significant' Improvement in Audit Quality

By Jorja Siemons 2024-12-10T18:38:31000-05:00

US audit regulators are seeing “significant improvements” in firms’ audit compliance rates in the wake of finding flaws in almost half of the audits reviewed last year, the head of the audit board said Tuesday.

Erica Williams, chair of the Public Company Accounting Oversight Board, said her staff has indicated that this year’s inspections are poised to show progress made by firms once the reports are published in 2025.

- Despite improvements, the auditing industry is also seeing a rise in restatements, Williams said, which is a result of a slippage of audit quality in prior years. “So, I must remind you now that this is not the time to lose focus,” she said. “Rather, it’s time to continue this progress on behalf of investors.”
- Williams defended her agency’s record on multiple occasions during the American Institute of Certified Public Accountants’ annual financial reporting and accounting conference in Washington this week. She noted the board has taken more formal actions on standard-setting and rulemaking in 2024 than any year since 2003.

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Trump's Pick for SEC Chair Blamed the US for FTX Crypto Disaster

By Monique Mulima

- Paul Atkins has served as an adviser to digital-asset firms
- Shares view that the US should encourage crypto businesses

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Trump's Pick for SEC Chair Blamed the US for FTX Crypto Disaster

By Monique Mulima2024-12-10T08:00:00005-05:00

- Paul Atkins has served as an adviser to digital-asset firms
- Shares view that the US should encourage crypto businesses

Paul Atkins, Donald Trump's pick to lead the Securities and Exchange Commission, once blamed an unusual suspect for the collapse of Sam Bankman-Fried's FTX crypto exchange: The US government itself.

Atkins, 66, had a front row seat to the FTX disaster that still resonates through the digital-asset world. His Washington-based consulting firm Patomak Global Partners is listed as a creditor in the FTX bankruptcy for a board-advisory consulting agreement dated January 2022, about 10 months before Bankman-Fried's firm blew up. It also served as an FTX lobbyist, according to court documents.

"The collapse of FTX was this international debacle that happened because, I think, the US didn't make our rules accommodating to this new technology," Atkins said on a podcast last year, while acknowledging that fraudulent behavior by Bankman-Fried was at the center of the exchange's demise.

The remarks echo years of gripes from executives in the crypto industry about what they consider to be legal gray areas overhanging digital assets, and underscore how dramatically the regulatory outlook will potentially change as Trump returns to the White House. The former crypto cynic has vowed to support the industry and appoint regulators who love crypto, a sharp reversal from the Biden administration's crackdown following the collapse of FTX and several other bankruptcies that cost crypto investors billions of dollars.

Atkins' nomination was greeted with jubilation in crypto, as evidenced by a jump in prices that sent Bitcoin above \$100,000 for the first time in the hours after the announcement. Patomak had also previously advised Reserve, a blockchain stablecoin company.

Atkins didn't respond to requests for comment.



Paul Atkins

Photographer: David Paul Morris/Bloomberg

A former SEC commissioner during President George W. Bush's administration and previously a staff member at the regulator, Atkins shares Trump's view that the US should encourage more crypto companies to operate in the US. On the same podcast, he also pointed his finger at the SEC for pushing industry players offshore. He cited Binance, the largest crypto exchange, which last year pleaded guilty and agreed to pay \$4 billion in penalties to settle US charges that it violated US money-laundering regulations and trade sanctions.

Binance "is mainly overseas because, again, they cannot comply with the regulations as written by the Securities and Exchange Commission and still operate with these decentralized distributed ledger type of assets," Atkins said on the podcast. "It just will not work, according to the rules the way they're written, so that's a problem."

Atkins has also highlighted SEC Commissioner Hester Peirce's Token Safe Harbor Act, which would allow a grace period for developers of decentralized networks before they are required to register under federal securities law. Peirce worked with Atkins at the SEC and praised his nomination in a post on X on Wednesday, saying she "cannot think of a better person for the job."

'Fair and balanced regulator'

During his time as a staff member of the SEC, Atkins worked for Richard Breeden, the chair of the regulator from 1989 to 1993. Breeden, who now runs Breeden Capital Management, described his experience working with Atkins as "superb in every way."

There is good reason for digital-asset enthusiasts to applaud his nomination, according to Breeden.

"If I was in the crypto industry, I would be thrilled to have such a thoughtful person with lots of knowledge about crypto being in charge of regulation and knowing that you're likely to get a fair and balanced regulator," Breeden said in an interview.

While the crypto industry is hoping for a more friendly regulatory environment, **Mark Hays**, associate director for cryptocurrency and financial technology at watchdog group Americans for Financial Reform, warned that there are risks from this.

"Atkins' wholehearted support of the industry and past record of supporting what we would consider to be deregulatory measures for other parts of the finance industry is troubling," Hays said. "The industry's broad and systemic record of fraud and mismanagement means that regulators should be keeping a close watch on this sector and ensuring that robust oversight and accountability is the priority."

Lee Reiners, a lecturing fellow at Duke University and co-host of the *Coffee & Crypto* podcast, also warned that a loosened approach to crypto at the SEC would spell trouble for consumers.

'Fraud and scams'

"I have concerns as someone who's been monitoring the crypto industry for quite some time, that essentially his appointment will sort of usher in a golden era, if you will, of crypto fraud and scams," Reiners said.

Under Atkins, Reiners expects that the SEC will file fewer lawsuits against crypto companies, but when it comes to the ongoing cases against Coinbase Global Inc. and **Kraken**, Atkins' previous experience could mean the cases continue.

"Tradition would stipulate that the incoming SEC chair would see those cases through, and as a traditionalist and someone who has clearly worked at the SEC and believes in the SEC as an institution, he might see those cases through," Reiners said.

However, Atkins could choose to not go ahead with those cases, which is what some in the crypto industry would like to see happen.

John Reed Stark, former chief of the SEC's Office of Internet Enforcement, previously worked with Atkins at the agency. Stark said he expects that Atkins will review ongoing investigations and litigation once he becomes chair to decide which ones are worth continuing.

"I think he will reach out and review a spreadsheet of all active litigation and he will either direct the staff to dismiss those cases, settle those cases, or perhaps even bundle them up and issue some sort of public report about them," Stark said.

While there will be significant challenges to making reforms, Atkins will likely be able to overcome them and will initiate a special study on regulation for crypto and digital assets and bring things to a halt in the mean time, Stark said.

Current SEC Chair Gary Gensler plans step down on Jan. 20 and Atkins will need to be confirmed by the Senate before becoming chair.

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Michael P. Regan, Dave Liedtka

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Boeing supplier Spirit AeroSystems defeats Texas bid for internal records

 [reuters.com/legal/government/boeing-supplier-spirit-aerosystems-defeats-texas-bid-internal-records-2024-12-10](https://www.reuters.com/legal/government/boeing-supplier-spirit-aerosystems-defeats-texas-bid-internal-records-2024-12-10)

Mike Scarcella

By Mike Scarcella

December 10, 2024 9:52 AM PST Updated 21 hours ago

The headquarters of Spirit AeroSystems Holdings Inc, is seen in Wichita, Kansas, U.S.

December 17, 2019. REUTERS/Nick Oxford/File Photo Purchase Licensing Rights , opens new tab

Dec 10 (Reuters) - Airline parts manufacturer Spirit AeroSystems has persuaded a judge to block Texas Attorney General Ken Paxton from forcing it to disclose internal documents as part of a product safety probe related to Boeing.

U.S. District Judge Robert Pitman in Austin on Monday adopted a U.S. magistrate judge's recommendation and declared , opens new tab that the Texas state statute Paxton invoked in his bid for the documents was unlawful.

Kansas-based Spirit sued to halt Paxton's document demand in May, arguing that Paxton's office was seeking confidential and proprietary information without a warrant in the course of its probe into the safety of airplane parts sold to Boeing.

Pitman, citing the magistrate's November report , opens new tab, barred the state from enforcing its information demand against Spirit.

Spirit and Texas did not immediately respond to requests for comment.

Spirit is a key supplier of fuselages for Boeing, which faced intense regulatory and investor scrutiny after January's mid-air panel blowout on a new 737 MAX plane. Boeing CEO Dave Calhoun has announced he will step down by the year's end amid the sprawling safety crisis. Paxton's request directed Spirit to turn over internal communication records and other documents "relevant to manufacturing defects in their products."

Spirit has said it "does not manufacture any part, in Kansas, Texas, or elsewhere, that allegedly failed in incidents involving Boeing 737 aircraft."

In his report, U.S. Magistrate Judge Mark Lane said the "request to examine" statute at issue gave too much power to the attorney general's office to demand "immediate" access to a company's records and no opportunity for a party to seek what he called "precompliance review."

Lane wrote that "no part of the statutory scheme limits the scope of the Attorney General's authority" and asked Pitman to declare the statute unlawful.

Paxton's office had urged Pitman to reject the judge's recommendation, arguing that the law at issue has been on the books for decades.

"For over 100 years that statute has been used in countless settings and generated multiple appellate court decisions without interruption," Paxton's office argued. It said the statute allows for court review before penalties are imposed for refusal to turn over records.

The case is Spirit AeroSystems Inc v. W. Kenneth Paxton, U.S. District Court, Western District of Texas, No. 1:24-cv-00472.

For plaintiff: Matthew Martens and Jaclyn Moyer of Wilmer Cutler Pickering Hale and Dorr

For defendant: Matthew Kennedy of Texas Attorney General's Office

Read more:

Boeing supplier Spirit AeroSystems sues to block Texas safety probe

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Reporting by Mike Scarcella

Adani Group

Adani drops US financing for strategic Sri Lanka port

Conglomerate pulls out of \$500mn loan deal as it wrestles with bribery allegations



The Adani Group said in 2023 it had won a loan from the US International Development Finance Corporation to fund a port expansion project in Colombo © Thilina Kaluthotage/Bloomberg

Chris Kay in Mumbai YESTERDAY



Gautam Adani's conglomerate has said it will no longer tap \$500mn in US development financing for a Sri Lankan port project after the group's billionaire chair was accused of orchestrating a multimillion-dollar bribery scheme.

Backing from the US International Development Finance Corporation for the project was announced in November 2023, months after Adani Group had been accused of "brazen" corporate fraud and stock price manipulation by short seller Hindenburg Research.

At the time, the conglomerate described the funding for the Colombo West International Terminal, the DFC's largest infrastructure investment in Asia, as "a ringing endorsement" of the company. Karan Adani, the billionaire's son who heads the ports business, said the loan was "a reaffirmation by the international community of our vision, our capabilities and our governance".

But the conglomerate has pulled out of the loan deal as it wrestles with [allegations of bribery brought by the US](#) in November. The terminal “will be financed through the company’s internal accruals and capital management plan”, Adani Group’s ports business said in a statement released late on Tuesday. “We have withdrawn our request for financing from the DFC.”

The withdrawal shows how the Indian conglomerate may be hit by funding constraints in the wake of criminal and civil charges. The company has repeatedly denied any wrongdoing, and Gautam Adani [said last month that “every attack makes us stronger”](#).

The [DFC](#) did not immediately respond to a request for comment. Last month, the development financing agency said it had yet to disburse the \$553mn loan and was still conducting due diligence.

The loan for the Adani port in Sri Lanka was part of a broader US push to counter China’s expanding influence in south Asia. Officials in Washington have publicly criticised Beijing’s funding of infrastructure projects in various countries for being debt traps. In a visit to Sri Lanka in 2020, Donald Trump’s secretary of state Mike Pompeo called China a “predator”.

[Adani](#), who has been accused by Indian opposition politicians of enjoying favoured treatment from Prime Minister Narendra Modi, has previously criticised China and insisted the investments were designed to meet Sri Lanka’s needs.

The Colombo terminal project, which was due to be operational this month, “is progressing well and is on track for commissioning by early next year”, Adani Ports said.

Still, Adani Group’s investments in Sri Lankan ports and green energy projects during the country’s debt crisis have been criticised by local politicians, who have argued that the deals lack transparency.

The government of Sri Lanka’s [new leftist president](#) Anura Kumara Dissanayake has opened investigations into Adani’s projects across the island nation.

The group’s overseas business interests are also coming under scrutiny in other countries. Kenya’s President William Ruto cancelled \$2.6bn in proposed deals after the US charges were brought against Adani and his associates. Bangladesh’s caretaker government is also probing cross-border electricity deals with Adani’s power company.

US & Canadian companies

Hackers take a bite out of Krispy Kreme

Cyber attack having 'material impact' on operations, company says in SEC filing



Krispy Kreme is 'experiencing certain operational disruptions, including with online ordering' because of 'unauthorised activity' in part of its IT systems © Brandon Bell/Getty Images

Jonathan Wheatley, Marianna Giusti and Eri Sugiura in London 57 MINUTES AGO



Doughnut maker Krispy Kreme said a cyber security attack has disrupted its online operations, including online orders, in parts of the US, which the group warned would have a material impact on its business.

The US company said in a filing to the US Securities and Exchange Commission on Wednesday that it had been notified on November 29 of “unauthorised activity” in part of its IT systems, which it had taken steps to contain and remediate.

As a result, it was “experiencing certain operational disruptions, including with online ordering”, Krispy Kreme said. Its stores remain open, it added in the filing.

The North Carolina-headquartered doughnut chain, which operates in 35 countries and in its own stores and supermarkets, said the incident “has had and is reasonably likely to have a material impact on the company’s business operations until recovery efforts are completed”.

Krispy Kreme said that it notified federal law enforcement and began to investigate in collaboration with external cyber security experts to “contain” disruptions.

The attack came weeks after a warning that fraud and ransomware are expected to threaten retailers, hospitality and travel businesses during their busiest Christmas holiday season, according to a report published last month by Virginia-based Retail & Hospitality Information Sharing and Analysis Center.

The centre’s audit of cyber threats reported during the last holiday season showed that ransomware accounted for 26 per cent of all reported incidents, doubling from 13 per cent in the previous year.

This year has seen “some of the largest breaches to date”, according to international cyber security firm Cypfer, with attacks increasing also in the retail and hospitality industries. In April, California-based Panda Restaurant Group, the owner of fast-casual Asian chain Panda Express, said that its corporate systems were hacked in March and some personal information of an undisclosed number of employees was stolen.

Krispy Kreme said it holds cyber security insurance that is expected to “offset a portion of the costs of the incident”. It does not expect the attack will have a “long-term material impact on its results of operations and financial condition”.

But cyber security experts say it can take months for a company to recover from an attack.

“Even if the system is back up-and-running, the issue is hackers will already have the [company’s] data and will be threatening to publish [it],” said Graham Cluley, a cyber security researcher.

Krispy Kreme relisted in 2021 following its acquisition in 2016 by European investment group JABgra Holding. In the US, the company has expanded its sales channels by piloting at McDonald’s restaurants.

Shares in Krispy Kreme were down nearly 3 per cent in trading in New York. The company declined to comment beyond its SEC filing.

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<https://bsky.app/profile/annmlipton.bsky.social/post/3lcyikafwy22b>



Ann M. Lipton

@annmlipton.bsky.social

heh

1. Retail Investors Will Not Read Traditional Disclosures

First, do not expect retail investors to read traditional disclosures. In every non-traded REIT case I saw, the non-traded REIT itself plainly disclosed that it was a terrible investment. One expressly disclosed that for multiple years the “distributions” it paid investors were just investor capital getting returned,⁴ When this happens without disclosure, we call it a Ponzi scheme.

 **Ben Edwards** @benpedwards.bsky.social · 18h

I spoke with the SEC's Investor Advisory Committee today as part of a panel on Mainstreaming Alternative Investments to Retail Investors.

These are my remarks:

papers.ssrn.com/sol3/papers....

**Benjamin P. Edwards Professor of Law, William S. Boyd School of Law
University of Nevada, Las Vegas Prepared Remarks to Investor
Advisory Committee Panel Discussion: Mainstreaming of Alternative ...**

These remarks address concerns with mainstreaming alternative investments to retail investors.

 papers.ssrn.com

December 10, 2024 at 4:24 PM  Everybody can reply

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4



7



32





Ann M. Lipton @annmlipton.bsky.social · 17h

holy shit

Yet what were these shares worth? One non-traded REIT put it this way in a risk factor, stating:

Our board of directors arbitrarily determined the price of the shares .. and such price bears no relationship to our book or asset values, or to any other established criteria for valuing outstanding shares. Because the offering price was not based upon any independent valuation, the offering price may not be indicative of the proceeds that you would receive upon liquidation.⁵

💬 2

↻ 1

❤️ 17

⋮



Silly B Man @lawnerd.bsky.social · 17h

I have heard startlingly little from academia about this opinion involving a non-exchange-traded Delaware corporation whose principal asset is *checks notes* a pirate ship.

[courts.delaware.gov/Opinions/Dow...](https://courts.delaware.gov/Opinions/Download.aspx?id=363900)

<https://courts.delaware.gov/Opinions/Download.aspx?id=363900>

🌐 courts.delaware.gov

💬 1

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❤️ 4

⋮



Ann M. Lipton @annmlipton.bsky.social · 17h

the one eyed willy thing remains ever in mind

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Ann M. Lipton @annmlipton.bsky.social · 17h
the one eyed willy thing remains ever in mind



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Silly B Man @lawnerd.bsky.social · 17h



able to determine v
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nony of two individua
and interested in the c



2





Ann M. Lipton @annmlipton.bsky.social · 17h



1



Silly B Man @lawnerd.bsky.social · 17h

Absolutely wild thing to put in an opinion about a class-representative stockholder-plaintiff when it isn't material to the decision and the court isn't even finding that it happened

1



1





Ann M. Lipton @annmlipton.bsky.social · 17h

i always said, delaware judges can get kind of punchy



Silly B Man @lawnerd.bsky.social · 17h

Delaware courts: "Hey why is corporate misbehavior getting worse?"

also courts: <create new doctrines for dismissing stockholder suits
policing fiduciary misconduct>

<make it more personally onerous to represent the corp & class>

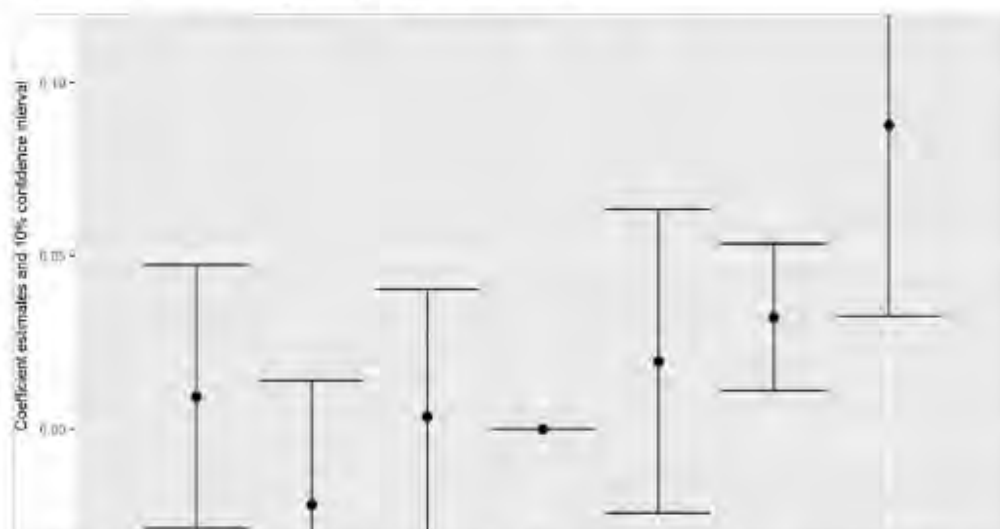
<award plaintiffs' attorneys less than 1% after \$55B trial victory>



Tim Martens @tmartens.bsky.social · 9h

This is super interesting because I show the opposite in my job market paper: link.springer.com/article/10.1...

It highlights that retail investor != retail investor. There seems to a lot of variation in their degree of sophistication.



The disclosure function of the U.S. patent system: evidence from the PTDL program and extreme snowfall - Review of Accounting Studies

Are retail investors using uncured disclosures in form of patents for their investment decisions? This study uses the investment decisions of retail ...

@ link.springer.com





Ann M. Lipton @annmlipton.bsky.social · 9h

maybe the ones who go to the types of brokers who pitch nontraded reits are a specific group



Ryan Dobbs @rwdobbs.bsky.social · 17h

How much of this boils down to "doctors are awful at investing but love being told they can buy a special investment"?



Firthermor @firthermor.bsky.social · 18h

Non-traded REIT scheme



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December 10, 2024, 9:42 AM PST

SEC Warns Companies Against 'Boilerplate' Disclosures on AI

By Jorja Siemons

Bloomberg Law News 2024-12-11T09:42:34218838959-05:00

SEC Warns Companies Against 'Boilerplate' Disclosures on AI

By Jorja Siemons 2024-12-10T12:42:50000-05:00

Publicly traded companies should avoid making “boilerplate” artificial intelligence-related statements to investors in the 2025 reporting season, a US Securities and Exchange Commission official said Tuesday.

Instead, companies should provide details tailored to their business that note emerging material risks stemming from AI, such as cybersecurity incidents, intellectual property concerns, and the potential for discrimination and bias, said Cicely LaMothe, deputy director of disclosure operations in the SEC’s Division of Corporation Finance.

“This is a space that really we should stay away from boilerplate-type disclosures,” LaMothe said at the American Institute of Certified Public Accountants’ annual financial reporting and accounting conference in Washington. Such disclosures are “not very helpful” for investors to understand the risks that AI may pose to a business, she said.

- While AI isn’t explicitly mentioned in SEC reporting rules, the commission has noted companies’ usage of the technology could trigger corporate disclosures throughout financial reports.
- The SEC has observed a significant uptick in AI-related disclosures companies provide investors, LaMothe said.
- Still, the SEC staff’s recent review of AI-related disclosures from leading publicly traded companies found most of those details weren’t specialized to businesses—despite the fact that AI’s impact depends on a company’s size and needs, LaMothe said.

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Microsoft Investors Rebuff Calls to Delve Into AI Risk, Privacy

By Clara Hudson

- Shareholders call for further transparency details
- Microsoft says it already reports extensively on risk

Bloomberg Law News 2024-12-11T10:13:26278462255-05:00

Microsoft Investors Rebuff Calls to Delve Into AI Risk, Privacy

By Clara Hudson 2024-12-10T12:06:53000-05:00

- Shareholders call for further transparency details
- Microsoft says it already reports extensively on risk

Microsoft Corp. shareholders on Tuesday rejected three proposals pressing the tech giant to mitigate and disclose AI risks from misinformation to breaches of data privacy.

Microsoft—a major investor in and partner of ChatGPT creator OpenAI—is the latest big tech company to face AI scrutiny from shareholders this year. Investors are asking companies to consider new transparency and ethics policies for developing and using AI, including generative AI, as they wrangle with the fast-developing technology.

Proposals targeting a range of companies over AI risks this year mostly drew a strong showing for first-time efforts: a bid seeking AI ethics information from Apple secured 37.5% support from shareholders in February.

One of the proposals rejected Tuesday raised concerns that developers at Microsoft could use unethical or illegal sources for training generative AI, such as personal information, copyrighted works, or proprietary commercial information provided by users.

Microsoft recently disputed claims circulating online that it uses customer data from certain Microsoft 365 applications including Word and Excel to train large language models. The allegations brewed on social media in late November after some Microsoft users said an update to the provider's terms of use could allow the company to scrape Microsoft Office documents for AI training.

The bid from the National Legal and Policy Center said shareholders “should be concerned with Microsoft’s record on data ethics,” referencing allegations that OpenAI stole personal information from users without notice or permission.

Microsoft did not immediately respond to a request for comment after the meeting, but said in its proxy statement that it has made public commitments to ethically source data it uses to train generative AI models, for example that it will “make it simple for consumers to opt-out of their data being used for training.”

The tech giant also noted that it will enhance its AI transparency reporting next year to comply with the EU AI Act. The company emphasized that OpenAI “is a separate organization that manages its own data sourcing practices.”

The week before the annual meeting, Microsoft published a report titled “Governance in the age of AI” to help its customers keep data secure while using its AI product Copilot.

Misinformation and Climate

Another proposal from Arjuna Capital that did not pass asked for a report on the risks AI misinformation could pose to the public and the business, detailing what steps the company is taking in response. The bid said disinformation “may pose serious risks to democracy by manipulating public opinion, undermining institutional trust, and swaying elections.”

Microsoft released its inaugural responsible AI report in May explaining how it builds generative AI systems to mitigate misinformation and disinformation. The tech giant committed to producing the report to the US government over a year ago, but that wasn’t enough to satisfy shareholders last year: Arjuna’s proposal secured 21.2% of investor support at the company’s annual meeting in late 2023. Arjuna said the report doesn’t address many “critical questions” about the company’s guardrails and how effective they are.

In its proxy statement, Microsoft said Arjuna’s request would be duplicative. “We report extensively on our practices, their effectiveness, and broader trends we observe,” the company said.

A third proposal from As You Sow, which also failed, asked for a report on the risks of Microsoft developing technology platforms including AI that facilitate new oil and gas production projects, and how that jibes with its own targets to reduce greenhouse gas emissions and to be carbon-negative by 2030.

“Microsoft’s reporting on the climate-positive applications of advanced technologies, while ignoring the impact of new fossil fuel production, puts the Company at risk of accusations of greenwashing, which can have significant reputational or legal consequences,” the bid said. “It does so even while identifying the growing risks of climate change.”

Microsoft said in response that “to broaden the market availability of clean energy, we seek to innovate technology solutions for our customers, suppliers, and partners and to invest and act as a first mover, yet the last few years have revealed that a global energy transition is more complex and less linear than anticipated.”

Other shareholder proposals that did not win include pressing the tech giant to: disclose risks over plans to house cloud data centers in Saudi Arabia; detail risks over developing augmented reality headsets for military use; and study the benefits of holding a small percentage of its assets in Bitcoin.

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SEC Says Xtreme Fighting CEO Hid Control to Avoid Sales Limits

By Gillian R. Brassil

- **COURT:** S.D. Fla.
- **TRACK DOCKET:** [No. 1:24-cv-24802](#) (Bloomberg Law subscription)

Bloomberg Law News 2024-12-11T10:02:18424205158-05:00

SEC Says Xtreme Fighting CEO Hid Control to Avoid Sales Limits

By Gillian R. Brassil 2024-12-10T11:25:45000-05:00

- **COURT:** S.D. Fla.
- **TRACK DOCKET:** [No. 1:24-cv-24802](#) (Bloomberg Law subscription)

Xtreme Fighting Championships, Inc. and its CEO generated over \$5 million illicitly from 2020 to early 2022, the US Securities and Exchange Commission says.

Steve A. Smith Jr. and in-house counsel Christopher Davies hid their control of the company's stock and used a pseudonym to skirt legal limits on sales by insiders, the SEC said in a lawsuit filed in the US District Court for the Southern District of Florida on Monday. The mixed martial arts entertainment company received at least \$436,000 of those illegal funds, the SEC said.

Xtreme Fighting traded in the over-the-counter market for the timeframe addressed by the SEC. When Smith acquired a control of the company and became its CEO in January 2020, the SEC says he "immediately began a fraudulent scheme to sell Xtreme Fighting's stock."

The stock was restricted because it was originally issued by Xtreme Fighting's predecessor in an unregistered private transaction.

Smith and Davies, who has since died and had previously plead guilty to securities fraud, issued stock to entities that were secretly controlled by each of them, the SEC says. By giving the stock to these groups that Xtreme Fighting seemed unaffiliated with, the stock incorrectly appeared to be exempt from registration and eligible for public resale, the SEC says.

“The stock should have been restricted and ineligible for public resale unless there was a valid exemption to registration, which there was not,” the SEC says.

There are volume and time requirements for reselling restricted stock in unregistered transactions, said the SEC. Smith made it appear that a group had held shares for the minimum time period, as well as sold shares through the group exceeding the volume limitation, the SEC says.

And in April 2022, OTC Markets Group Inc. put Xtreme Fighting’s stock in a more restrictive trading level after the company failed to file a timely Form 10-K. The annual report hadn’t been filed yet because 2021 financial statements hadn’t been audited by an independent public accounting firm, the SEC says. Before filing, the company’s auditor informed Smith that it needed to review certain financial documents and time to do so, according to the complaint.

Smith and Davies—posing as Xtreme Fighting’s counsel under the name “Jim Barnes,” given he had been barred by the SEC from preparing such filings—said they needed the audit done ASAP to avoid a more stringent recharacterization in OTC Markets, the SEC says. Two days after the OTC Markets redesignation, Smith allegedly signed and allowed to be filed the form which stated it had appointed a new auditor for 2021.

OTC Markets removed the restriction. The auditor resigned, writing to Smith that the CEO knew it had not even started the 2021 audit, and learned “Barnes” was really Davies.

About a month later, Xtreme Fighting filed an amended 10-K, marking financial statements previously listed as audited as not.

The SEC is seeking permanent injunctions related to issues surrounding the charges, a return of illegal funds, civil penalties, a bar on Smith in offering penny and trading other stocks (that are not personal ones) and directing a public company.

A representative for the company did not immediately respond to an email seeking comment.

The case is Securities and Exchange Commission v. Smith et al , S.D. Fla., No. 1:24-cv-24802, complaint filed 12/9/24 .

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Using Data To Inform Corporate Disclosure Decisions

By **Liz Dunshee and Nessim Mezrahi** (December 10, 2024, 5:04 PM EST)

When it comes to disclosure, today's market volatility and regulatory factors require public companies and their advisers to confront competing demands of transparency and protection. Companies must adhere to expanding required and voluntary disclosure frameworks to comply with laws, access capital and garner high support from investors in director elections.[1]

However, each public disclosure creates a high-severity risk for directors and officers: If the company misstates information, it may lead to private rights of action and government investigations.[2]

Following the U.S. Supreme Court's **dismissal** of a writ of certiorari in late November in Facebook Inc. v. Amalgamated Bank, Meta Platforms Inc. — previously known as Facebook — must now defend against a multibillion-dollar securities class action for alleged violations of U.S. Securities and Exchange Commission Rule 10b-5.

As summarized by the Associated Press, the plaintiffs' claims are premised on the "[i]nadequacy of the disclosures [that] led to two significant price drops in the price of the company's shares in 2018, after the public learned about the extent of the [Cambridge Analytica] privacy scandal." [3]

Data and analysis by SAR LLC indicate that during the 12-month period from Oct. 1, 2023, through Sept. 30, 2024, 211 companies faced private securities fraud litigation for alleged violations of Sections 10(b) and 20(a) of the Exchange Act, and Rule 10b-5 promulgated thereunder, whereby shareholders have claimed approximately \$556.7 billion in market capitalization losses.[4]

During the salient period, defendant issuers have paid approximately \$3.02 billion in monetary settlements to resolve securities class actions in North America.[5]

This article explores how this data can inform decisions about whether and how issuers disclose information, and why the corporate controller is well positioned to oversee this element of the disclosure analysis. We refer to this concept as "disclosure controllership."

Balancing Transparency and Risk Through Responsible Disclosure Controllership

Predisclosure Materiality Assessment

The decision of whether to share a development publicly, and the extent of information to disclose, often turns on whether the information is material.[6]

Public companies, and their directors and officers, may face securities fraud and derivative lawsuits if investor plaintiffs can plead sufficient facts that, if true, would indicate an issuer materially misstated information that it disclosed, or that it omitted from disclosure a fact that a reasonable investor would have been substantially likely to view as having significantly altered the total mix of information made publicly available.[7]

The annual probability of an issuer being sued by investor plaintiffs for alleged fraud-on-the-market is approximately 3.5%, based on the filing frequency exhibited during the aforementioned 12-month



Liz Dunshee



Nessim Mezrahi

period. Table 1 below presents the probability of suit by industry sector.

Table 1: Empirical Probability of Rule 10b-5 Private Securities-Fraud Litigation

Industry Sector [8]	Annual Average Probability [9]
Communication Services	1.85%
Consumer Discretionary	5.27%
Consumer Staples	3.64%
Energy	0.51%
Financials	0.87%
Health Care	4.82%
Industrials	3.56%
Information Technology	5.60%
Materials	1.97%
Real Estate	2.33%
Utilities	1.18%
Overall	3.50%

In evaluating materiality, companies must evaluate all relevant facts and circumstances, including financial impact and qualitative considerations.[10] Although it is already common for the company's controller or chief accounting officer to serve as a member of a cross-functional disclosure committee that monitors corporate disclosure triggers, three recent developments make the controller's disclosure committee role more important than ever — and warrant greater focus on the function of disclosure controllership.[11]

First, litigation trends show that plaintiffs are scrutinizing disclosures outside of the mergers and acquisitions context, and that companies are facing an increasing magnitude of market capitalization losses on financially material disclosures.[12]

These losses negatively affect long investors and heighten the importance of predisclosure materiality assessments. According to Scott Musoff, co-deputy head of Skadden Arps Slate Meagher & Flom's securities litigation group, "[w]e predicted that as market caps increase, the same percentage of [stock price] declines become greater alleged losses." [13]

Second, companies are facing vast disclosure requirements and expectations, which require tracking and processing large amounts of data while adhering closely to internal procedures. For example:

- Many companies now publish sustainability reports that include data points on greenhouse gas emissions and transition risks, workforce demographics, and more, which can serve as the basis for securities fraud lawsuits even though the disclosures are not required by the federal securities laws and are not filed with the SEC.[14]
- In applying SEC disclosure rules, courts have recognized the need to describe known material events and uncertainties, and recent developments suggest that companies also should have procedures to inventory and consider disclosure if events materialize that their risk factors warn about in general terms.[15][16]

- The SEC has extracted penalties from several companies in recent years based on alleged misalignment between disclosures and internal documentation.[17]

For these reasons, proactive companies are applying concepts from their existing internal controls to disclosures outside of their financial statements. It is more important than ever to document the quantitative and qualitative elements of materiality assessments, and use a consistent framework for disclosure decisions.

Controllers — who already have oversight responsibility for a company's financial statement reporting protocols, including filing submissions with the SEC as well as familiarity with the company's operations — are well positioned to support these processes.[18] Controllers are not only able to provide data to assist with the materiality analysis, but they can also leverage their established systems to track materiality determinations for matters outside of financial statements and maintain backup for data-based disclosure points.[19]

According to Deloitte, "[c]ontrollers can add strategic value by working with business leaders, including the CFO, to reassess disclosures and report on accounting treatments, as well as other metrics that matter to investors, to best unlock or convey the value of the company." [20]

Lastly, it is important to note that when a development becomes publicly known, regulators and investor plaintiffs often point to material stock price movements to make after-the-fact challenges to materiality determinations and disclosure decisions.[21]

Historically, it has been extremely difficult to predict the impact of company-specific news on stock price. Emerging data analytics tools, such as ongoing event study analyses that test stock price reactions to corporate events, may change this.

Controllers will be well positioned, in collaboration with investor relations teams, to use these tools to evaluate whether similar developments at peer companies have correlated with statistically significant stock price movements, after controlling for extraneous factors, and to incorporate this data-driven analysis to support disclosure recommendations.[22]

Mechanism and Context of Disclosure

In addition to involving controllers in the predisclosure materiality analysis, companies can enhance disclosure controllership by understanding how the mechanics and context of disclosure correlate with securities litigation risks.

Companies should plan all aspects of an announcement with an eye toward balancing transparency and risk, including the day and time of the release, and whether to combine news about multiple positive and/or negative developments.[23]

For example, based on a review of 777,140 corporate events over a two-year period on 4,661 New York Stock Exchange- and Nasdaq-listed companies, the disclosure channel of press release versus SEC filing is correlated with whether a corporate disclosure results in a material stock price movement from the dissemination of company-specific information.[24]

Single-firm event studies were used to determine that 5.41% of the close-to-close trading sessions exhibited a financially material change in stock price when an event was disclosed in both a press release and SEC filing, rather than just one or the other.[25]

Data and analysis indicate that close-to-close market capitalization losses associated with the corresponding 10,055 adverse corporate events amounted to \$8.9 trillion, or 13.64% of the aggregate market capitalization of NYSE- and Nasdaq-listed companies as of Sept.13.[26]

Table 2: Two-Year Frequency and Severity of Financially Material Corporate Events Disclosed in Both Press Releases and Filings with SEC

Industry Sector [27]	FREQUENCY Avg. No. of High-Risk Adverse Corporate Events [28]	SEVERITY Aggregate Market Capitalization Losses of High-Risk Adverse Corporate Events [29]
Communication Services	2.0	\$1,049.37
Consumer Discretionary	2.2	\$1,506.78
Consumer Staples	2.1	\$425.75
Energy	1.5	\$333.89
Financials	2.2	\$1,160.69
Health Care	2.2	\$1,143.88
Industrials	2.4	\$909.75
Information Technology	2.4	\$1,998.79
Materials	2.0	\$234.99
Real Estate	1.5	\$15.65
Utilities	1.8	\$109.23
Overall	2.0	\$8,888.77

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Meanwhile, only 2.15% and 1.66% of corporate disclosures disseminated exclusively through either SEC filings or via press announcements, respectively, exhibited financial materiality when applying the same 95% confidence standard.[30]

In some situations, companies are expressly required to disclose information by way of an SEC filing, and there are also times when making an SEC filing reduces overall risk exposure.[31] In other situations, however, companies may have more discretion over whether to make a disclosure by press release, SEC filing or both.

These findings underscore that this is not a decision to make lightly. Disclosure committees, with insight from corporate controllers, should consider current data points about disclosure methodologies alongside their regulatory obligations, liability risks and other factors.[32][33][34]

Postdisclosure Financial Materiality Assessment

While companies may not have a uniform, formulaic approach to determining materiality prior to disclosure, the postdisclosure determination of financial materiality is less ambiguous. In the context of assessing open market securities fraud claims, courts have widely accepted event studies to support the postdisclosure analysis.[35]

According to Solicitor General Elizabeth Prelogar, "To assess whether a particular event or news report caused a change in a stock's price, event studies isolate company-specific (as opposed to market- or industry-wide) price movements in the stock and evaluate whether such movements were statistically significant around the time of the event or report." [36]

The securities litigation risks facing public companies are driven by the frequency and severity of corporate disclosures that exhibit financial materiality.

Companies and their insurers can therefore also use data derived from the uniform application of event study analysis to monitor their risk exposure following a corporate disclosure, as well as to monitor a company's risk profile over time, based on how the frequency and severity of their material disclosures compare to those of peers.

This data can inform decisions about corrective actions and future disclosures, as well as help companies and insurers plan for potential claims and adopt risk transfer solutions. Within the company, the corporate controller is well positioned to track this postdisclosure data and share it with other decision-makers to foster disclosure controllership, which will more effectively mitigate securities litigation risks.

Data Analytics Is Critical Component of a Disclosure Controllership Framework

Today's vexing complexity of adequate corporate disclosure was in full display at the Supreme Court, when in late November the justices opted not to issue a ruling in *Facebook v. Amalgamated Bank*, thereby allowing a securities class action to proceed against the company in the U.S. Court of Appeals for the Ninth Circuit. [37][38][39]

The highest court in the land has potentially expanded the temporal scope of risk factor disclosures by allowing the October 2023 **ruling** by the Ninth Circuit to stand, which stated that "shareholders adequately pleaded falsity as to the statements warning that misuse of Facebook users' data could harm Facebook's business, reputation, and competitive position, and the district court erred by dismissing the complaint as to those statements." [40]

To make disclosure adequacy even thornier for issuers, the securities plaintiffs bar is relying on increasingly sophisticated data analytics to actively monitor pension fund investment portfolios to follow securities transactions, examine losses and notify clients right away when losses may be due to fraud or other securities laws violations. [41][42]

Public companies — and their advisers and insurers — can leverage data analytics that apply the court-approved event study methodology to support predisclosure materiality determinations and monitor postdisclosure risks.

Although notable declines in stock price pursuant to corporate disclosures "aren't an automatic trigger for shareholder suits, of course," according to Reuters, companies may benefit by incorporating stock price reaction analysis of company-specific news into their controller's role to build a more robust disclosure controllership framework. [43]

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[1] See, e.g., 2024 Benchmark Policy Guidelines, Glass Lewis 86-87, Nov. 16, 2023. <https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf> (noting that "[w]hen companies have not provided for explicit, board-level oversight of environmental and social matters and/or when a substantial environmental or social risk has been

ignored or inadequately addressed, [Glass Lewis] may recommend voting against members of the board").

[2] See 15 U.S.C. § 78j (2010) and 17 C.F.R. 240.10b-5 (1992), which provides that companies are liable for material misstatements or omissions, regardless of whether the information is provided voluntarily or in response to a legal requirement, and regardless of whether the information is provided in an SEC filing or elsewhere.

[3] **Facebook Inc. v. Amalgamated Bank** , No. 23-980 (Nov. 22, 2024); "Supreme Court Allows Multibillion-Dollar Class Action to Proceed Against Meta," Associated Press, Nov. 22, 2024. <https://apnews.com/article/supreme-court-meta-facebook-lawsuit-9173ad92e11df4b2a565418e419dfb88>.

[4] 3Q 20204 U.S. SCA Rule 10b-5 Exposure Report, SAR, Oct. 10, 2024. The quantum of aggregate market capitalization losses excludes 24 defendant companies for which insufficient data was present to perform the event study analyses under SAR standards of quality. <https://www.sarlit.com/sca-rule-10b-5-exposure-report>.

[5] ISS Securities Class Action Services; Rule 10b-5 Securities Class Action Settlements in North America.

[6] See **TSC Indus. Inc. v. Northway Inc.** , 426 U.S. 438, 449 (1976) (holding that in the context of assessing securities fraud, information is considered "material" if there is "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote," or "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available"); **Basic Inc. v. Levinson** , 485 U.S. 224, 238 (1988) (holding that "with respect to contingent or speculative information or events," materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event" (quoting **Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co.** , 401 F.2d 833, 849 (2d Cir. 1968))). In the absence of certain fact-specific situations, such as when a company is conducting an ongoing securities offering or when it has triggered a duty to update information that it has previously provided, U.S. federal securities laws do not impose a general duty to disclose all material information. See *Basic*, 485 U.S. at 239 n.17 (stating "silence, absent a duty to disclose, is not misleading"). However, U.S. stock exchange rules promote transparency from listed companies by requiring prompt disclosure of material information. NYSE Rule 202.05; Nasdaq Rule 5250(b)(1).

[7] This article focuses on private rights of action, but public companies may also be subject to civil and criminal enforcement proceedings brought by the SEC's Enforcement Division or the Department of Justice. See 15 U.S.C. § 78j; 17 C.F.R. 240.10b-5. Directors and officers may also face shareholder derivative lawsuits that accompany a Rule 10b-5 private securities-fraud class action. See, "Guest Post: Derivative Litigation: Board Lessons and Takeaways," Greg Markel, Giovanna Ferrari, and Sarah Fedner, Seyfarth Shaw LLP. The D&O Diary, Oct. 4, 2023. <https://www.dandodiary.com/2023/10/articles/shareholders-derivative-litigation/guest-post-derivative-litigation-board-lessons-and-takeaways/#more-25247>.

[8] Global Industry Classification Standard (GICS) is a widely used industry taxonomy developed by MSCI and Standard and Poor's.

[9] The estimated average percentage of publicly traded companies that trade via common stock or ADRs on the NYSE or Nasdaq that may become defendants within a twelve-month period.

[10] See *TSC Indus.*, 426 U.S. at 449; *Basic*, 485 U.S. at 238; Exchange Act Form 8-K: Questions and Answers of General Applicability, U.S. Securities and Exchange Commission (June 24, 2024), <https://www.sec.gov/rules-regulations/staff-guidance/compliance-disclosure-interpretations/exchange-act-form-8-k#104b.05> (+see, Questions 104B.07, 104B.08, and 104B.09 emphasizing the qualitative aspects of the materiality analysis under the SEC's cyber disclosure rule); Staff Accounting Bulletin No. 99, 64 Fed. Reg. 45,150, 45,151 (Aug. 19, 1999) (publication of Staff Accounting Bulletin); Selective Disclosure and Insider Trading, 65 Fed. Reg. 45150 (Aug. 24, 2000) (publication of adopting release).

- [11] Ernst & Young & Society for Corporate Governance, Corporate Governance in Focus: Harnessing Disclosure Committees for Modern Reporting, EY (July 2024), <https://www.ey.com/content/dam/ey-unified-site/ey-com/en-us/insights/financial-accounting-advisory-services/documents/ey-corporate-governance-in-focus-disclosure-committee.pdf>.
- [12] U.S. Securities Litigation Risk Report, SAR, Sept. 23, 2024. <https://www.sarlit.com/us-securities-litigation-risk-report>.
- [13] "Report: Securities Fraud Losses Claimed Balloon in First Half of 2024," Ellen Bardash, July 15, 2024, Law.com. <https://www.law.com/2024/07/15/report-securities-fraud-losses-claimed-balloon-in-first-half-of-2024/>.
- [14] "92% of S&P 500® Companies and 70% of Russell 1000® Companies Published Sustainability Reports in 2020, G&A Institute Research Shows," BusinessWire, Nov. 16, 2021. <https://www.businesswire.com/news/home/20211116006064/en/92-of-SP-500%C2%AE-Companies-and-70-of-Russell-1000%C2%AE-Companies-Published-Sustainability-Reports-in-2020-GA-Institute-Research-Shows>.
- [15] Item 303 of Regulation S-K requires companies to "focus specifically on material events and uncertainties known to management that are reasonably likely to cause reported financial information not to be necessarily indicative of future operating results or of future financial condition. This includes descriptions and amounts of matters that have had a material impact on reported operations, as well as matters that are reasonably likely based on management's assessment to have a material impact on future operations." In describing results of operations, Item 303 also requires companies to "[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(b)(2)(ii)). The U.S. Supreme Court has held that a company's "pure omission" to disclose known trends cannot serve as the basis for a private securities fraud claim, but companies may still be liable for "misleading half-truths." See **Macquarie Infrastructure Corp. v. Moab Partners LP** , 601 U.S. 257, 258 (2024).
- [16] See, e.g., Opinion (For Publication), United States Court of Appeals for the Ninth Circuit, **In Re Facebook, Inc. Securities Litigation** , Case No. 22-15077 (allowing claims to proceed based on alleged failures to disclose past events in risk factors); **Yi Xiang v. Inovalon Holdings Inc.** , 254 F. Supp. 3d 635 (S.D.N.Y. 2017) (finding that Item 303 of Regulation S-K requires discussion of material "known trends or uncertainties," which may include the effect of pending tax changes). The SEC also has alleged that Item 105 of Regulation S-K requires issuers to disclose when specific past events that their risk factors warn about in general terms have materialized. See Facebook to Pay \$100 Million for Misleading Investors About the Risks It Faced From Misuse of User Data, U.S. Securities and Exchange Commissions (July 24, 2019), <https://www.sec.gov/newsroom/press-releases/2019-140>. An October 2024 enforcement action against victims of the SolarWinds cybersecurity breach also took issue with "hypothetical risk factors." Unisys Corp., Exchange Act Release No. 11323 (Oct. 22, 2024). A joint dissenting statement from Commissioners Peirce and Uyeda objected to the burden that this expectation imposes on companies. Hester Peirce and Mark Uyeda, Commissioners, Sec. & Exch. Comm'n, Statement Regarding Administrative Proceedings Against SolarWinds Customers (Oct. 22, 2024).
- [17] Activision Blizzard Inc., Exchange Act Release No. 96796 (Feb. 3, 2023); First Guaranty Bancshares Inc., Exchange Act Release No. 97631 (May 31, 2023); Charter Commc'ns Inc., Exchange Act Release No. 98923 (Nov. 14, 2023); Unisys Corp., Securities Act Release No. 11323, Exchange Act Release No. 101401 (Oct. 22, 2024).
- [18] "What Is A Controller in Finance? Role And Responsibilities," Ilana Hamilton, Brenna Swanston, Keith Duff, Mar. 22, 2024, Forbes adviser. <https://www.forbes.com/adviser/education/business-and-marketing/become-a-financial-controller/>.
- [19] See "Charting a New Course For Controllers In The Post-Pandemic World," CFO Insights, Deloitte, April 2021. Noting that, "[i]n the absence of a chief data officer, the controller is strategically positioned to oversee the collection, organization, analysis, and governance of financial data to provide the information needed to support critical decisions."

[20] Id.

[21] U.S. Securities Litigation Risk Report, SAR, Sept. 23, 2024. <https://www.sarlit.com/us-securities-litigation-risk-report>.

[22] Event studies, which are widely accepted to support post-disclosure financial materiality assessments, will become more accessible to companies on a pre-disclosure basis as emerging tools allow users to quickly analyze large data sets. See *infra* note 23.

[23] Companies may employ various tactics to attempt to soften the market impact of negative news and/or frustrate plaintiffs' ability to prove loss causation. See Ed deHaan, Terry J. Shevlin & Jake Thornock, Market (In)Attention and Earnings Announcement Timing, 60 J. Accounting & Econ 3/1-/25 (2014) (finding that earnings reported after hours and on busy earnings days are significantly worse than those released at other times); The Friday Night Dump, Footnoted, <https://www.footnoted.com/> (focusing on important information contained in Friday filings); *Pelletier v. Endo Int'l PLC*, 439 F. Supp. 3d 450 (E.D. Pa. 2018) (rebuking executives for waiting to announce corrective information until they had offsetting good news); Caroline Crenshaw, Commissioner, Sec. & Exch. Comm'n, Statement Regarding Information Bundling and Corporate Penalties (Sept. 3, 2021) (calling for stricter enforcement policy for information bundling).

[24] U.S. Securities Litigation Risk Report, SAR. Sept. 23, 2024. <https://www.sarlit.com/sca-rule-10b-5-exposure-report>.

[25] The applied event study parameters account for a one-year control period prior to the two-year evaluative period to test statistical significance of the residual return over the impacted close-to-close trading session at the 95% confidence standard.

[26] SAR ACE (Adverse Corporate Event) Database, www.sarlit.com. As of Sept. 13, 2023.

[27] Id.

[28] For example, in addition to events that SEC rules require companies to disclose on Form 8-K regardless of materiality, companies with ongoing securities offerings tend to disclose potentially material information on Form 8-K so that it is incorporated by reference into extant registration statements. 17 C.F.R. § 230.408 (2024) (requiring a prospectus to include any material information as may be necessary to make the information in the prospectus not materially misleading); 15 U.S.C. § 77i (2024) (imposing liability for a materially untrue statement or omission); 17 C.F.R. § 240.10b-5 (prohibiting the use of any materially untrue statements or omissions when purchasing or selling securities).

[29] Global Industry Classification Standard (GICS) is a widely used industry taxonomy developed by MSCI and Standard and Poor's.

[30] High-Risk Adverse Corporate Events that correspond to statistically significant negative stock price declines after controlling for general and industry-specific factors when issuers disseminated disclosures via press releases and SEC filings.

[31] Aggregate market capitalization losses that correspond to all High-Risk Adverse Corporate Events.

[32] See, e.g., NYSE Rule 202.05; NYSE Rule 202.06, which encourage listed companies to quickly issue a press release about any news or information that might reasonably be expected to materially affect the market for its securities, and generally discourage releasing material news within 15 minutes after the Exchange's official closing time.

[33] Additional liability risks may attach to information disclosed in an SEC filing. See 17 C.F.R. § 240.13a-15 (2024) (applying disclosure control and procedure requirements to information required to be disclosed in reports filed or submitted under the Exchange Act); 15 U.S.C. § 77k (2024) (providing for liability for false and misleading registration statement disclosures, without requiring proof of scienter).

[34] Disclosure committees may consider whether the disclosure channel sends an unintended message about the importance of the information or establishes an undesired precedent for future disclosures. Filing or furnishing information on Form 8-K is not itself an admission that the information is material. Selective Disclosure and Insider Trading, *supra* note 7. However, the market may perceive disclosure on Form 8-K as more likely to be material than information distributed solely by press release.

[35] See "Materiality and Magnitude: Event Studies in the Courtroom," David Tabak and Frederik Dunbar, Nat'l. Econ. Rsch. Assocs., Working Paper No. 34, 1999, noting that "[o]ne of the most important measurements that can be derived from an event study is that of the materiality of the event under consideration."

[36] Brief for the United States as Amicus Curiae Supporting Neither Party, *Goldman Sachs Grp. Inc. et al. v. Ark. Tchr. Ret. Sys.* , 594 U.S. 113 (2021) (No. 20-222).

[37] *Facebook Inc. v. Amalgamated Bank* , No. 23-980 (Nov. 22, 2024); see also Facebook Inc. v. Amalgamated Bank Oral Argument, C-SPAN, Nov. 6, 2024. <https://www.c-span.org/video/?538151-1/facebook-inc-v-amalgamated-bank-oral-argument>.

[38] "High Court Quietly Pulls Meta Case Without a Ruling," Jessica Corso, Law360, Nov. 22, 2024. <https://www.law360.com/securities/articles/2264599/high-court-quietly-pulls-meta-case-without-a-ruling>.

[39] See "U.S. Supreme Court Dismisses Facebook Case, Saying Writ Improvidently Granted," Kevin LaCroix, The D&O Diary, Nov. 24, 2024. <https://www.dandodiary.com/2024/11/articles/securities-litigation/u-s-supreme-court-dismisses-facebook-case-saying-writ-improvidently-granted/>.

[40] Opinion (For Publication), United States Court of Appeals for the Ninth Circuit, *In Re Facebook Inc. Securities Litigation* , Case No. 22-15077.

[41] Robbins Geller Rudman & Dowd LLP Portfolio Monitoring Program. <https://www.rgrdlaw.com/services-investor-portfolio-monitoring-program.html>.

[42] "Securities Litigation 101: Portfolio Monitoring Best Practices," Christopher Lometti, Richard E. Lorant, Cohen Milstein Sellers & Toll, Oct. 27, 2022. <https://www.cohenmilstein.com/portfolio-monitoring-best-practices/>.

[43] "Big Firm Litigators Are Amped Up for 2023," Alison Frankel, Dec. 30, 2022. <https://www.reuters.com/legal/government/big-firm-litigators-are-amped-up-2023-2022-12-30/>.



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BREAKING: Justices Will No Longer Rule On Nvidia Case

By **Jessica Corso**

Law360 (December 11, 2024, 10:13 AM EST) -- The U.S. Supreme Court on Wednesday said it will no longer consider a closely-watched securities case involving Nvidia Corp., for the second time this year throwing out a petition in a shareholder class action that it previously agreed to hear.

The justices issued a single-sentence ruling dismissing Nvidia's grant of certiorari, saying that it had been "improvidently granted" without offering further detail.

The dismissal comes just weeks after the Supreme Court similarly said **it would no longer consider** a shareholder class action involving Facebook parent company Meta Inc. Both cases underwent oral arguments last month.

The Supreme Court agreed in June to hear the Nvidia case, promising to answer two questions surrounding the pleading standards of the Private Securities Litigation Reform Act: Whether suing shareholders needed access to the internal company documents when claiming that the company misled them, and to what extent an expert report could be relied upon to get around the lack of those documents.

Nvidia investors said in a 2019 complaint that the company and its CEO, Jensen Huang, hid the company's \$1 billion exposure to the volatile crypto mining market due to the industry's position as a major purchaser of Nvidia's graphics processing units.

They said that the truth came to light in late 2018, when the company announced a 7% year-over-year quarterly revenue decline as crypto markets struggled. Suing investors said the announcement caused stock prices to drop by 28.5% over the next two trading days.

Nvidia said that investors lacked proof showing that Huang reviewed internal documents with crypto sales figures and accused them of relying on a report from an outside expert to get around the necessary pleading standards of the PSLRA.

Investors said they also had the testimony of two former employees who knew what Huang knew but Nvidia questioned the strength of those employee testimonies, arguing that they hadn't pointed to any specific document Huang reviewed.

The company appealed to the Supreme Court after a divided Ninth Circuit found the company's arguments unconvincing and allowed the case to move forward last year.

During oral arguments last month, the justices **seemed to second guess** their decision to hear the dispute, wondering whether they were just being asked to correct a single ruling rather than clarifying the PSLRA more broadly.

Nvidia and Huang are represented by Neal Katyal, Katherine Wellington, William Havemann, Reedy Swanson and Keenan Roarty of Hogan Lovells, and John Dwyer, Patrick Gibbs, Samantha Kirby, Kathleen Hartnett, Sarah Lightdale and Patrick Hayden of Cooley LLP.

Nvidia investors are represented by Deepak Gupta, Jonathan Taylor and Greg Beck of Gupta Wessler LLP, Gregory Joseph, Rachel Cherington and Courtney Solomon of Joseph Hage Aaronson LLC, Matthew Mustokoff and Andrew Zivitz of Kessler Topaz Meltzer & Check LLP, and John Rizio-Hamilton

and Jonathan Uslaner of Bernstein Litowitz Berger & Grossmann LLP.

The case is Nvidia Corp. et al. v. E. Ohman J:Or Fonder AB et al., case number 23-970, in the Supreme Court of the United States.

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Ohio Justices Reject Opioid Nuisance Claims In \$650M Appeal

By **Emily Field**

Law360 (December 10, 2024, 1:04 PM EST) -- The majority of the Ohio Supreme Court on Tuesday held that the state's product liability law doesn't allow for public nuisance claims to be brought over the opioid crisis, in a challenge to a \$650 million verdict won by two counties.

The court said that while the opioid epidemic has affected many, the law doesn't hold that public nuisance is the solution for the problem. The court had accepted **a certified question** from the Sixth Circuit about the state law in a case brought by two counties.

The court held in a 5 to 2 opinion that the Ohio Product Liability Law abrogates public nuisance claims.

"The remaining puzzle pieces easily fall into place following the conclusion that all product-based public-nuisance claims are product-liability claims," the court said. "This is straightforward: Product-liability claims brought at common law — such as the counties' claims — have been abrogated."

"We are disappointed by the Ohio Supreme Court's decision, which limits the use of Ohio public nuisance claims as a path for holding corporations accountable for misconduct and creates new hurdles for the national prescription opiate litigation that has resulted in excess of \$1 billion in settlements for Ohio communities alone," Jayne Conroy of Simmons Hanly Conroy, Paul T. Farrell Jr. of Farrell & Fuller Law LLC and Joe Rice of Motley Rice LLC, the plaintiffs' executive committee co-leads, said in a statement.

"While this decision hinders efforts to secure further opioid settlement funds for these communities that continue to bear the devastating impact of the opioid crisis, it does not mean this fight is over," they said.

The Ohio Supreme Court is only the second state court to consider whether the opioid epidemic can be considered a public nuisance. The Oklahoma Supreme Court **overturned** the first verdict in the opioid litigation when it found in 2021 that a lower judge improperly expanded the state's public nuisance law to the manufacture and sales of legal products.

West Virginia's high court will address whether its state laws allow public nuisance claims over the addiction crisis, after the Fourth Circuit asked it in March **to weigh in** on a bellwether case.

The case had been against several major pharmacies.

Walgreens said in a statement that the company was pleased with the court's ruling.

CVS said, "We are pleased to have prevailed in this case, in which the Ohio Supreme Court determined the parameters of Ohio law precluded this cause of action."

In a **March hearing**, David C. Frederick of Kellogg Hansen Todd Figel & Frederick PLLC urged the Ohio high court to answer the question sent by the Sixth Circuit about whether Lake and Trumbull counties can claim that the opioid epidemic is a public nuisance that can be remedied, with a finding that — as they showed at trial — the issue wasn't that the narcotics were defective. Instead, the counties claimed that the pharmacies failed to monitor for suspicious prescriptions, he said.

"The allegation here and the proof at trial was not that opioids are defective, it's that they're dangerous," Frederick said. "The problem here was that the pharmacies failed to police their dispensing practices."

Trumbull County and Lake County are represented by Hunter Shkolnik of Napoli Shkolnik PLLC, and David C. Frederick and Daniel V. Dorris of Kellogg Hansen Todd Figel & Frederick PLLC.

Walmart is represented by Jones Day.

Walgreens is represented by Sullivan & Cromwell LLP, and Bartlit Beck LLP.

CVS is represented by Munger Tolles & Olson LLP, and Zuckerman Spaeder LLP.

The case is In re: National Prescription Opiate Litigation, Trumbull County, Ohio, et al. v. Purdue Pharma LP, case number 2023-1155, before the Ohio Supreme Court.

The underlying cases are In re: Trumbull County, Ohio, et al. v. Purdue Pharma, LP, et al., case numbers 22-3750, 22-3751, 22-3753, 22-3841 and 22-3844, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Robert Rudinger.

Update: This article has been updated with more background and reaction to the court's decision.



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Bristol-Myers Said To Renege On \$450M Milestone Promise

By **Rae Ann Varona**

Law360 (December 10, 2024, 10:45 PM EST) -- Former security holders of a biotechnology company Bristol-Myers Squibb acquired in 2016 hauled the pharmaceutical giant into Delaware's Court of Chancery on Monday, accusing it of using "patent prosecution sleight of hand" to avoid paying up to \$450 million in promised milestone payments related to an autoimmune disorder treatment.

Former holders of stocks, options and warrants in Padlock Therapeutics Inc. asserted in a **new complaint** that Bristol-Myers acquired Padlock, then only a two-year-old company, because it had been impressed with Padlock's research and development on new therapies aimed at inhibiting a class of enzymes that cause inflammation in autoimmune diseases like rheumatoid arthritis.

The former security holders alleged that, while Bristol-Myers agreed to pay up to \$450 million until the fruits of Padlock's research reached certain milestones, Bristol-Myers decided to "renege on the deal and claim all of the benefits of Padlock's discoveries for itself."

"Through a deceptive scheme involving manipulation of the patent process and by hiding information from the Padlock security holders, Bristol-Myers has attempted to deprive the security holders of the benefit of the bargain," the complaint asserted.

Shareholder Representative Services LLC lodged the lawsuit as a representative for the former Padlock security holders, alleging breach of contract, anticipatory breach of contract and breach of duty of good faith and fair dealing under Delaware law.

SRS said in the complaint that Padlock had, in its two years before being acquired, made strides in developing therapies targeting the activity of protein-arginine deiminases with the goal of treating autoimmune diseases like rheumatoid arthritis, lupus and multiple sclerosis without broadly impacting immunity.

According to the complaint, Bristol-Myers recognized the value of Padlock's research and upon acquiring Padlock in 2016, agreed to pay Padlock security holders an upfront payment of roughly \$150 million, as well as additional payments of up to \$450 million in milestone payments to be paid when a product reached certain steps in the U.S. Food and Drug Administration or foreign approval processes.

But on Oct. 17, 2023, the federal government website clinicaltrials.gov posted a Bristol-Myers clinical trial, marking what SRS asserts was the first milestone for payment.

"Bristol-Myers did not inform SRS of this clinical trial in any Update Report or other communication," SRS said.

SRS also said that it wrote to Bristol-Myers, demanding payment on behalf of the Padlock security holders, but that Bristol-Myers not only refused to make the initial payment, "it also repudiated future payment obligations."

Bristol-Myers' refusal to pay the milestone payment was pretextual, SRS says, alleging in its redacted complaint that Bristol-Myers had tried to justify itself by asserting that its obligation to pay the Padlock security holders for their contribution had been extinguished.

SRS alleged that Bristol-Myers engaged in a "patent prosecution sleight of hand" to set the stage for its denial that it had a milestone product patent "and to deny the Padlock security holders their right to payment."

According to the complaint, the underlying agreement included an implied term preventing Bristol-Myers from manipulating the patent prosecution process to avoid paying milestone payments. SRS said that Bristol-Myers thus had a duty to Padlock security holders to act fairly and reasonably in exercising its discretion in connection with patent prosecution activities.

But Bristol-Myers carried out a "duplicious patent prosecution scheme" that "was and is intended to frustrate the benefit of the bargain that SRS and the Padlock security holders reasonably expected from the agreement," SRS asserted.

Counsel for the SRS did not immediately respond to a request for comment on Tuesday, nor did a representative for Bristol-Myers.

SRS is represented by A. Thompson Bayliss and Christopher Fitzpatrick Cannataro of Abrams & Bayliss LLP and Martin J. Black, Daniel R. Roberts and Noah M. Leibowitz of Dechert LLP.

Counsel information for Bristol-Myers was not immediately available.

The case is Shareholder Representative Services LLC v. Bristol-Myers Squibb Co., case number 2024-1246, in the Court of Chancery of the State of Delaware.

--Editing by Dave Trumbore.



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'Figurehead Plaintiff' Dooms Cert. In Hotel Workers' BIPA Suit

By **Celeste Bott**

Law360 (December 10, 2024, 6:00 PM EST) -- An Illinois federal judge refused Tuesday to certify a class of hotel workers accusing software provider Unifocus of violating Illinois' landmark biometric privacy law, saying their class representative had become a "forbidden figurehead plaintiff" who didn't see the operative complaint until more than three years into the litigation.

Ruling from the bench during a telephonic hearing Tuesday afternoon, U.S. District Judge Martha Pacold said class certification would be inappropriate given lead plaintiff Joseph Duron's admissions during his June 2022 deposition that he didn't know which attorneys were working his case and had only seen the amended complaint days before. The suit was initially filed in September 2018.

Unifocus made the timekeeping system used by Duron's former employer, Loews Chicago Hotel Inc., according to the suit. His complaint initially accused only the hotel of failing to obtain written consent and make certain disclosures required under the Illinois Biometric Information Privacy Act, but was later amended to bring claims under the statute only against Unifocus.

While class counsel largely handles a putative class action like this one, the lead plaintiff's role isn't nonexistent, Judge Pacold noted. That person still owes a fiduciary duty to their fellow class members and should be monitoring what the attorneys are doing in the case, she said.

But Duron couldn't be monitoring his attorneys' actions "when he wasn't aware they existed," the judge told the parties. Rather, he has happily let counsel run the case with little to no involvement on his part, she found.

And he was not aware until around his deposition that his suit was targeting Unifocus, and was under the belief he was suing his former employer, the judge pointed out.

Judge Pacold further noted that Duron was one of only six people who opted out of a \$1.05 million settlement the Chicago hotel reached with employees in a separate BIPA case. Almost all other Loews Chicago employees are covered by that deal, while Duron is potentially exempt from a defense that applies to the rest of the class, and he isn't an adequate representative in light of that, the judge said.

Also on Tuesday, Judge Pacold granted summary judgment to Unifocus on Duron's claims that it failed to make publicly available a data retention schedule and guidelines for permanently destroying biometric information and that it profited off hotel employees' biometric information, saying the plaintiff lacked standing to bring those claims.

But she left intact claims alleging the company collected workers' information without consent and that it disseminated their biometric information to third parties.

While Unifocus has argued its conduct doesn't fall under BIPA's scope because the finger scan device used by the hotel merely creates templates when users scan their fingers, and that those aren't "biometric information" under the statute since they can't be used to identify an individual, Judge Pacold wasn't convinced.

She said the templates on their own don't need to identify an individual, but they are biometric information because they can be used to identify an individual through other means, likening it to a

forensic scientist using a partial fingerprint to identify a suspect.

As for the dissemination claim, Unifocus has not disputed that it stores backup copies of the data with a third party, she said.

Duron and the proposed class are represented by Steven A. Hart and John S. Marrese of Hart McLaughlin & Eldridge.

Unifocus Texas LP is represented by Brett M. Doran and Thomas Sotos of Greenberg Traurig LLP.

The case is Duron v. Loews COH Operating Co. LLC et al., case number 1:18-cv-06479, in the U.S. District Court for the Northern District of Illinois.

--Editing by Covey Son.

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Judge Won't Cull EpiPen Antitrust Action Against Mylan

By **Nadia Dreid**

Law360 (December 10, 2024, 10:25 PM EST) -- Mylan Pharmaceuticals didn't get the early exit it sought from litigation accusing it of working with Pfizer to inflate the price of the latter's popular auto-injecting emergency allergy medication EpiPen, as a Kansas federal judge has ruled the case must move on to discovery.

U.S. District Judge Daniel D. Crabtree on Monday dashed Mylan's hope of a judgment on the pleadings in the class action. He said direct purchasers' allegations that Mylan agreed to delay the market entry of a generic version of a blockbuster narcolepsy drug in order to convince another drug company — Teva Pharmaceuticals — to delay a generic version of the injector are more than enough to establish a claim.

Judge Crabtree rejected Mylan's attempt to invoke the Seventh Circuit's **Abbvie** precedent, where the court rejected reverse payment claims because the settlements at issue did not involve cash payments.

"Here's the bottom line: the court isn't persuaded that AbbVie's 0 + 0 logic applies to the allegations in this case," Judge Crabtree said in the 24-page order.

Judge Crabtree explained that the plaintiffs have pleaded a single global agreement that involved two separate component settlements but that Abbvie and other underlying court rulings assume "that early entry is the whole settlement" and don't "contemplate a side deal, where the challenger is willing to accept a later generic entry to prolong its monopoly power over a distinct drug product and distinct product market."

"Plaintiffs plausibly allege that defendants swapped something of value — Mylan's delayed launch of generic Nuvigil— to forestall Teva's launch of generic EpiPen. One extended monopoly exchanged for another extended monopoly," the judge said. "Under Actavis and its progeny, that allegation—clothed with the ample factual detail provided here—suffices to state a plausible antitrust claim."

The trade needn't have been in cash to constitute a reverse payment, the judge said, noting that federal precedent is clear on that.

The question, the judge said, isn't "merely whether each part of the conspiracy is lawful" but whether "the entire arrangement, viewed as whole, is lawful."

"Here, plaintiffs have alleged enough facts to support a reasonable finding that the whole arrangement is unlawful," Judge Crabtree said.

The court also said no to certifying the matter for interlocutory appeal, so the matter will move forward to discovery instead of taking a trip up to the Tenth Circuit.

Pfizer, which was previously named in the lawsuit alongside Mylan, has already secured its exit from the litigation. Its ticket out came in the form of a \$50 million settlement that received the **final seal of approval** from Judge Crabtree in July.

Mylan makes and markets the EpiPen device, while Pfizer manufactures the drug that goes inside the EpiPen. The pair of drug companies have been battling this lawsuit since 2020, which accuses them

of working together behind the scenes to delay a generic EpiPen's market arrival and, therefore, keep the price artificially high.

The companies also spent the better part of the last decade fighting off sprawling multidistrict litigation that was sparked after the price of an EpiPen climbed up to \$600 in 2016 from the \$100 it had been less than a decade earlier. The pen works by injecting a shot of adrenaline into a person experiencing anaphylactic shock, hopefully stopping it before he or she suffocates to death or experiences a deadly drop in blood pressure.

For people with severe asthma or food allergies, having one on hand when they need it could be the difference between life and death.

The price surge consumed the news cycle and became an issue in the 2016 presidential campaign. It even inspired a satirical video game called EpiPen Tycoon, where players must hike EpiPen prices up enough to satisfy investors without eliciting public outcry.

Mylan reached a \$465 million deal with the U.S. Department of Justice in 2016 over the company's practice of classifying the EpiPen as a generic drug in order to receive Medicaid rebates.

The class is represented by Thomas P. Cartmell, Eric D. Barton and Tyler W. Hudson of Wagstaff & Cartmell LLP, Dianne M. Nast of NastLaw LLC, and Michael L. Roberts, Erich P. Schork and Sarah E. DeLoach of Roberts Law Firm PA.

Mylan is represented by Brian C. Fries and James Moloney of Lathrop GPM LLP, Adam K. Levin, David M. Foster, Carolyn A. DeLone, Michael D. Gendall and Charles A. Loughlin of Hogan Lovells US LLP and Philip A. Sechler of Sechler Law PLLC.

Pfizer is represented by Joseph Rebein and Ashley N. Harrison of Shook Hardy & Bacon LLP and Raj S. Gandesha, Edward Thrasher and Kathryn Swisher of White & Case LLP.

The case is KPH Healthcare Services Inc. v. Mylan NV et al., case number 2:20-cv-02065, in the U.S. District Court for the District of Kansas.

--Editing by Amy French.



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Robinhood Seeks Arb. For Remaining Meme Stock MDL Suits

By **Emilie Ruscoe**

Law360 (December 10, 2024, 10:39 PM EST) -- Stock trading platform Robinhood urged a Florida federal court to send to arbitration the seven remaining individual suits brought against it as part of a multidistrict litigation over the platform's decision to freeze trading in certain so-called meme stocks amid a social-media fueled run on shares of those issuers.

In a Monday motion in Miami federal court, Robinhood asked U.S. District Judge Cecilia M. Altonaga to compel the matter's remaining individual Robinhood user suits to arbitration before the Financial Industry Regulatory Authority's dispute resolution forum and to stay those cases.

The move would put to rest the final individual claims in a consolidated multidistrict litigation brought by investors over Robinhood's January 2021 decision to implement trading restrictions on shares of GameStop Corp., Bed Bath & Beyond and other issuers amid what the firm calls a "rollercoaster ride of price movements."

The MDL has largely been dismantled, with three tranches of claims dismissed with prejudice, and class certification denied to the tranche asserting violations of federal securities laws. With that, "there remains only one category of claims in this MDL: individual, federal securities claims brought by plaintiffs who — though their claims were consolidated into the MDL — were not one of the settling named plaintiffs in the federal securities tranche," Robinhood says.

The company argues that because of the class certification decision, the remaining claims should be arbitrated before FINRA.

"Consistent with FINRA arbitration rules, the customer agreement provided that Robinhood could not seek to arbitrate a putative class member's claims until class certification was denied, the class was decertified, or the customer was excluded from the class by a court," Robinhood asserts.

The litigation generally stems from the company's decision in January 2021 to put in place "a temporary position closing only status for certain so-called meme stocks" — or shares that went viral for reasons not related to formal valuation of the issuer — as those shares experienced "extreme" volatility.

"The PCO helped Robinhood manage the risk posed by the unprecedented amount of meme-stock trading and the rollercoaster ride of price movements," Robinhood notes in its Monday motion, adding that the decision to put the PCO in place resulted in "immediate litigation."

Robinhood and its users reached the deal to settle the related securities claims in May, telling the court not long after the denial of the relevant class certification bid.

In the most recent version of the investors' complaint, from January 2023, they claim that Robinhood's "selective denial of access to [its] technology for more than a week wiped out tens of billions of dollars of investors' equity."

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

The Robinhood investors are represented by Laurence M. Rosen, Phillip Kim, Robin Bronzaft Howald, Jonathan Stern, Brent LaPointe and Michael A. Cohen of The Rosen Law Firm PA.

Robinhood is represented by Samuel A. Danon, María Castellanos Alvarado and Tom K. Schulte of Hunton Andrews Kurth LLP, and Antony L. Ryan, Kevin J. Orsini and Brittany L. Sukiennik of Cravath Swaine & Moore LLP.

The case is In re: January 2021 Short Squeeze Trading Litigation, case number 1:21-md-02989, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Aislinn Keely.

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