

# Match Group Top Brass Sued for Downplaying Active User Decline

By Ben Miller

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [24-cv-10776](#) (Bloomberg Law subscription)

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Match Group Top Brass Sued for Downplaying Active User Decline

By Ben Miller 2024-12-16T13:50:38000-05:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [24-cv-10776](#) (Bloomberg Law subscription)

Match Group Inc.'s directors and two top executives understated challenges arising from declining monthly active Tinder users before disclosing last month that the dating platform's usership was down 9% year-over-year, according to a shareholder derivative suit.

The Tinder parent—which also runs Hinge, OkCupid, and Match.com—previously faced allegations that its officers misled investors about the company's growth prospects, including a proposed class action last month that similarly claims Match downplayed user decline.

CEO Bernard Kim is named as a defendant in the Dec. 13 shareholder derivative complaint filed in the US District Court for the Central District of California, as well as President and Chief Financial Officer Gary Swidler. They are also defendants in the proposed class action alongside Match.

Match frequently highlights monthly active users and average revenue per user as key indicators of growth for each of its dating platforms. But starting in May 2023, the company began highlighting the potential to reactivate lapsed users by introducing new features, according to the complaint.

On Nov. 7, the day after Match disclosed the user downturn, the company's share price fell by more than 17% to close at \$31.11, the stock's biggest single-day drop of all time, according to Bloomberg data.

By allegedly understating Tinder's challenges generating user growth, Match ran the risk that the active user numbers wouldn't recover by the time it released its third quarter 2024 financial results, all while the company faced issues relating to average individual user revenue, according to the complaint.

Match also allegedly repurchased its stock at artificially inflated prices, overpaying by approximately \$135 million from May 2023 to October 2024, the complaint said. The suit seeks damages on behalf of the company for Securities Exchange Act violations.

Tostrud Law Group PC, Rigrodsky Law PA, and Joshua Grabar, who practices in Philadelphia, represent the shareholder plaintiff.

Match didn't immediately respond to a request for comment.

The case is *Hollin v. Kim*, C.D. Cal., No. 2:24-cv-10776, complaint filed 12/13/24 .

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# Celsius Execs Sued Over Rosy Projections Belied by Stalled Sales

By Gillian R. Brassil 2024-12-17T11:23:02000-05:00

- **COURT:** D. Nev.
- **TRACK DOCKET:** [No. 3:24-cv-00578](#) (Bloomberg Law subscription)

While beverage-maker [Celsius Holdings, Inc.'s](#) products piled up in PepsiCo warehouses, causing a deceptive revenue boom, Celsius executives misled investors about the company's financial projections, artificially inflating its stock price, a [derivative shareholder suit](#) says.

Throughout 2024, Celsius officers touted a PepsiCo, Inc. distribution deal in public filings and statements, shareholder Kurt Dobler said in a complaint filed Monday in the US District Court for the District of Nevada. But executives hid that Pepsi had made only a large one-time purchase of Celsius' drinks, causing the company's 2023 revenues to skyrocket when demand wasn't there.

"Making matters worse, Celsius had already recognized revenues for the products shipped to Pepsi, which would later have be drawn down and would adversely affect the Company's financial performance and outlook in the future," Dobler's complaint said. Seven of the individuals named in the suit allegedly engaged in insider trading while the stock was artificially inflated, Dobler said, allowing them to collect over \$491 million.

Celsius' sales and revenue grew exponentially after entering the energy drink market, and its long-term partnership with Pepsi bolstered it, the complaint said, with 2023 sales exceeding \$1.3 billion when 2020 sales totaled \$130.7 million. In 2022, the company agreed to have Pepsi be its main US distributor and exclusive Canadian one. Celsius came to be dependent on Pepsi's domestic distribution platforms, Dobler said.

The seemingly high revenue growth made its stock appealing—until Nielsen reported retail trends in May 2024 and market analysts wrote Celsius faced difficult sales comparisons for upcoming quarters. Celsius stock plummeted almost 13% over the news, closing at \$82.92 the next trading day, May 28.



Celsius Holdings Inc. shares since May 15, 2024.

Bloomberg terminal data

Still, CEO [John Fieldly](#) boasted about Celsius' growth when reporting second quarter 2024 earnings in August, Dobler said.

In September, Celsius executives said at a conference that third quarter sales to Pepsi were down more than \$100 million from the previous year, that warehouses had "several million more cases over the past 1.5 years than they really needed to hold." Share prices fell further, dropping about 12%, to close at \$32.39 per share on Sept. 4.

When reporting its 2024 Q3 financials in November, Fieldly and Celsius CFO [Jarrod Langhans](#) said that Pepsi's cut depressed results. The stock fell about 5%, closing at \$30.04 on Nov. 6.

The plaintiff says executives willfully or recklessly made misleading statements about the Pepsi purchase that outpaced demand, that Celsius' financial outlook had been overstated, and that all this combined with insider trading caused the company substantial harm.

He wants Celsius awarded damages and for the judge to direct executives to reform its corporate governance and internal procedures.

A [shareholder sued](#) the company, Fieldly, and Langhans over similar allegations in a [proposed class](#)

[action](#) last month.

Leverity & Associates Law CHTD. and The Brown Law Firm, P.C. represent Dobler. The latter declined to comment in an email.

In the class action filed last month, Alston & Bird LLP represent Celsius, Fieldly, and Langhans. These attorneys did not respond to emails seeking comment.

Celsius declined to comment when asked about both the company and its executives in an email. PepsiCo, which is not a named defendant in the derivative action, did not respond to an email seeking comment.

The case is [Dobler v. Celsius Holdings, Inc. et al](#) , D. Nev., No. 3:24-cv-00578, complaint filed 12/16/24 .

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# Canoo SPAC Deal Sponsors Win Again in Blank-Check Merger Suit

By Jennifer Kay and Quinn Wilson

- Chancery Court dismissed claims that investors were misled
- Delaware high court says chancery's ruling should be affirmed

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Canoo SPAC Deal Sponsors Win Again in Blank-Check Merger Suit

By Jennifer Kay and Quinn Wilson 2024-12-16T13:56:14000-05:00

- Chancery Court dismissed claims that investors were misled
- Delaware high court says chancery's ruling should be affirmed

The blank-check merger that made electric vehicle startup Canoo Inc. into a publicly traded company should stand undisturbed, the Delaware Supreme Court said Monday.

A Hennessy Capital LLC investor had argued the Delaware Chancery Court erred in dismissing his challenge to the transaction in May 2024. But the high court's full-five member panel ruled unanimously that the chancery's dismissal should be affirmed, Justice Karen L. Valihura said in an order.

The investor, Paul White Jr., alleged in 2022 that Hennessy Capital and its principals misled investors about changes to Canoo's business model. The suit comes as many other shareholders have challenged such mergers, usually alleging that a merger's backers were driven by lopsided incentives to trick investors into participating because they knew they'd get a windfall from even a bad deal.

The mergers were designed to let startups, particularly in the EV sector, bypass traditional initial public offerings. They involve private businesses and special purpose acquisition companies, a type of publicly traded shell entity, but have led to underperformance in the open market.

The Chancery Court in May 2024 dismissed the Hennessy Capital investor's lawsuit, finding the claims that Hennessy Capital and its principals misled investors about changes to Canoo's business model were "fatally flawed" and reliant on "post-closing developments, strained inferences, and documents that contradict his theories."

Vice Chancellor Lori W. Will said the critical question here is whether a SPAC transaction's sponsors deceived investors when it came to that final safety valve: the right to redeem their initial ante even after a deal is reached. She said that White "has lost sight of these fundamentals."

In oral arguments Dec. 4 before the Delaware Supreme Court, the architects of the merger attempted to differentiate Canoo's struggles from a wave of similar shareholder challenges to transactions involving special purpose acquisition companies. It was the sponsors and Hennessy Capital's board, not investors, who had been deceived in the merger, they said.

White is represented by deLeeuw Law LLC and Schubert Jonckheer & Kolbe LLP. Hennessy Capital and its principals are represented by Sidley Austin LLP and Potter Anderson & Corroon LLP.

The case is *In re Hennessy Cap. Acquisition Corp. IV S'holder Litig.*, Del., No. 245,2024, opinion 12/16/24 .

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# US Judge Dismisses Securities Litigation Against Insurance Underwriter

 [law.com/2024/12/16/us-judge-dismisses-securities-litigation-against-insurance-underwriter-](https://www.law.com/2024/12/16/us-judge-dismisses-securities-litigation-against-insurance-underwriter-/)

Emily Cousins

An insurance underwriter in specialty insurance represented by attorneys from Skadden, Arps, Slate, Meagher & Flom has secured dismissal of a securities class action claiming that defendants neglected to share "key risks" of underwriting for construction defect claims.

U.S. District Judge Lewis Kaplan of the Southern District of New York threw out the lawsuit against Argo Group International Holdings Ltd. and four executives.

Argo was represented by Skadden attorneys Jay B. Kasner, Alexander C. Drylewski, Tansy Woan and Sarah E. Danehy.

The plaintiffs, Police & Fire Retirement System City of Detroit and Oklahoma Law Enforcement Retirement System, brought the class action against Argo for allegedly violating the Securities Exchange Act of 1934 for allegedly "repeatedly and misleadingly touting the strength of Argo's construction business between 2018 and 2022," the decision said.

Argo announced its aggregate loss reserves would be increased by around \$130 million to \$140 million due to "underfunded reserves" for claims that cover defective parts for residential and commercial contractors.

Kaplan's 35-page decision granted Argo's motion to dismiss for failure to state a claim where relief can be granted.

The court pointed to the U.S. Supreme Court's 2015 decision in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, which expanded statements of opinion by corporations that could be used to bring a lawsuit. However, the court said Argo's statement about the reserves did not fall under those categories.

In terms of Argo's statements about its financial performance, the court held that the plaintiffs did not "provide statement-specific reasons why each quoted passage allegedly is false or misleading, instead listing numerous separate quotations one after the other before supplying a generic explanation at the end."

The court also concluded that Argo's statements of "general corporate optimism" did not meet the pleading standard to show they were misleading or false, but were instead described as "puffery" that is "inactionable."

The plaintiffs also fell short on their claims of scienter. The court held the defendants actions "did not give rise to a strong inference of fraudulent intent."

Counsel for the plaintiffs, Mica Cocco and Daniel Berger of Grant & Eisenhofer, did not respond to a request for comment.

## Read the decision:

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### Corporate Deal

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Virgin Music Group has agreed to purchase Downtown Music Holdings for \$775 million. The transaction, announced Dec. 16, is expected to close in the second half of 2025. Beverly Hills, California-based Virgin was advised by Kirkland & Ellis and Freshfields Bruckhaus Deringer. The Kirkland & Ellis team included partners Shellie Freedman, Peter Martelli and Seth Traxler. Downtown, which is based in New York, was represented by a Skadden, Arps, Slate, Meagher & Flom team including partners David Eisman, Howard Ellin and Glen Mastroberte.

[Read More](#)

### New Suit - Trademark

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Nuka Enterprises and Synapse Biosciences d/b/a 1906.SHOP were slapped with a trademark infringement lawsuit on Dec. 17 in Colorado District Court centered on the sale of herbal supplements. The lawsuit was filed by Revision Legal on behalf of JoySpring Holdings, which asserts that the defendants sell products which infringe the 'Genius Drops' mark. Counsel have not yet appeared for the defendants. The case is 1:24-cv-03485, Joyspring Holdings LLC v. Nuka Enterprises LLC.

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# BNY Mellon Investors' Self-Dealing Proposed Class Suit Dismissed

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## Class Action

Signage is displayed outside a Bank of New York Mellon Corp. office building in New York, on Jan. 13, 2020.

Photographer: Gabriela Bhaskar/Bloomberg

- Investors can't use state law to bring securities fraud class
- Plaintiffs can either proceed without class, or as federal suit

Bank of New York Mellon Corp. convinced a federal court to dismiss a proposed class action that said the bank failed to disclose conflicts of interest created by investing wealth-management money into BNY funds.

The Pennsylvania law claim is preempted by the Securities Litigation Uniform Standards Act, which means it can't proceed as a class action under a state cause of action, the US District Court for the Western District of Pennsylvania said.

Stephen and Leslie Walden said that several million dollars of their money went to underperforming funds that benefited BNY financially. The Waldens said their agreement with BNY prohibited investing in affiliate funds. After BNY was granted partial summary judgment, the Waldens confirmed that they would proceed with a claim alleging that the bank breached its investment agreement and violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

Magistrate Judge Christopher B. Brown said that the court "has a constant duty to assure itself of its subject matter jurisdiction at all stages of the litigation," and that while SLUSA was discussed at an earlier motion to dismiss, the court denied dismissal on theories the Waldens have since abandoned.

Alleging that "a reasonable investor would have considered the undisclosed conflicts and resulting lack of informed consent significant information when contemplating investing in affiliate funds" is indicative of securities fraud, the court said.

The Waldens can proceed as individuals, or they can pursue a class action under federal law. But they can't proceed under Pennsylvania consumer protection law as a class action, the court ruled, dismissing the case without prejudice.

DiCello Levitt LLP and Councill, Gunnemann & Chally LLC represent the clients. Reed Smith LLP represents BNY Mellon.

The case is *Walden v. Bank of N.Y. Mellon Corp* , W.D. Pa., 12/16/24 .

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# Musk Ruling Takes Aim at Lawyer Windfalls in Moonshot Pay Cases

By Mike Leonard

- Judge in landmark case finds unusual way to slash legal fees
- Decision reflects balancing of ordinary concerns, public scorn

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Musk Ruling Takes Aim at Lawyer Windfalls in Moonshot Pay Cases

By Mike Leonard 2024-12-17T05:00:00000-05:00

- Judge in landmark case finds unusual way to slash legal fees
- Decision reflects balancing of ordinary concerns, public scorn

The judge who killed Elon Musk's \$56 billion compensation deal handed his courtroom foes a fraction of the legal fees they sought for their success, underscoring a broader reckoning with "eye-popping" attorney paydays.

Facing a torrent of vitriol from the world's richest man and his fans, the chief judge of Delaware's elite business court rejected a request for billions, calling it a "bold ask" in a case about excessive pay. She slashed the fee amount to \$345 million by an unusual method: pegging it to the package's \$2.3 billion value when it was awarded, in 2018, rather than when she struck it down in January.

Chancellor Kathaleen St. J. McCormick said she was looking to solve "the windfall problem." As Delaware's Chancery Court increasingly confronts blockbuster cases targeting tech titans, the decision reflects the tightrope its judges are walking to weigh ordinary litigation incentives against the destabilizing impact of astronomical legal payouts.

In the handful of previous cases to generate comparable fees, "you didn't have the same cast of characters publicly bandying about the size of the award," said University of Pennsylvania law professor Jill Fisch. "Musk, plus the amount of play this case has had on social media, heightens those concerns."

Delaware's bar association has positioned itself to parry the renewed barrage the judge has faced since rejecting Musk's pay package a second time this month, in the same decision that set the fees. But there's no completely ignoring the billionaire's bullhorn.

She's "certainly thinking about that in this case, because the plaintiff's lawyers are getting paid and Elon Musk is not," said Berkeley Law professor Adam Badawi.

### 'A Lottery Ticket'

The ruling was in some respects unique, offering a tailored solution to a one-off problem: No other CEO has ever been paid nearly as much, and no other shareholder suit has recovered anything like \$56 billion.

The dispute involved shareholder derivative claims, which are technically brought on a corporation's behalf. Unlike class action recoveries that go directly to investors, damages in derivative cases are typically paid into a company's coffers by its leaders or insurers.

That procedural quirk means Tesla itself is set to get the money back. It also means the company is on the hook to Musk's legal adversaries, to the chagrin of its investor base.

McCormick's decision laid out a road map for navigating a significant emerging issue. It was the first to confront the question of when to value a stock options grant—when it's made or when it's invalidated—in the context of Delaware shareholder litigation over a "moonshot" compensation package that's worth little unless a company hits ambitious milestones.

Options in general present a valuation dilemma because of their potential to fluctuate, and Musk's more than most thanks to the volatility and soaring trajectory of Tesla Inc. shares. But the litigation also "relates to a longstanding debate" about how to value "what's basically a lottery ticket" given to a CEO, according to Columbia University law professor Eric Talley.

"Do you base the fees on the outcome once the lottery numbers are chosen?" he said. "Or on the fair market value of the ticket when it was bought?"

### 'Exceptional Case'

McCormick said in her 103-page opinion Dec. 2 that the day of the ruling generally represents the better approach. Using "grant date fair value" to set fees, she said, would give lawyers no reason to challenge packages that were worth little when given—even if they later ballooned—while pushing them to sue over some that eventually turned out to be worthless.

Still, those concerns "are not dispositive in the exceptional case," according to McCormick. "This is that case." A denominator of \$2.3 billion "provided ample incentive," she said.

"It has a little bit of a flavor of, 'Finger in the wind, here's a convenient number that gets me to a place that's kind of consistent with other cases,'" Talley said.

Although the judge eschewed a one-size-fits-all methodology, her reasoning may set the tone in similar disputes as the compensation structure grows in popularity, according to Badawi. "All these executives agree to these moonshots because they think they're Elon Musk," he said. "They're not, and most of these grants result in nothing."

## The Right Incentives

McCormick's balancing act—blazing a new trail instead of helplessly applying the usual fee factors—showcased the flexibility Delaware courts have to get creative when immodest attorney compensation threatens to “freak out the normies,” according to Talley.

“She drew heavily on precedents that say, ‘Look, there are these guiding factors, but there’s always a policy overlay,’” he said. “Would it shock the conscience for lawyers to be paid this richly?”

Unlike federal courts, which apply a percentage-of-the-damages formula—subject to adjustments in “megafund” cases—Delaware’s judges look to a looser range of criteria calibrated to reward productive work in risky cases that go all the way to trial.

The Musk litigation—involving several untested theories—went well past trial, ending with half a year of additional proceedings over his bid to restore the compensation by shareholder vote.

“These judges are repeat players who can take a much more engaged view,” Fisch said. “They have a pretty strong basis for distinguishing good cases from bad cases, and they see how their docket responds to the incentive effect.”

McCormick kept those principles in mind, compensating without overcompensating for the breathtaking magnitude of the recovery, according to Badawi.

Her cobbled-together methodology “may not be intellectually satisfying, in terms of creating an overarching framework,” he said. “But each case is unique, and this case was especially unique.”

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# Denying Elon Musk's \$56 Billion Pay Deal Is a Radical Remedy

- *Vinson & Elkins attorneys examine denial of package*
- *Damages argument not presented in questioning compensation*

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Denying Elon Musk's \$56 Billion Pay Deal Is a Radical Remedy

By Michael Holmes, Jeffrey Crough, and Will Stripling 2024-12-17T04:30:04000-05:00

- *Vinson & Elkins attorneys examine denial of package*
- *Damages argument not presented in questioning compensation*

Among the thorny issues in the Delaware Court of Chancery's most recent denial of Elon Musk's compensation package is whether rescission was the appropriate remedy as opposed to damages. The court's choice to apply rescission—that is, to cancel Musk's pay package entirely—seems particularly drastic, because Musk performed his end of the bargain.

Rescission, the court noted, requires a plaintiff to establish “that it is possible for all parties to [a] transaction to be restored” substantially to their pre-transaction position. Applying this principle, the court found Musk's pay package itself was “not too complex to unscramble” because Musk hadn't exercised the options to purchase Tesla stock that made up the pay package.

But it seems that Musk can't be fully returned to 2018 when the pay package was approved. Musk, who has other ventures and opportunities, worked to grow Tesla while the pay package was in place. Under the court's ruling, Musk effectively goes uncompensated as an executive.

While the court seemed comforted that Musk's equity stake would have kept him engaged in the same manner that he was, it seems a difficult, if not impossible, question to answer how Musk might have altered his efforts between his many endeavors had the pay package not been in place.

Tesla and its stockholders also can't be returned to 2018, nor would they likely want to be.

In 2018, Tesla had a market capitalization of roughly \$50 billion. At that time, Musk saw that Tesla could “become a trillion-dollar company within a 10-year period,” in which case he would become one of the wealthiest people in the world. “If all that happens over the next 10 years is that Tesla’s value grows by 80 or 90 percent, then my amount of compensation would be zero,” Musk added.

Musk delivered: Tesla is now a trillion-dollar company. In an analysis of returning all parties to their pre-transaction position, it seems incongruent to deprive Musk entirely of his benefit of that bargain, while allowing Tesla and its stockholders to retain their upside.

The Delaware court recognized there “were undoubtedly a range of healthy amounts that the Board could have decided to pay Musk.” Moreover, courts consider rescission an extraordinary remedy that is generally disfavored when monetary damages would suffice. In view of that, why award full rescission, when less drastic remedies, such as damages, were available?

The court largely put this back on Musk, citing the defendants’ failure “to identify any logically defensible delta between the unfair [pay package] and a fair one.” But arguing that some lower figure was the “fair one” would have been untenable, because Tesla’s board had deemed the package fair and was defending that decision at trial.

The question of what package would have been fair could instead have been put on the plaintiff, who didn’t dispute that Musk was entitled to something and was in the position of proving plaintiff’s entitlement to a remedy.

It seems the plaintiff here decided to go “all in” on rescission instead of presenting a damages methodology—likely because doing so would have precluded a rescission award.

In other cases, where plaintiffs made the same tactical decision, courts have denied plaintiffs rescission where it was deemed unwarranted, even though the plaintiffs established transactional unfairness.

Rescinding a contractual arrangement poses difficult questions when years of performance have occurred under the arrangement. Whether the Delaware Supreme Court will provide further clarity on these issues remains unclear.

The case is *Tornetta v. Musk*, Del. Ch., C.A. No. 2018-0408-KSJM, decided 12/2/24 .

*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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December 16, 2024, 6:53 AM PST

# Konica Minolta 401(k) Plan Fee Class Action Settles for \$900,000

By Jacklyn Wille

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Konica Minolta 401(k) Plan Fee Class Action Settles for \$900,000

By Jacklyn Wille 2024-12-16T09:53:44Z000-05:00

Konica Minolta Business Solutions USA Inc. negotiated a \$900,000 class settlement with employees challenging their retirement plan's fees and investment options.

The proposed deal would resolve an 8,000-person class action covering the Konica Minolta plan's participants and beneficiaries since June 2014. The settlement amount represents about 70% of what the class members could expect to receive if they prevailed at trial, according to a Dec. 13 motion asking that the deal receive preliminary court approval.

- The four-year-old lawsuit, which is assigned to Magistrate Judge Jessica S. Allen of the US District Court for the District of New Jersey, says the imaging and printing device manufacturer's 401(k) committee mismanaged the \$800 million plan by offering poorly performing funds and paying excessive annual recordkeeping fees
- Prior court rulings allowed the lawsuit to advance and certified it as a class action
- The deal allows class counsel to request \$150,000 in attorneys' fees, along with litigation costs

Groom Law Group and Gibbons PC represent the Konica Minolta defendants. Berger Montague and Edelson Lechtzin LLP represent the employees.

The case is Luense v. Konica Minolta Bus. Sols. USA, Inc. , D.N.J., No. 2:20-cv-06827, settlement motion 12/13/24 .

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December 16, 2024, 8:02 AM PST

# Wesco Distribution 401(k) Suit Settles After Revival on Appeal

By Jacklyn Wille

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Wesco Distribution 401(k) Suit Settles After Revival on Appeal

By Jacklyn Wille 2024-12-16T11:02:51000-05:00

Wesco Distribution Inc. is finalizing a class settlement with employees who previously convinced a federal appeals court to revive their lawsuit challenging the company's retirement plan.

The parties, who first announced that they'd struck a deal last month, say they plan to file details of the settlement for Judge Marilyn J. Horan's approval by late January. Their status report, filed Dec. 13 in the US District Court for the Western District of Pennsylvania, didn't include details about the terms of the agreement.=

- The case, which was appealed after being dismissed three times, challenges the annual administrative fees paid by the company's 401(k) plan and says the plan offered funds in pricey share classes instead of identical, cheaper options
- The US Court of Appeals for the Third Circuit ruled in May that the workers' complaint included enough details and context to advance past the company's motion to dismiss
- Hundreds of lawsuits challenging retirement plan fees have been filed over the past few years, and federal appeals court rulings have been mixed

Wesco is represented by Morgan, Lewis & Bockius LLP. The workers are represented by Chimicles Schwartz Kriner & Donaldson-Smith LLP and Franklin D. Azar & Associates.

The case is Mator v. Wesco Distrib., Inc. , W.D. Pa., No. 2:21-cv-00403, status report 12/13/24 .

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# 2025: A Legal Odyssey—Artificial Intelligence in Products Liability Mass and Class Actions

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Martin P. Schrama and Stefanie Colella-Walsh

## Expert Opinion

There is enormous potential in the development and use of AI in products liability mass and class actions, not yet as a replacement for human attorneys, but as a powerful force multiplier.

December 17, 2024 at 03:00 PM

To put artificial intelligence (AI) into much-needed perspective, the infamous archetypal AI computer, HAL 9000, was depicted in "2001: A Space Odyssey." The titular year of that film was almost a quarter-century ago. Though the movie was released in 1968, the premise was loosely based upon an Arthur C. Clarke short story from 1951 (it also bears mentioning that most of the film took place on a manned space mission to Jupiter). Suffice to say that the projected progress and reach of AI has been, at times, overly optimistic.

Notwithstanding, upon peeling back the ongoing flavor of the month fervor over AI, there remains a multifaceted tool particularly applicable to products liability mass and class actions. AI is perhaps as groundbreaking as the introduction of what was originally referred to as the World Wide Web—which, despite the best efforts of various websites purporting to empower any subscriber to draft complex contracts and estate documents, still does not appear to be in danger of rendering human attorneys obsolete any time in the foreseeable future. With that caveat, there is enormous potential in the development and use of AI in products liability mass and class actions, not yet as a replacement for human attorneys, but as a powerful force multiplier.

The first example of the power of AI is evident in a simple Google search, "What is AI and what does AI do?" Admittedly, the fact that Google's AI assistant formulates the answer to this search about itself does lend a certain creepy sci-fi feel:

"[AI] is a set of technologies that allow machines to perform tasks that are usually done by humans, such as learning, reasoning, and problem solving. AI systems use data to make predictions, recommendations, and decisions. They can also adapt their behavior based on the results of their actions."

The search assistant is actually paraphrasing a definition that it found on the European Union Parliament's official website. Essentially, Google used AI to rapidly analyze massive amounts of internet content and then apply prevalent word relationships based upon millions

of examples in large language models showing how humans tend to speak (anticipating the reflexive attorney reaction, there is no need to get into any of the pesky intellectual property issues concerning AI for our purposes right now).

The point, without getting too deep into the evolving scientific terminology or dystopian predictions surrounding AI, is that right now AI is very good at reviewing extensive data sets and then generating work product of various forms including classification, summarization, pattern recognition, analysis, and predictive modeling. As far as autonomously generating quality creative content (with the required spark of humanity), AI is simply not there yet and there is no telling when it will fully arrive.

This is not surprising, as AI currently relies upon the protocols set and the data fed into the application to achieve the desired machine learning effect. As always, mistakes are an integral part of any type of learning. When asked to perform more creative tasks, such as high-level research and writing, the mistakes (sometimes referred to as hallucinations) are more pronounced. We do not need to pile on here to the widely publicized cases in New York and Canada where the AI application utilized for generating legal briefing content hallucinated citations to controlling cases that did not exist in the real world—but we can all agree that was not a good look for the profession.

On the plus side, there is no doubt that AI is exponentially increasing efficiencies for both plaintiffs and defendants in the products liability mass and class action context from inception to resolution—admittedly with some growing pains. One example of this can be seen in the defective drug and medical device claims that generally dominate complex litigation dockets. Millions of adverse events and reactions are recorded every year and made available through global, regional, and national drug and medical device monitoring databases. AI applications can be used to quickly analyze and model that considerable volume of data. Defendants can readily use that information to identify trends, anticipate, and defend against potential vulnerabilities. Plaintiffs can identify drug side effects and device failures, then instantly scour public records and social media in the search for claims, clients, and class representatives (again, attorneys will likely start to discern significant privacy and confidentiality ramifications here and elsewhere that we will have to leave for another day).

Before any claims are even filed, plaintiffs and defendants can determine whether there is already an existing consolidation of individual claims or overlapping class claims. Additionally, countless attorney hours of research can be spared gathering crucial information such as whether particular claims are encompassed within prior settlements or other resolutions. Litigators can also easily handicap their chances of prevailing in particular jurisdictions and even before specific judges.

Once in litigation, AI discovery applications such as Technology-Assisted Review (TAR) are unimaginably faster and more accurate than any small army of attorneys could have ever hoped to be just a few years ago. Gone are the days of giant rooms full of contract

associates performing tedious document review or toiling over privilege and redaction logs. Well, at least the rooms will be much, much smaller, as humans still need to set and adjust protocols, and teach the AI application through numerous examples of what to look for in different types of reviews and tasks.

This leads the more cynical among us to observe that the devil in AI can tend to be in the input details, causing some courts to pump the brakes a bit. In the District of New Jersey Multidistrict Litigation (MDL) *In re Valsartan, Losartan, and Irbesartan Product Liability Litigation*, the defendant conceded that it used its own AI application, without input from the plaintiffs, to contend that approximately 260,000 discovery documents were predicted to be nonresponsive and not subject to production. In response, the court favored more collaborative human safeguards, rather than a unilateral configuration of the AI protocol to review, analyze, and code potentially discoverable documents, particularly in light of the parties' agreed upon Electronically Stored Information (ESI) protocol.

There is also a significant role for AI in the ultimate resolution of claims. At the conclusion of sprawling products liability mass and class actions, settling parties frequently find themselves the dog that finally caught the proverbial car, in that administering the settlement and closing out all of the cases can be more work than litigating the claims. AI applications promise to revolutionize costly and arduous settlement administration tasks such as identifying claimants, providing notice, reviewing claims, calculating costs/liens/attorney fees, issuing payment, and performing the many other ministerial tasks that go into final resolution of the litigation.

Again, not everyone is totally on board yet with these seemingly boundless efficiencies of total automation. In the settlement of the Northern District of California consumer class action *In re Juul Labs Inc. Marketing, Sales Practices and Products Liability Litigation*, there was a healthy skepticism to wholesale outsourcing of critical parts of settlement administration to nonhumans. There, the court expressed reservations over the use of an untested AI application to submit class settlement claims and objections based on due process concerns prompted by any unintentionally incorrect or potentially misleading information that might be provided to class members without more rigorous human oversight.

One common theme that is clear is that AI is not a silver bullet—at least not yet. Regardless of how long any attorney has been practicing, it should be easy to point to one or several transformative innovations that promised to dramatically cut down attorney working hours by bringing automation to legal work. Unfortunately, advances such as having calls, emails, and texts available at all times of the day and night on a pocket-sized computer have turned out to be much less personally liberating than initially envisioned. But clear also is that AI, maybe even more so than other technologies before it, is a powerful and potentially game-changing tool. Pushing aside the initial hype as well as the initial cynicism surrounding AI and its use in products liability mass and class actions, there remains the unassailable fact that AI is faster, more accurate, less costly, and just plain better than what we had before.

A final note, despite its inauspicious start in bringing about the demise of just about all of its fellow crew members, HAL 9000 redeemed itself when it returned to successfully use AI to save the day in a sequel film, "2010: The Year We Make Contact." That movie was released in 1984, and was based upon a Clarke novel from 1982 (right around the time that President Ronald Reagan first took office).

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December 17, 2024

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By Andrew J. Heck

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Bloomberg Law News 2024-12-17T12:54:42060320503-05:00

## ExxonMobil, Others Accused of Plastics Lies in New Class Action

By Drew Hutchinson 2024-12-17T11:34:20000-05:00

- Residents allege ‘unconscionable’ practices fueling pollution
- Complaint marks third of its kind since September

ExxonMobil Corp. and other corporations violated antitrust and consumer protection laws when they “artificially” increased demand for single-use plastics by lying about their recyclability, residents of four states alleged in the latest lawsuit targeting the plastics industry.

Promoting single-use plastic as recyclable when most aren’t contributed to a serious pollution crisis, according to the lawsuit filed Monday in the US District Court for the Western District of Missouri.

“These joint misrepresentations have led to higher plastic prices than otherwise would have occurred in a competitive market and massive sanitation problems for county and city governments and their landfills,” the lawsuit says. “Defendants should be required to repay the consumers they lied to and defrauded.”

The plaintiffs are four residents from Missouri, Kansas, California, and Florida. They’re seeking damages and a court order stopping the companies from engaging in the “deceptive, unfair, unconscionable, and unlawful” business practices alleged in the lawsuit.

ExxonMobil, Chevron USA Inc., DuPont de Nemours Inc., and the American Chemistry Council are among the 11 defendants named. The nationwide class includes people or entities who indirectly purchased plastics beginning in January 1990.

Monday’s class action complaint comes three months after California Attorney General Rob Bonta (D) [filed a lawsuit](#) against polymers producer ExxonMobil, saying the company had violated state public nuisance, pollution, and false advertising laws by promoting plastics as recyclable.

Ford County, Kan., [followed](#) with its own class action lawsuit in November.

Sharp Law LLP is representing the class of state plaintiffs and also represents the plaintiffs in the Ford County lawsuit.

The case is [Rodriguez v. ExxonMobil Corp.](#) , W.D. Mo., No. 4:24-cv-00803, complaint filed 12/16/24 .

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# Overbilling refunds should nix class action for damages, Apple says

[dailyjournal.com/articles/382462-overbilling-refunds-should-nix-class-action-for-damages-apple-says](https://www.dailyjournal.com/articles/382462-overbilling-refunds-should-nix-class-action-for-damages-apple-says)

Technology,

Class Action

Dec. 17, 2024

In a motion to dismiss, Apple said the claims are inadequately and implausibly pled, if not barred outright because two of the four lead plaintiffs received refunds for the overbilling and the other two cannot prove Apple was aware of the billing error.



Apple Inc. asked a federal judge in San Jose to dismiss a putative class action accusing the tech company of fraudulently charging customers for their Apple Care + device maintenance subscriptions after they traded in their device.

The dispute stems from two complaints filed by customers who claim that Apple violated California law and its own terms and conditions by repeatedly charging them for Apple Care +. It is an optional monthly insurance policy Apple offers to consumers that covers certain device repairs. In some instances, the plaintiffs claim, they were charged "years" after they sent the subject device back to Apple.

Apple denied wrongdoing in its motion to dismiss, filed Friday in the Northern District of California, and argued, "All of Plaintiffs' claims are inadequately and implausibly pled, if not barred outright as a matter of law" because two of the four lead plaintiffs received refunds for the overbilling and the other two claimants cannot prove Apple was aware of the billing error.

The two lawsuits were consolidated on Oct. 29 by U.S. District Judge Eumi K. Lee who will hear oral arguments on Apple's motion to dismiss on April 30. *Edwards v. Apple Inc. et al.*, 5:24-cv-05795 (N.D. Cal. filed Aug. 23, 2024).

Apple's attorneys from Wilmer Cutler Pickering Hale and Dorr LLP - Chris Johnstone of Palo Alto, Jennifer Milici of Washington D.C., and Alan Schenfeld of New York City - argued in the motion that the lawsuits are based on a "bombastic theory" that the complaint itself dispels.

"Beyond their flawed breach of contract claims, plaintiffs bring a number of California statutory and common law claims all hinging on a bombastic theory of the case - that Apple is engaged in an ongoing scheme to intentionally deprive customers of their funds by charging for AppleCare+ coverage on devices Apple knows those customers are no longer using," stated the motion signed by Milici. "Plaintiffs offer nothing more than baseless speculation in support of this theory, which in any event is undermined by their own factual allegations showing that when Apple learns a customer has been inadvertently charged for AppleCare+ coverage after trading in a device to Apple, Apple provides the appropriate refunds."

The following lead attorneys for the plaintiffs could not be reached for comment Monday regarding Apple's filing of the motion: Aaron Karl Block of The Block Firm LLC in Atlanta, Candice L. Fields of Candice Fields Law PC in Sacramento, and Kyle McLean of Siri & Glimstad LLP in Los Angeles.

In the amended consolidated complaint, filed on Nov. 15, the plaintiffs' legal team argued that Apple can still be held liable in instances where it refunded plaintiffs for excess Apple Care + charges.

"Even where Apple has provided refunds, affected consumers were damaged, have Article III standing, and have the right to pursue various forms of relief," the attorneys wrote.

"Beginning with standing, the U.S. 9th Circuit Court of Appeals has squarely held that a plaintiff who receives a refund for a challenged practice nonetheless has standing to pursue interest or other compensation for the 'lost use of her money' while the defendant wrongly possessed it. . . . Apple's refund for its past misconduct, while continuing to follow the same unlawful course of conduct going forward, does not vitiate claims for declaratory or injunctive relief to prevent further misconduct."

Apple's subscription billing practices have been a touchstone for litigation in courts throughout California and the world.

On Nov. 14 a consumer watchdog in the United Kingdom, known as "Which?" announced that it was launching a \$3.8 billion legal claim against the company on behalf of 40 million customers who claim the company "trapped" them into iCloud subscriptions and overcharged them for cloud storage services.

#382462

# WarnerMedia resolves case against law firm in fight over mass arbitration

[reuters.com/legal/legalindustry/warnermedia-resolves-case-against-law-firm-fight-over-mass-arbitration-2024-12-16](https://www.reuters.com/legal/legalindustry/warnermedia-resolves-case-against-law-firm-fight-over-mass-arbitration-2024-12-16)

David Thomas

By David Thomas

December 16, 2024 1:16 PM PST Updated 18 hours ago

The exterior of the Warner Bros. Discovery Atlanta campus is pictured after the Writers Guild of America began their strike against the Alliance of Motion Pictures and Television Producers, in Atlanta, Georgia, U.S. May 2, 2023. REUTERS/Alyssa Pointer Rights 

Dec 16 (Reuters) - Warner Bros Discovery (WBD.O) , opens new tab's WarnerMedia has resolved a lawsuit that accused law firm Zimmerman Reed of engaging in ethical misconduct and lodging thousands of baseless arbitration claims in order to force a settlement payout. The two sides said in a New York County Supreme Court filing , opens new tab on Friday that they were discontinuing the case with prejudice, which means it cannot be refiled. Lawyers for WarnerMedia and partners at Minneapolis, Minnesota-based Zimmerman Reed did not immediately respond to requests for comment on the filing, which did not disclose the terms of any settlement.

WarnerMedia sued Zimmerman Reed in May, after the law firm told the company and its affiliate Discovery Digital that it was representing thousands of purported arbitration clients alleging that the Discovery video streaming platform illicitly disclosed their viewing history to Meta (META.O) , opens new tab.

The lawsuit, which sought to disqualify Zimmerman Reed from proceeding with the privacy claims, accused the firm of trying to extract a massive settlement by leveraging the threat of huge administrative fees associated with large-scale individual arbitrations.

WarnerMedia and Discovery alleged that one of Zimmerman Reed's managing partners and other professionals at the firm had posed as claimants in privacy arbitrations brought by other law firms in order to "surreptitiously gain access to information" to use in their own mass arbitration campaign.

Zimmerman Reed countered in a June court filing that WarnerMedia's disqualification petition was "frivolous on its face."

The case is the latest in which companies facing mass arbitrations have taken the offensive against law firms bringing such claims.

French skin care company L'Occitane in February accused Zimmerman Reed of "manufacturing" mass arbitration claims under a California wiretapping law. The lawsuit and

arbitration claims were dismissed by a federal judge in April. Zimmerman Reed denied wrongdoing.

Another plaintiffs law firm, Keller Postman, has been engaged in an escalating legal battle with streaming platform Tubi and its lawyers at Jenner & Block. Fox Corp-owned Tubi accused Keller Postman in June of filing thousands of "cookie-cutter" arbitration claims over allegedly discriminatory targeted ads without investigating the facts.

Keller Postman has since asked a judge to disqualify Jenner from representing Tubi, and is also seeking a court order in Los Angeles that would block Tubi and Jenner from using any materials they obtained from a private investigator. Both sides have denied any wrongdoing. The case is WarnerMedia v. Zimmerman Reed, New York County Supreme Court, No. 652500/2024

For WarnerMedia: Jay Musoff and Evan Farber of Loeb & Loeb

For Zimmerman Reed: David Wilck and Carol Lastorino of Rivkin Radler

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# North Carolina justices hold insurer liable for COVID shutdown losses, defying 'bandwagon'

[reuters.com/legal/government/column-north-carolina-justices-hold-insurer-liable-covid-shutdown-losses-defying-2024-12-16](https://www.reuters.com/legal/government/column-north-carolina-justices-hold-insurer-liable-covid-shutdown-losses-defying-2024-12-16)

Alison Frankel

A woman wearing a protective mask walks past empty tables outside a restaurant in Miami, Florida, U.S., May 18, 2020. REUTERS/Marco Bello/File Photo Purchase Licensing Rights [↗](#), opens new tab

Dec 16 (Reuters) - The North Carolina Supreme Court did something truly surprising on Friday: It sided with policyholders who sued their insurer after being denied coverage for losses sustained while their businesses were shut down during the early days of the pandemic.

The state justices ruled [↗](#), opens new tab that 16 bars and restaurants are entitled to partial summary judgment against their insurer, Cincinnati Financial (CINF.O) [↗](#), opens new tab subsidiary The Cincinnati Insurance Co. The justices concluded that the restaurants' lost business during government-mandated COVID-19 shutdowns was covered under Cincinnati's property insurance policies as a direct physical loss.

Cincinnati, of course, argued otherwise, offering what the North Carolina high court acknowledged to be a reasonable interpretation of policy language that was open to debate. But the policyholders' lawyers at The Paynter Law Firm provided compelling arguments to the contrary, the Supreme Court said. And under North Carolina law, the justices concluded, ambiguities in policy language must be resolved in favor of policyholders.

"It is the insurance company's responsibility to define essential policy terms and the North Carolina courts' responsibility to enforce those terms consistent with the parties' reasonable expectations," wrote Justice Anita Earls. "Otherwise, insurance companies are licensed to pitch consumers on an expansive, 'all-risk' policy, while hiding behind a narrower definition imposed by judicial fiat when it comes time to pay out. Such a setup contradicts our court's holdings."

That might not seem like a remarkable holding until you consider the context of the North Carolina decision: 11 federal circuit courts and at least 20 state supreme courts have analyzed property insurance policies containing substantially similar language to the policies at issue in the North Carolina case — and none of them [↗](#), opens new tab has concluded that businesses were entitled to coverage for the losses they sustained during government-mandated pandemic closures.

Only the Vermont Supreme Court has previously sided with a policyholder in a COVID business interruption insurance case, in a 2022 decision [\[1\]](#), opens new tab overturning the dismissal of a military shipbuilder's lawsuit against its insurer. But the Vermont justices' ruling came only at the pleading stage of the shipbuilder's case.

The North Carolina decision was on summary judgment – marking the first time, according to the restaurants' counsel, Gagan Gupta of the Paynter firm, that any state supreme court has definitively ruled that an insurer owes coverage to policyholders.

A Cincinnati Insurance spokesperson said by email that it will now “work with the trial court and our policyholders to determine appropriate next steps” when the case is remanded.

“While we respect this ruling from the North Carolina Supreme Court, we have agreed with the nearly 20 state supreme courts and all 11 federal appellate courts that did not find coverage for pandemic-related business interruption claims under our property insurance policy,” Cincinnati said in the statement.

Cincinnati was represented in the North Carolina case by Brooks, Pierce, McLendon, Humphrey & Leonard and Litchfield Cavo. Lawyers at the two firms did not respond to my email query.

The big question, of course, is whether the North Carolina ruling will end up being a unique outlier or a turning point in the once-vast litigation over insurance coverage for businesses shut down during the early days of the pandemic.

Plaintiffs' lawyer Gupta and Marshall Gilinsky of Anderson Kill, who filed a friend-of-the-court brief backing policyholders in the North Carolina case, told me they are hoping that high courts in states that have not yet ruled definitively on COVID business interruption claims will find the North Carolina justices' reasoning to be persuasive.

“We finally have a state supreme court that had the steadfastness to apply the rules as they have existed for 60 years,” said Gilinsky.

Both Gilinsky and Gupta noted that the North Carolina justices cited the surprising (to me, anyway) statistic that the overwhelming majority of property insurance policies — nearly 83%, according to Gilinsky's amicus brief — contain a specific provision excluding claims for interruptions caused by a virus. The insurance industry, Gilinsky and Gupta said, nevertheless portrayed COVID shutdown cases as an existential threat, which may have helped defendants persuade courts to reject policyholders' theories.

Gupta said there is no doubt that Friday's decision will help policyholders beyond the 16 plaintiffs in the case. Insurers, he said, will now bear the burden of showing why North Carolina businesses are not entitled to coverage, as long as their policies did not contain an exception for viruses.

“We flipped the starting point,” said Gupta, who described Friday’s ruling as the highlight of his career.

But law professor Tom Baker of the University of Pennsylvania, who has been closely tracking COVID business interruption litigation since these lawsuits began cropping up in 2020, said he is “not holding my breath” that the North Carolina decision will spark a broad swing in judicial sentiment.

To be clear, Baker said the North Carolina justices’ clear-headed analysis shows that different state courts can reach different but equally reasonable conclusions about how to define insurance policy terms. Insurance law varies from state to state, Baker said, so he always predicted that states might disagree on COVID coverage, as they have on coverage for environmental and asbestos liability.

The problem for policyholders, Baker said, is that insurers managed to remove most COVID coverage suits to federal court – and federal appellate courts quickly reached a consensus favoring the defendants. It’s not clear, Baker said, whether and when additional state supreme courts will even get a chance to weigh in.

“It’s so hard to fight against the bandwagon,” Baker said.

Read more:

Appeals court delivers another crushing win for insurers over COVID biz interruption  
Business insurance battle for COVID losses shifts to state high courts  
Reporting By Alison Frankel

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# Settlement Negotiations Taking Shape in Class Action Against Poppi Prebiotic Sodas



law.com/2024/12/16/settlement-negotiations-taking-shape-in-class-action-against-poppi-prebiotic-sodas

Riley Brennan

Attorneys from Cooley and Bursor & Fisher informed a federal judge Monday that the parties are nearing a finalized settlement in a consumer class action against Poppi's Prebiotic Sodas.

Following mediation earlier this month, the parties filed a joint stipulation on Monday indicating that they reached a resolution in principle and asked the court to grant them an additional 60 days to finalize and execute a formal class settlement agreement. According to the stipulation, the parties agreed the extra time would allow them to finalize and execute a formal class settlement agreement and preserve judicial resources, noting Poppi's pending motion to dismiss.

The matter stems from a May lawsuit filed by attorneys with Bursor & Fisher on behalf of a consumer, who accused Poppi of falsely representing that their sodas have prebiotic gut health benefits. Poppi retained Cooley as counsel in June and filed a motion to dismiss the suit in September.

Earlier this month, the parties joined a private mediation with retired Judge Jay C. Gandhi. Following the mediation, the parties indicated that they were finalizing a settlement. The court agreed to vacate Poppi's motion to dismiss the hearing scheduled for Dec. 19 and agreed to give the parties 60 days to work through the details.

The class action was filed in the U.S. District Court for the Northern District of California, on behalf of Kristin Cobbs against Vngr Beverage, doing business as Poppi, and brought claims for violation of California's False Advertising Law, Consumers Legal Remedies Act, and Unfair Competition Law, as well as unjust enrichment claims.

According to the suit, Poppi falsely marketed the drink as a "Prebiotic Soda" made "For a Healthy Gut," despite not providing any meaningful prebiotic effects.

Neither Poppi's attorney, Michelle C. Doolin, of Cooley in San Diego, nor Cobbs' attorney, L. Timothy Fisher, of Bursor & Fisher in Walnut Creek, California, immediately responded to requests for comment.

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# States Granted Leave to Oppose Clearview AI Privacy Settlement

By Tonya Riley 2024-12-17T11:53:49000-05:00

A federal judge granted 22 states and the District of Columbia leave to file amicus briefs opposing a settlement to resolve claims that facial recognition company Clearview AI violated biometric privacy laws.

A group of state attorneys general said the settlement has “severe flaws that undermine consumers’ fundamental right to privacy and does not meaningfully redress the harms suffered by class members,” according to a [request filed](#) Dec. 12 in the US District Court for the District of Northern Illinois.

Judge Sharon Johnson Coleman approved the request Monday.

The states include Vermont, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Oregon, Rhode Island, Tennessee, Washington, and the District of Columbia.

Clearview AI [opposed](#) the motion to file the briefs. The company didn’t immediately respond to a request for comment.

The decision Monday is the latest challenge to the settlement, which has been rejected by a number of plaintiffs.

Clearview AI reached the settlement in June to resolve consolidated lawsuits alleging the company violated the Illinois Biometric Information Privacy Act by scraping billions of online photos and inputting them into a facial recognition database. The settlement would give plaintiffs and counsel a collective 23 percent stake in the company, which could be redeemed for compensation.

State attorneys general expressed concerns that the “highly speculative” relief required class members “to rely on the continued success of Clearview’s invasive business practices, and in turn,

will be forced to support Clearview's continued harms."

Advocacy groups Just Futures Law, which represents some of the plaintiffs, and NorCal Resist made similar arguments.

A final approval hearing is scheduled for Jan. 30, 2025.

Clearview AI is represented by Lynch Thompson LLP.

The case is [In Re: Clearview AI, Inc., Consumer Privacy Litigation](#), N.D. Ill., No. 1:21-cv-00135, leave granted 12/16/24

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# Keller Postman and Jenner & Block Accuse Each Other of Unethical Actions in Tubi Settlement

 [law.com/2024/12/16/keller-postman-and-jenner--block-accuse-each-other-of-unethical-actions-in-tubi-settlement](https://www.law.com/2024/12/16/keller-postman-and-jenner--block-accuse-each-other-of-unethical-actions-in-tubi-settlement)

Amanda Bronstad

## What You Need to Know

- Keller Postman represented nearly 24,000 class members who opted out of a \$19.99 million settlement with Tubi in order to arbitrate their claims.
- An Illinois state court judge in the Tubi settlement held a Dec. 4 final approval hearing, which was continued to Jan. 8.
- On Dec. 9, Keller Postman filed a motion to disqualify Jenner & Block from a D.C. federal case Tubi filed earlier this year to thwart the mass arbitrations.

Last July, two women dressed in black suits showed up at the front door of Lumeah Deschamps' mother's house. One of them said she was an FBI agent from Washington, D.C.

Deschamps refused to open the door but, through the window, the women kept asking about an arbitration demand she filed against streaming service Tubi Inc.

"I was scared," Deschamps said in a Dec. 6 declaration attached to a lawsuit her lawyers at Keller Postman filed this month against Tubi and its law firm, Jenner & Block. "The whole episode was alarming."

The incidence is one of several cited in Keller Postman's Dec. 11 suit, filed in Los Angeles Superior Court, which alleges Jenner & Block hired a former FBI special agent to interview class members who had opted out of a \$19.99 million settlement with Tubi in order to arbitrate their claims. Keller Postman, which represented the arbitrating plaintiffs, along with nearly 24,000 other class members, is well known for pursuing mass arbitrations.

For the past year, the Chicago-based firm has been locked in a battle against Tubi and Jenner & Block. Before this month's suit, Tubi sued Keller Postman in U.S. District Court for the District of Columbia to block the mass arbitration. The suit alleges Keller Postman breached Tubi's arbitration agreement by not providing notice before filing a claim, a requirement that Keller Postman countered is unconscionable and unenforceable.

Keller Postman then moved this month in the D.C. case to disqualify Jenner & Block from representing Tubi, citing the former FBI special agent, Stephanie Talamantez, who showed up repeatedly at the homes of nearly two dozen clients, pressuring them to sign declarations.

U.S. District Judge Ana Reyes in the  
District of Columbia. Photo: Diego M.  
Radzinski/ALM

U.S. District Judge Ana Reyes, in the District of Columbia, has set a status conference for Dec. 19.

Keller Postman partners Warren Postman and Albert Pak, both in Washington, D.C., declined to comment.

Tubi's attorney, Brandon Fox, who is the Los Angeles managing partner for Jenner & Block, said in a statement, "What we know is simple and straightforward: Keller Postman brought thousands of frivolous arbitration claims. They acted unilaterally and without the informed consent of their purported clients before causing them to breach the informal dispute resolution process in Tubi's terms of use. Our investigation was ethical, necessary, and warranted."

## **'Outrageous and Unprofessional'**

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The fight began earlier this year as Tubi was negotiating a class action settlement in a 2023 case brought in the U.S. District Court for the Northern District of Illinois, alleging the streaming service sold subscriber data to third parties without the consent of its users in violation of the Video Privacy Protection Act. The case, which plaintiffs attorney Eugene Turin, of Chicago's McGuire Law, refiled this year in the 17th Judicial Circuit Court, in Illinois, reached a \$19.99 million settlement with Tubi on behalf of millions of subscribers.

Court papers claim the deal, which also required Tubi to update its privacy policies, is the largest VPPA settlement so far. Tubi has about 74 million subscribers but, unlike Hulu or Netflix, relies on advertising for its free streaming services.

Keller Postman represents nearly 24,000 class members who moved to opt out of the settlement and arbitrate their claims, specifically, alleging that by showing advertisers user data about their sex, gender or age, Tubi is violating California's Unruh Civil Rights Act. Four clients of Keller Postman also objected to the settlement on the same grounds.

Tubi, in filings last month, opposed the objections and called the opt-out claims "frivolous."

"Instead of simply excluding themselves so they could litigate their meritless arbitration claims, objectors seek to disrupt a nationwide settlement," Fox wrote.

Many of the opt-out claims had deficiencies; they were signed by Keller Postman or didn't have wet signatures, for instance, he wrote.

Postman responded, “Tubi’s implication that Keller Postman had fabricated the signatures of thousands of clients and committed a wide-scale fraud on this court is outrageous and unprofessional.”

Moreover, Tubi’s attacks reveal “flagrant ethical violations by contacting Keller Postman’s clients without Keller Postman’s consent and misleading them into signing demonstrably false declarations.”

Not only did Tubi’s lawyers contact Keller Postman’s clients, Postman wrote, but they did not inform the firm ahead of time about their plans to do so.

Brandon Fox, the Los Angeles  
managing partner for Jenner & Block.  
Courtesy photo

However, Fox insisted that the former FBI special agent verified whether the class members were still represented by an attorney before asking them questions.

“The mass arbitration for which it now seeks special treatment from this court, in the form of exclusions and release, is a farce,” Fox wrote in a Dec. 3 reply. “This baseless attack is simply an effort to pull the court’s attention away from Keller Postman’s failure to obtain the informed consent of its clients, who do not have even a basic understanding of the claims filed in their names.”

Judge Ronald Barch of the 17th Judicial Circuit Court in Illinois held a Dec. 4 final approval hearing, which was continued to Jan. 8.

## ‘Riddled With Ethical Violations’

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On May 31, Tubi filed its D.C. lawsuit against Keller Postman, accusing the firm of violating the District of Columbia’s Rules of Professional Conduct. The suit claims Keller Postman teamed up with New York-based Troxel Law to solicit claimants through social media such as Instagram and YouTube and then, without vetting them, filed thousands of arbitration claims to force a settlement.

“Keller Postman’s conduct is riddled with ethical violations from beginning to end,” Jenner & Block special counsel Kelly Morrison, in Los Angeles, wrote. “In fact, Keller Postman is well aware that many of its arbitration demands will be fraudulent: Its marketing campaign is structured to avoid obtaining basic information that would weed out fraudulent claims.”

The firm also failed to provide notice, according to the complaint, in order to file the arbitration claims ahead of the May 1 date when JAMS updated its mass arbitration rules, under which Tubi would only have to pay \$7,500 in fees, rather than \$48 million, the suit says.

Keller Postman moved to dismiss the suit, but last month, Tubi sought to amend its complaint after disclosing the findings of the former FBI special agent, who interviewed 22 of the 29 individuals who withdrew their arbitration claims. Most denied that Keller Postman ever represented them. Three denied filing a claim, two did not have Tubi accounts, and eight believed the claims pertained to a data breach. Only two understood the claims, but one of them actually wanted more targeted advertising from Tubi.

Several filed declarations.

On Dec. 9, Keller Postman opposed the amendment and filed its motion to disqualify Jenner & Block from the case, citing California's Rules of Professional Conduct.

"This flagrant abuse of represented lay parties by an adversary's attorney is sanctionable in any court in the country," Postman claimed. Many clients reported being misled, intimidated and harassed. Some felt frightened or threatened.

The motion seeks to have Jenner & Block removed from representing Tubi while striking the statements obtained by the former FBI special agent, plus related attorney fees.

Postman wrote, "The pattern of behavior here has all the hallmarks of a lawyer and law firm who believe they are above the law."

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#### Corporate Deal

Virgin Music Group has agreed to purchase Downtown Music Holdings for \$775 million. The transaction, announced Dec. 16, is expected to close in the second half of 2025. Beverly Hills, California-based Virgin was advised by Kirkland & Ellis and Freshfields Bruckhaus Deringer. The Kirkland & Ellis team included partners Shellie

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December 16, 2024, 8:03 AM PST

# UConn's Endowment Is Abandoning Hedge Funds for New Kind of ETF

By Emily Graffeo

- Many hedge funds "don't justify the fees," says UConn's Ford
- \$634 million endowment using buffer ETFs to help mitigate risk

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UConn's Endowment Is Abandoning Hedge Funds for New Kind of ETF

By Emily Graffeo2024-12-16T11:03:40914-05:00

- Many hedge funds "don't justify the fees," says UConn's Ford
- \$634 million endowment using buffer ETFs to help mitigate risk

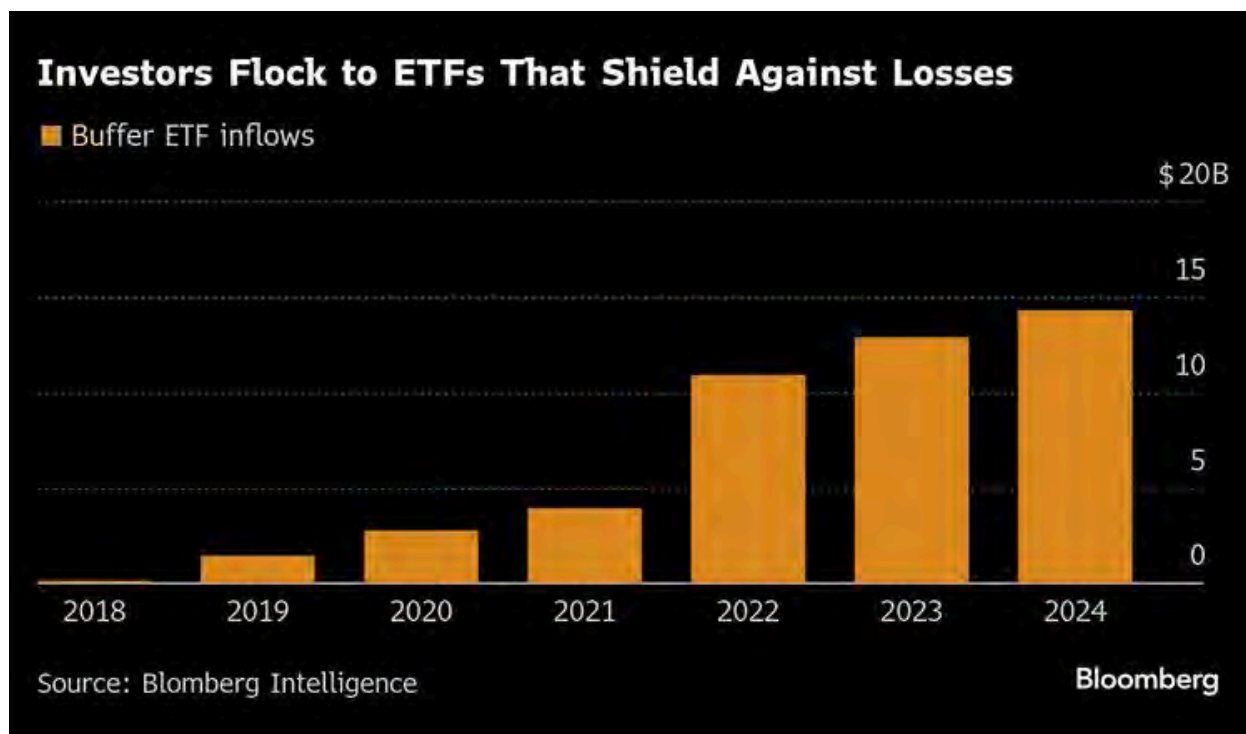
The University of Connecticut's endowment is turning away from hedge funds and embracing a cheaper way to mitigate risk in its \$634 million investment portfolio.

The UConn Foundation sold almost all of its hedge fund exposure during the most recent fiscal year and bought so-called buffer ETFs, said **David Ford**, chairman of the investment committee. The increasingly popular exchange-traded funds, which use options to protect against losses while capping upside gains, have amassed more than \$58 billion in assets, almost all within the past three years.

Market watchers say it's a sign of growing institutional adoption of the nascent fund strategy, one that could help the ETF industry, largely known as a beacon for retail investors, make further headway with sophisticated money managers overseeing trillions of dollars.

To Ford, hedge funds have become a "victim of their own success," with many growing so large that returns have suffered, particularly compared to the years after the late **David Swensen** of Yale University revolutionized endowment investing by incorporating alternative strategies into asset allocations. Ford says buffer ETFs are a cheaper and easier way to lessen portfolio volatility relative to using a hedge fund or structuring a bespoke trade, and come with the benefit of improved liquidity.

"This takes the complexity out of hedging, or most of the complexity," Ford said. "Instead of having to go to an institutional desk and say, we want to design the following options trade, it's already prepackaged and trading."



Top hedge funds have often historically charged clients 2% of assets managed and 20% of profits. UConn has purchased buffer ETFs overseen by Innovator Capital Management, where the average fee for the products is 0.8%, according to data compiled by Bloomberg. The largest buffer funds track the returns of major stock indexes like the S&P 500, capping gains over a one- or two-year span, while also promising to shield against losses if the index slumps.

In order to reap the full protection and potential upside, investors typically need to participate in the fund from the very beginning. After the fund's outcome period ends, they can redeem their shares or roll them into the next cycle.

The "first way to improve our returns is to cut down on the amount of fees that we're paying," Ford said.

[Read More: Yale's \\$41.4 Billion Fund Reports Second-Lowest Ivy Return](#)

Assets in buffer ETFs have surged since Innovator launched its first such fund in 2018. Other money managers including BlackRock Inc., Fidelity Investments and Allianz SE have since debuted their own offerings. Yet skeptics have argued that the funds may not be able to produce the same level of returns should the Federal Reserve continue to lower interest rates.

UConn is keeping exposure to two long-only equity managers, Ford said, as he continues to see the potential for outsized returns from stock picking.

"They're the ones who are going to pick the best single names and we'll take over responsibility for hedging," he said. "What we found is that a lot of hedge funds have less upside and they can be good at dampening volatility, but we're paying enormous fees to get lower return."

UConn's endowment returned 12.1% in the most recent fiscal year ended June 30, compared to a 13.5% gain for the Innovator US Equity Power Buffer ETF, the manager's largest such product.

"Hedge funds 25 or 30 years ago, they could do something, they could deliver something that was unique because there weren't a ton of them," Ford said. "Today you've got a number of funds that are more dependent on data and or leverage than they are on actually finding uncorrelated opportunities."

(Updates with details of fund mechanics in seventh paragraph.)

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## Matt Levine's Money Stuff: Albertsons Is Mad at Kroger

By Matt Levine 2024-12-17T14:36:33406-05:00

### Supermarkets

Imagine how you would solve this problem from first principles. It is October 2022, and two big supermarket companies, Albertsons Cos. and Kroger Co., are discussing a merger. Both companies feel the need to get bigger to compete with Walmart, Target, Costco and Amazon, and this seems like a logical combination. Kroger is the bigger company, with roughly twice as much revenue, so naturally Kroger will buy Albertsons for cash.

There is a problem. The problem is that the US Federal Trade Commission, in 2022, is skeptical of big mergers, and this would be a big merger. In particular, Kroger and Albertsons supermarkets compete with each other in many areas, and a merger could undermine that competition and lead to higher prices. If a Kroger is across the street from an Albertsons, competition with the Albertsons will keep the Kroger's prices low, but if those two supermarkets are owned by the same company there will be nothing to stop them from raising prices. A merged Albertsons and Kroger would compete better against Walmart, but worse against each other, and the FTC is going to focus on that reduced competition.

There is a traditional solution. The solution is divestiture: You combine Kroger's [2,722](#) stores and Albertsons' [2,269](#) stores to make a supermarket giant, but then you take, say, 500 or so of those 5,000 stores and put them into a separate, competing company. (Possibly you spin the stores out as a standalone company, but more realistically you sell those 500 stores to a third, probably smaller supermarket company.) In every town where the Kroger and the Albertsons are each other's main competition, you keep one of those stores in the new Kroger/Albertsons, and you give the other one to the new competitor. The result is that Kroger/Albertsons, with, say, 4,500 stores, is bigger and more nationally competitive, but it has *local* competition everywhere: from other supermarkets or, if necessary, from the 500-store divestiture company.

That is the rough idea, but there are details to worry about. The FTC is going to be skeptical of this solution. There are two main sources of skepticism. One is that Kroger will want to keep as many stores as possible, or at least as many good profitable stores as possible. It will be inclined to say

“ehh, this Kroger and this Albertsons are all the way across town from each other, and there is another supermarket in the area, so keeping both of them won’t really undermine local competition.” Whereas the FTC will want as much competition as possible, and will be inclined to say “no, competition between that Kroger and that Albertsons is essential in that community, so you can’t keep them both.”

The other is that “the 500-store divestiture company” is not a particularly inspiring business plan. The FTC doesn’t just want Kroger to *get rid* of some stores; it wants those stores to *succeed*, to continue operating and providing real competition. It will worry that the divestiture company is “a patchwork of assets cobbled together by Kroger’s antitrust lawyers, not a standalone business likely to succeed.” (And in fact, when Albertsons acquired Safeway in 2014, it divested 146 stores for antitrust reasons — but sold them to a company that quickly went bankrupt and sold many of the stores back to Albertsons, a bad precedent for this deal.) So the FTC will insist that Kroger divest, not just the minimum set of stores that compete directly with each other, but a set of stores that constitute a viable business. And it will insist that Kroger sell those stores not to some random fly-by-night operator but to a viable supermarket company that can run those stores successfully. (But not to *too* big a supermarket company: That might be bad for competition too.)

So you are sitting down to write the merger agreement in October 2022. You want to capture this dynamic. You want to say something like:

- 1. Kroger will buy Albertsons and combine their 5,000 stores.
- 2. But Kroger will divest some set of stores to maintain competition.
- 3. It will do the divestitures in a way that satisfies the FTC: It will divest enough stores, to a viable enough competitor, to make the FTC happy.

One other complication here. A rough general rule of thumb in mergers is that buyers are more likely to get cold feet than sellers. Kroger is a bigger company than Albertsons, it is the buyer, and it is paying a premium, in cash, for Albertsons’ stock. Because of the likelihood of FTC review, there will be a long time between the signing of this merger in October 2022 and its closing. During that time, Kroger might change its mind. It might conclude that it is overpaying for Albertsons, or that it doesn’t need Albertsons. Or it might conclude that the deal isn’t worth the divestitures: Buying Albertsons and keeping all 5,000 stores might be a good deal, but if the FTC wants it to divest 800 really good stores to approve the deal, then never mind.

Whereas Albertsons is in a different position. It is selling itself for cash at a premium. It is putting its life on hold to get the deal done. If the deal falls apart, Albertsons is in trouble. If the FTC says “we’ll let you do this deal but you have to divest 800 really good stores,” Albertsons will say “yes fine that’s fine we don’t care.” Once the deal is signed, Albertsons turns into just an expectation of receiving the cash purchase price; it doesn’t care at all what happens to the future business. It just wants to make sure the deal closes.

So here you are negotiating the merger. How should you address this dynamic? What should the agreement say?

Well, if we are just brainstorming, here’s one idea: You go to the FTC, before signing the merger agreement, and say, “look, we want to do a merger, so we can compete with Walmart. You should like that; it will make us more competitive. But of course we don’t want to reduce local competition. So let’s work out a divestiture plan that you are happy with, and once you’re signed off, we will sign and announce the deal and be very confident that it will close.” And the FTC says “sure, here are the divestitures we want,” and Kroger and Albertsons come back with a counteroffer, and eventually you negotiate a deal that everyone can live with and you sign and announce the merger. Or you don’t — the FTC demands more divestitures than Kroger is willing to do — and you never sign the deal. But you figure this all out pretty quickly, before signing the deal, so that if there’s no deal to be done you can all move on with your lives.

This is not how actual antitrust practice works. The FTC is not going to consult with you on hypotheticals. You have to sign the deal first, and *then* see what the FTC says. This is of course a bummer, particularly for Albertsons: If you sign the deal, and it turns out that the FTC says no, then that’s bad for the jilted merger target.

So let’s try something else. Before you sign the deal, you — Albertsons and Kroger — negotiate a detailed divestiture plan. You agree on exactly which stores to divest, and you find a viable buyer. You don’t run it by the FTC in advance — they’re not going to consult with you on hypotheticals — but you run it by *your antitrust lawyers* in advance, and they all say “yes *this* divestiture plan will definitely satisfy the FTC and the courts, so there is no risk that they will hold up the deal.” And then you sign the deal with a clear, precise, agreed-upon plan.

I imagine that there are deals and industries where this is viable, but it doesn’t seem all that plausible here. The FTC does not have a formula. Code, here, is not law. There is some legal realism involved; you have to model how [Lina Khan](#) thinks. You can’t just sit down and write out a plan that will

definitely satisfy the antitrust regulators; you have to talk to them and see what they say.

So you have to live with a deal that does not specify everything in advance. You need to write a merger agreement that leaves open exactly what will happen. But, if you are Albertsons' lawyer, you really do want to make sure that the deal will close. You know that, whatever the FTC asks for to get the deal closed, *you* will say yes: You just want to get the deal closed. You want to make sure that *Kroger* will also say yes to whatever the FTC asks for. How do you put that in the contract? Maybe:

- “Kroger agrees to do whatever the FTC asks for to get this deal closed.” Or
  - “Kroger agrees to do whatever *Albertsons* asks for to satisfy the FTC and get this deal closed.”
- Or
- “Albertsons will handle all correspondence with the FTC, and whatever it agrees to is binding on Kroger.”

Something like that: Something that basically says “Kroger has to do whatever it takes to get the deal closed.” Obviously *Kroger* will push back on this: What if the FTC asks it to divest 3,000 stores? Maybe you put some limits in the contract. “Kroger will do whatever the FTC asks, except that if the FTC asks it to divest more than 650 stores it can walk away.”

Kroger and Albertsons did [sign and announce their deal](#) in October 2022. The FTC, and nine states, did [sue to stop it](#), despite Kroger's offer to divest 579 stores to C&S Wholesale Grocers, a grocery wholesaler that also operates some supermarkets. Last week a court agreed with the FTC and [blocked the deal](#).

The next day, [Albertsons sued Kroger](#), saying that “Kroger willfully breached the Merger Agreement in several key ways, including by repeatedly refusing to divest assets necessary for antitrust approval, ignoring regulators' feedback, rejecting stronger divestiture buyers and failing to cooperate with Albertsons.” Its [complaint](#) was unsealed this week, arguing that “Kroger derailed the merger after suffering a classic case of buyer's remorse”: Because of “negative market reaction to the Merger and falling post-pandemic profits,” Kroger no longer really wanted the deal, so it intentionally sabotaged its chances of getting antitrust clearance so it could walk away.

But how did they deal with this problem in negotiations? Well, here is how Albertsons describes it :

Albertsons began negotiations by insisting on significant assurances that Kroger would take all necessary steps to secure regulatory approval and close the Merger. ...

*First*, Kroger generally agreed to use “reasonable best efforts” to satisfy all closing conditions “as promptly as reasonably practicable.”

*Second*, Kroger assumed a more stringent obligation to use its “best efforts” — not limited by any standard of reasonableness — “to avoid, eliminate, and resolve any and all impediments under any Antitrust Law . . . so as to enable the Closing to occur as promptly as practicable.” That “best efforts” provision explicitly required Kroger to divest any assets and make any changes to its operations that were necessary to obtain antitrust approval.

*Third*, if a regulator threatened or instituted an antitrust challenge, Kroger committed to take “any and all actions” necessary to “eliminate each and every impediment under any Antitrust Law” to closing the Merger. This “any and all actions” obligation is an exceptionally high standard: Kroger had to resolve antitrust concerns, as Delaware courts have put it, “come hell or high water.”

There was only one caveat to Kroger’s “best efforts” and “any and all actions” obligations: those commitments did not require Kroger to divest more than 650 physical stores. Albertsons bargained hard for this 650-store threshold, rejecting Kroger’s repeated proposals for a lower cutoff. Indeed, Albertsons withheld its consent to the Merger until Kroger’s CEO personally committed to divest 650 stores and shook hands on that term with the CEO of Albertsons’ largest stockholder.

So loosely speaking the merger agreement said “Kroger has to do whatever the FTC asks to get the deal closed, except divest more than 650 stores.” Albertsons thought this was good enough:

This 650-store threshold was still conservative and thus protective of Albertsons; the Parties understood that if Kroger met its stringent obligations to make “best efforts” and take “any and all actions” to secure antitrust approval, it would be readily achievable to construct a divestiture package that would fully address any antitrust concerns without needing to divest more than 650 stores.

But:

Because of Kroger’s “best efforts” and “any and all actions” promises, Albertsons agreed that Kroger would have the principal responsibility for devising and implementing a strategy to obtain antitrust

approval. But Kroger committed to “cooperate” with Albertsons in the antitrust clearance process; consult with Albertsons before meeting or communicating with regulators; give Albertsons the opportunity to attend and participate in such meetings; consider Albertsons’ strategic views; and “work together in good faith to resolve [any] disagreement.”

So Kroger was in charge of dealing with the FTC, creating the divestiture plan and getting the antitrust approvals. And Albertsons now says that its plan wasn’t good enough:

Despite knowing better, Kroger squandered its credibility with regulators from the outset by proposing a plainly indefensible divestiture package that elevated Kroger’s bottom line over its contractual obligations to Albertsons to put forward a tenable divestiture proposal. Kroger then deepened that rift with regulators by refusing to adjust its proposed divestiture package in response to regulators’ predictable and readily addressable feedback.

Kroger compounded these breaches by turning away divestiture buyers with long track records of successfully running large-scale retail grocery businesses and instead selecting a bidder whose primary experience was as a wholesaler.

The argument is that Kroger initially proposed to divest just 238 stores, annoying regulators. It eventually expanded that to divesting 579 stores, but not the right stores. It tried to keep too many of the good ones:

Demonstrating the seriousness of Kroger’s blunders, the Washington Attorney General highlighted in its opening statement at trial an example of a store that Kroger’s management had suggested be included in the divestiture package, but which was vetoed by Kroger’s CEO Rodney McMullen because “this store has real estate that is worth a lot.” In its opinion enjoining the Merger, the Washington Court ultimately concluded — citing that very example — that “Kroger kept the best performing assets for itself.” As the Washington Court put it: “Where it could, Kroger followed a simple rule: if a store was a ‘good EBITDA producer, . . . we wouldn’t want to divest.’”

And it proposed to sell the stores to C&S, the wholesaler, rather than better buyers:

During the course of the solicitation process, approximately 90 potential buyers were contacted about the transaction, and about 60 indicated their interest in exploring the divestiture transaction by signing NDAs. Unbeknownst to Albertsons at the time, some of these prospective buyers were experienced, large-scale grocery retailers including [redacted], who should have been front runners and would

have been strong competitors to Kroger. Instead, Kroger turned them away. ...

Kroger's choice of C&S ultimately would fuel plaintiffs' efforts to challenge the Merger. The FTC, Colorado Attorney General, and Washington Attorney General focused much of their cases on C&S's perceived shortcomings as a divestiture buyer. The FTC, for example, repeatedly emphasized C&S's thin and uneven track record in grocery retail.

This is all sort of plausible stuff: Kroger was in charge of getting the antitrust clearances, it was required by the contract to do everything possible to get those clearances (short of divesting 651 stores), it came up short in various ways, and it didn't get the clearances. It's plausible because, after all, the FTC sued, the court blocked the deal, and the FTC and the judge did object specifically to some of Kroger's decisions (C&S, the particular stores). Perhaps if Kroger had made different decisions, it would have been fine.

On the other hand it is all hypothetical: If Kroger had picked the best possible buyer from the 60 interested bidders, and sold that buyer 650 stores picked solely to maximize competition, would the FTC still have sued to stop the deal? Would a court have agreed? I don't know. Albertsons says no. But it's not like the FTC gave Kroger a specific list of demands and said "if you do these things we'll sign off." Kroger gave the FTC its proposals, and the FTC expressed concerns; the FTC *might* have approved some alternative list of divestitures, but you can't know that for certain. If there was nothing Kroger could have done, then [it doesn't matter](#) that it [didn't do more](#):

To prevail in court against Kroger, Albertsons would have to show that Kroger had better options for a divestiture that would have satisfied the court and still preserved the value of the deal for Kroger, said Joseph Ostoyich, head of U.S. antitrust litigation for Clifford Chance.

"A lot of if's—that's not an easy thing to show, but that is what they are going to have to do," said Ostoyich, who isn't involved in the litigation.

It is just sort of unsatisfying? Albertsons and Kroger signed up for a merger that had obvious antitrust issues. Albertsons wanted, and thought it got, a merger agreement saying "Kroger has to do whatever it takes to get antitrust approvals for this deal," almost. (Up to those 650 stores.) But you can't really know for sure what it would take to get antitrust approvals for the deal: Maybe the deal could never have gone through; maybe the FTC would not have been satisfied with divestitures of fewer than 700 stores. There is no formula, so there was no way to make the merger certain. Albertsons just had to roll the dice for two years, and now it has to sue.

## SpaceX margin loans

See, if I owned \$1 million of my employer's stock, and I needed \$150,000 to renovate my kitchen, what I'd do is I'd sell \$150,000 of the stock and keep the other \$850,000. That way, if the stock went up, I'd make money (85% as much as I would before selling the stock), but I'd have the \$150,000 in cash for the kitchen. Here's another approach:

As SpaceX's valuation hits a record of about \$350 billion, propelling Elon Musk's own net worth to new heights, Morgan Stanley also stands to benefit.

The bank has opened its specialized lending program to SpaceX employees who want to cash in on soaring shares in Musk's rocket and satellite maker but not lose their equity stake, people with knowledge of the matter said.

To participate, employees needed at least \$500,000 worth of vested SpaceX stock, some of the people said. ...

The loan structure includes an advance rate of 15% on the value of pledged shares, with a loan maintenance of 40%, some of the people said. The interest rate on offer is roughly SOFR plus 4.5%, equating to around 9% at Monday's rate.

I suppose that it is not all that convenient for a SpaceX employee to sell 15% of her stock: "At SpaceX, staff have regularly had the option of selling shares through a tender offer that has, in recent years, occurred biannually," but maybe you want to renovate your kitchen between tender offers.

Still I feel like there is some continuum between people who believe "you should have roughly 0% of your net worth in your employer's stock, because you have large undiversified exposure to your employer in the form of your paycheck and human capital, so you should do what you can to diversify that exposure with your investments," and those who believe "you should have roughly 300% of your net worth in your employer's stock, because your employer is awesome and you should be all in." I am, by nature, very much a 0% guy.

One gets the sense that everyone at SpaceX is more of a 300% person. Selling 15% of your stock would mean owning slightly less SpaceX stock, and one of the main benefits of working at SpaceX is

that you get to own SpaceX stock. *Borrowing* 15% of the value of your SpaceX stock at SOFR plus 450 means that you get money *and* keep all your SpaceX stock. Obviously it costs you 9%, and you'll feel bad about it if SpaceX's stock goes down, but if you are worried that SpaceX's stock might go down then maybe you shouldn't work at SpaceX.

## Blue Owl

One important development in the financial industry over the past 20 years is that alternative asset managers have become enormous institutions. It used to be that a private equity firm was a handful of ex-bankers cobbling together one leveraged buyout at a time; now Blackstone Inc. manages a trillion dollars and barely mentions leveraged buyouts. The big firms do private equity, sure, but also real estate and infrastructure and, especially, private credit. Apollo's ambition, now, is not to do leveraged buyouts; it's to be a one-stop provider of [retirement savings](#). These firms have grown, organically and by acquisition, over many years to become gigantic platforms with institutional relationships and scale to do every business.

But there are still a lot of small alternative asset managers, who might find it hard to compete in this age of giant platforms. What can they do? Well, if they are *private credit* managers, the answer is pretty easy: There are tons of traditional asset managers who are desperate to buy private credit firms, so you just go and sell yourself to BlackRock or State Street. But what about private equity or infrastructure managers? I guess one funny idea is "all the little ones should merge and become a big one." Oddly there's a guy who [can maybe make that happen](#):

The co-founder of private capital investment firm Blue Owl is seeking to engineer a multiway merger to create a diversified alternative investment giant in the mould of Blackstone and KKR that he could ultimately take public.

Michael Rees, whose firm pioneered a strategy of buying small minority stakes in fast-growing private capital groups, has been sounding out potential partners for a deal that would combine specialists from different fields to create an industry heavyweight, according to four people familiar with the matter.

The billionaire dealmaker has pitched a tie-up of between three and five firms within Blue Owl's portfolio which would span private equity buyouts, infrastructure deals, credit-based investments and other sectors such as real estate.

It feels like 2024 is an amazing time to own minority stakes in every medium-size alternative asset manager: We're in "a wave of merger activity that culminated with BlackRock's \$12bn purchase last week of credit manager HPS — a Blue Owl portfolio company." But 2025 might not be:

Some executives now fear that the industry's power will increasingly be driven by a handful of diversified players that have scope to attract new money from investors ranging from large sovereign wealth funds to wealthy individual investors and eventually retirement savers.

In October, Michael Brandmeyer, an executive at Goldman Sachs, warned that ... "there are a lot of private equity firms right now that are investing their last funds. They just don't know it yet."

But if you own minority stakes in every medium-size alternative asset manager, perhaps you can turn them into one big manager.

## Crypto

Bloomberg's Claire Ballentine has an article about crypto late adopters, "a wave of first-time crypto investors flooding the digital asset world." "Crypto Surge Lures Final Holdouts," says the headline, which is an interesting bet that we are nearing the top. What if crypto is still luring holdouts a year from now? It does *seem* unlikely, doesn't it?

One possible interpretation here is that crypto, for late-adopting US investors, is a sort of *straddle* on Donald Trump's presidency: It will go up if he does really well, and it will go up if he does really poorly. One view is that crypto is now linked to Trump, who has set himself up as a pro-crypto president and promised to establish a strategic Bitcoin reserve, so the better Trump does, the better that is for crypto:

"I've been wary of crypto my whole life," said Ian Johnson, a 28-year-old living in Sioux Falls, South Dakota, who recently bought Bitcoin for the first time. "I just want to see what it does. If Trump does a good job, I feel like it's going to spike like crazy."

Another view is that Bitcoin is a hedge to inflation and economic catastrophe and, you know:

Mikko Rintala, a 50-year-old software engineer who lives in Finland, also got in around the election.

Rintala is no fan of Trump and views crypto as a hedge against the volatility the president-elect could cause. He has about a \$1,000 in his Binance account spread across Bitcoin and Ripple.

"I thought, if Trump won, then nobody knows what will happen to the economy," he said. "For me crypto is like buying lottery tickets."

It seems to me that, the more crypto is integrated into the traditional financial system, the less useful it is as a hedge against a collapse of that system. But I guess we're still at a point where you can play both sides. Also, if it is *true* that crypto will do really well in high-growth and disaster scenarios, that is an appealing sort of asset. Also here's this guy:

Crypto.com was also the venue of choice for Bob Candelaria, who saw UFC fighter Jon Jones wearing a shirt with the exchange's logo and decided to check it out. The 44-year-old truck driver, based in Nashville, was blown away by the ease of creating an account and buying his first bit of crypto. He spent a couple hundred dollars total on Bitcoin, Ethereum and Dogecoin. He now spends the time between runs in his truck studying up.

"If you breathe oxygen, you can buy crypto," he said. "I've been telling my friends, if your eyes blink you can do it."

I feel like "it is extremely easy to buy this asset" is not an *amazing* investment case for the asset, but to be fair "it is impossible to buy this asset" was for a while part of the bear case against crypto, so this is a relevant response.

## Things happen

Honda, Nissan to Start Talks on Possible Merger, Nikkei Says. Investors on alert for ructions in US [funding market](#). The relentless advance of [American asset managers](#) in Europe. EU Takes a Fresh Look at Confiscating Russia's Frozen Assets. [Trafigura](#) under fresh scrutiny after scandals hit profits. Weather Derivatives Are Booming in an Unpredictable Climate. Former Ozy Media CEO [Carlos Watson](#) Sentenced to Nearly 10 Years in Prison.

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- 1. I say “a Kroger” and “an Albertsons,” but both companies operate a bunch of supermarket brands, including Shaw’s, Star Market, Safeway, Vons, etc. (Albertsons) and Fred Meyer, Ralph’s, King Soopers, etc. (Kroger).
- 2. That is the FTC’s actual description of the divestitures in this case, from its [administrative complaint](#) in February 2024.
- 3. In fact Kroger’s stock went up about 5% when the deal was blocked.
- 4. It’s [section 6.3 of the merger agreement](#).
- 5. This is a technical term: This sort of antitrust provision is called a “[hell or high water clause](#).”
- 6. Actually Albertsons argues that Kroger should have picked a bunch of buyers: “Kroger also artificially narrowed the field of potential buyers by insisting on a single buyer for all divested assets. In numerous other large merger transactions, the FTC had accepted proposals for multiple buyers to purchase divested assets. Assembling multiple buyers who could purchase stores in different geographical regions would avoid triggering new antitrust concerns from the divestiture transaction, as it would spread store ownership among more, not fewer, owners than prior to the Merger.”

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# Becton Dickinson to Pay \$175 Million to Settle SEC Probe

By Lydia Beyoud

- Agency alleged company misled investors over medical device
- Company to retain outside compliance firm to review disclosure

Bloomberg Law News 2024-12-17T09:52:42552182739-05:00

Becton Dickinson to Pay \$175 Million to Settle SEC Probe

By Lydia Beyoud2024-12-16T17:52:37862-05:00

- Agency alleged company misled investors over medical device
- Company to retain outside compliance firm to review disclosure

Becton, Dickinson & Co. has agreed to a \$175 million fine over Securities and Exchange Commission claims it repeatedly misled investors about one of its most important products.

The regulator said Becton Dickinson was aware an infusion pump it manufactured had flaws which would prevent it from obtaining approval by the Food and Drug Administration. It continued to sell the Alaris pump without FDA clearance and without informing investors about the regulatory risk to the device, which represented about 10% of the company's profits in 2019, according to the SEC.

The SEC also said the device maker materially overstated its operating income in fiscal 2019 by failing to properly account for the costs of fixing the pump's software flaws. That resulted in the company overstating its operating income by 82% in the fourth quarter of that year, the SEC said.

The company neither admitted to nor denied the findings in the settlement.

As part of the settlement, the company agreed to retain an outside, independent consultant to review its systems for making disclosures.

"Public companies have a fundamental duty to accurately disclose material business risks and should expect to be held accountable when they fall short in that regard, Sanjay Wadhwa, SEC acting director of enforcement, said in a press release.

Becton Dickinson has implemented a number of improvements to its operational and governance processes and related disclosure practices, according to a company statement.

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# CFPB Reports Widespread Misconduct Across Student Loan Market

 [law.com/nationallawjournal/2024/12/17/cfpb-reports-widespread-misconduct-across-student-loan-market](https://www.law.com/nationallawjournal/2024/12/17/cfpb-reports-widespread-misconduct-across-student-loan-market)

Dan Novak

The student loan market is rife with misleading and fraudulent practices, the Consumer Financial Protection Bureau stated in a report released Monday.

Much of the misconduct is related to the post-pandemic return to repayment, when 6 million people started paying back their student debt for the first time, the CFPB reported. In total, 28 million people resumed paying student loans this past year following a pause during the COVID-19 crisis, the bureau found.

“These violations include failing to provide appropriate avenues for consumers to communicate with their servicers, sending deceptive billing statements, withdrawing excess amounts from borrowers’ deposit accounts, and numerous problems related to processing of [income-driven-repayment] applications,” the report stated.

The CFPB highlighted illegal practices from student loan servicers, including private lenders, federal loan servicers and higher education institutions that provide private loans.

“The entire higher ed sector is implicated here,” said Stephanie Hall, a higher education policy expert at the Center for American Progress.

Hall said she was pleased the CFPB report confirmed findings from education research and policy groups, but added the report was still very alarming.

It “points to what a lot of us in the field think is a forthcoming default crisis and seeing a lot more federal student loan borrowers default into 2025,” she said.

The CFPB stated that lenders misled borrowers about refinancing rules, used illegal collection tactics such as falsely threatening legal action and issued deceptive billing statements.

Private lenders also had not made clear to borrowers that refinancing loans would result in losing access to federal loan cancellation programs, the CFPB added.

“Examiners identified abusive misleading statements regarding loss of federal benefits as well as regulatory violations in connection with the refinancing and consolidation of loans,” the report stated.

The CFPB did not name specific companies or institutions in the report but said it shared its findings with companies to give them a chance to correct their behavior before launching any formal investigation or taking enforcement action.

“Companies break the law when they mislead student borrowers about their protections or deny borrowers their rightful benefits,” CFPB Director Rohit Chopra said in a statement Monday. “Student loan companies should not profit by violating the law.”

There is \$1.7 trillion in student loan debt in the United States, representing the second-highest form of consumer debt after housing.

The wide-ranging report on abuses in the student-loan market comes as President-elect Donald Trump has proposed eliminating the CFPB or absorbing it into another agency. Trump's fellow Republicans have called on the CFPB to cease all rulemaking for the remainder of President Joe Biden's term.

The agency has taken multiple enforcement actions against student loan servicers since Chopra became director in 2021, including a \$120 million settlement with private lender Navient in September. Navient neither admitted nor denied wrongdoing in agreeing to the settlement.

The Center for American Progress' Hall said the CFPB is one of the few agencies focused on consumer rights and protections rather than on behalf of taxpayers and Americans generally. Eliminating the CFPB would lead to even more harm in the student loan sector, she said.

“I think it would really tilt the scales back out of favor of just common everyday consumers if we were to eliminate the CFPB or drastically change its work,” Hall added. “And without some sort of body that's really enforcing those regulations, it could become like an every-man-for-himself sort of thing.”

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Latest

# Crypto Fraud Victims Often Shortchanged Due to DOJ Regulation

**B** [news.bloomberglaw.com/business-and-practice/crypto-fraud-victims-often-shortchanged-due-to-doj-regulation](https://news.bloomberglaw.com/business-and-practice/crypto-fraud-victims-often-shortchanged-due-to-doj-regulation)

Elisha Kobre

Victims of cryptocurrency fraud often lose out to the government when it comes to recovering their losses. That is because of an obscure Department of Justice regulation that prioritizes the government's right to keep forfeited funds over victims' rights to restitution for their losses.

Regulation 28 CFR 9.8(c) has a devastating impact on victims. It conflicts with Congress' goals of ensuring that victims of federal crimes be made whole, and should be changed to ensure that victims, rather than the government, have priority when funds are recovered from a defendant.

Despite the unfairness and prevalent application of the regulation to deny victims their full restitution, it has largely escaped public scrutiny because it is applied by a little-known section within the DOJ as part of an administrative process that isn't public and is subject to little or no meaningful judicial review.

Few assets have risen in value as quickly and sharply as cryptocurrency. Bitcoin has experienced a 1,245% increase over the past five years, soaring briefly to more than \$100,000 over the past few weeks. Ethereum has seen a 2,405% increase over the past five years.

At the same time, fraud is rampant in the cryptocurrency space. Phishing, social engineering, extortion schemes, and SIM swapping—through which fraudsters gain control of a victim's cell phone and reset the victim's accounts—are just a few examples of how bad actors defraud victims of valuable crypto assets.

According to the Federal Bureau Investigation's 2023 cryptocurrency fraud report, the FBI received more than 69,000 complaints from the public regarding financial fraud involving the use of cryptocurrency in 2023. Estimated losses with a nexus to cryptocurrency totaled more than \$5.6 billion. Those over age 60 were by far most likely to be victimized by cryptocurrency fraud.

Successfully investigating and prosecuting crypto fraud is rare, and recovering assets in these cases is even rarer. But incredibly, even in that small sliver of cases, the government generally keeps most of the recovered assets at the expense of the victims.

Congress passed the Mandatory Victims Restitution Act in 1996 with the “primary and overarching” purpose “to make victims of crime whole, to fully compensate these victims for their losses and to restore these victims to their original state of well-being.”

For victims of crimes covered by the MVRA, including most crypto fraud offenses, the amount of restitution is provided by a basic and sensible formula (assuming the stolen property itself can no longer be returned). That is, the greater of the value of the property on the date of the loss, or the value of the property on the date of sentencing.

This formula recognizes that a victim’s loss—and corresponding restitution—must include the appreciation of the asset value following the date of the crime. A victim isn’t “made whole” absent compensation for the appreciation of their stolen asset—gains they would plainly have realized absent their being dispossessed of their property because of the crime.

For many objects of fraud, there may be little difference between the value of property on the date of the loss and the value on the date of sentencing. Currency, precious metals, and even securities typically experience only modest fluctuations in value.

Cryptocurrency, on the other hand, is different. Ten Bitcoin stolen a year ago are worth less than half today’s value—a difference of more than half a million dollars. Providing restitution for that appreciation in value—which the victim earned by risking his or her money—is critical to making the victim whole.

Congress certainly thought so when it provided a formula in the MVRA that compensates victims for appreciation or gains between the date of the crime and the date of sentencing.

In most cases, victims have little chance of recovering restitution from the defendant, who is often indigent and may have little prospect for earnings, at least in the short run. But in many crypto cases, the government does seize and forfeit proceeds of the crime—including often substantial amounts of cryptocurrency—which it may then keep under federal forfeiture law.

Forfeiture and restitution have different goals. Forfeiture aims to punish the defendant for gains made from illegal activity while restitution is intended to compensate victims. Forfeited funds therefore belong to the government.

Nonetheless, Congress provided a mechanism called “restoration” through which the DOJ—through its Money Laundering and Asset Recovery Section—may “restore forfeited property to victims”—i.e., use forfeited property to make victims whole where there will be no recovery from the defendants. Using forfeited funds to compensate victims would fulfill Congress’ intent—and basic fairness—to make victims whole with funds traceable to the fraud.

Regulation 28 CFR 9.8(c), however, is regularly applied to severely hamper this goal. It became effective in 1997 after the MVRA was passed and limits the amount that may be restored to a victim from forfeited funds to “the fair market value of the property” as of the loss date.

In other words, a victim won’t be compensated through restoration for any appreciation of their stolen property or gains that occurred following the date of the loss. This restriction applies even if the government seized more than enough property to fully compensate all the victims of the scheme.

The DOJ’s regulation limiting restoration to the value of the property on the date of the loss often leaves the government with a massive windfall at the expense of the victims. It also can’t be squared with Congress’ directive, through the MVRA, that victims be made whole and receive the “full amount” of their losses.

It’s also just plain unfair. Property is forfeited only if it is directly traceable to the offenses of conviction. Forfeited funds, therefore, even if not directly traceable to identified victims, are nonetheless fruits of the crime through which the defendant harmed the victims.

Victims are the ones that sustained the loss, not the government. It’s only right that the victims, rather than the government, receive the benefit of those funds.

*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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### Write for Us: Author Guidelines

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December 17, 2024, 2:00 AM PST

# Crypto Got What It Wanted in November's Election. Now What?

By Molly White

Bloomberg Law News 2024-12-17T09:51:56907497366-05:00

Crypto Got What It Wanted in November's Election. Now What?

By Molly White2024-12-17T05:00:34171-05:00

Crypto is heading into 2025 on a tear. One month after Donald Trump won the US presidential election, Bitcoin crossed the \$100,000 mark for the first time, and evangelists began declaring it only the beginning of another cryptocurrency bull run.

This rally feels different from the regular boom-and-bust cycles that defined cryptocurrency's teenage years. For the first time, the US will have a president who's directly endorsed cryptocurrencies—and even introduced his own token. Trump is already lining up crypto believers to take key spots in government. Because his campaign promises at the annual Bitcoin Conference in July included establishing a “strategic national Bitcoin stockpile,” analysts are seriously discussing whether the country might do it. Even before the election, BlackRock Inc. and other financial giants started exchange-traded funds to offer cryptocurrencies through traditional brokerage accounts, paving the way for the asset to reach an even broader group of buyers. Crypto, which has always played up its antigovernment, antiestablishment ideology, has become the establishment.

The foundation for this unlikely reemergence has been under construction for years. As attention shifted away from crypto during its downturn, executives and strategists within the industry quietly got to work. That didn't mean building the long-promised killer app that would finally prove the practical utility of blockchains. Instead, they laid the groundwork for an unprecedented political influence campaign. This worked out to more than \$130 million in political spending in the 2024 cycle, along with a heavy public-relations campaign to convince candidates that they couldn't afford to alienate single-issue “crypto voters”—a group strategists largely invented from whole cloth.

A cartoon outside a Coinhero store in Hong Kong marks the occasion of Bitcoin reaching more than \$100,000.

Photographer: Justin Chin/Bloomberg

The crypto campaigners also amplified narratives that federal agencies have engaged in a wholesale war on crypto and have pursued extragovernmental campaigns to punish innovative financial startups that have done nothing wrong. This will sound familiar to anyone who's heard Trump and his surrogates talking about tech regulation, even if it reverses the reality, which is that the crypto industry has consistently ignored existing rules while arguing that the government should pass friendlier ones. "The crypto industry is built on a foundation of regulatory noncompliance," says Hilary Allen, a law professor at American University and the author of *Driverless Finance*.

The lack of regulation has led to some spectacular cases of fraud, but the consequences have been relatively limited. Financial crises turn into full-blown catastrophes once a crash in one sector starts doing real damage elsewhere. (You didn't need to be holding a big mortgage on a suddenly cheap house to feel the pain in the 2008 crash, for instance.) The silver lining to the 2022 crypto bust, which wiped out countless retail investors as well as a number of major crypto firms, was that people who hadn't bought into the hype were insulated from the devastation. But the firewall separating the volatile and fraud-prone crypto markets from traditional finance may not hold through a Trump presidency, or protect us through the next crypto market downturn.

Industry cheerleaders like Paul Atkins, Trump's nominee to run the Securities and Exchange Commission, are slated to take over leadership at key federal agencies, meaning what little enforcement we've seen in the sector is likely to disappear. Instead, the new administration has telegraphed its intention to defang or dismantle the agencies and regulations that protect consumers and maintain faith in businesses and markets. The result could be a crypto industry that's much more entangled with everything else. "The ultimate irony," Allen says, "is that the crypto industry is angling to integrate itself with the rest of the financial system so that it will be supported by the very central banks crypto was originally designed to repudiate."

Despite industry protests, regulations had discouraged major banks from getting too involved in crypto, thus shielding them from its subsequent collapse. The importance of that separation was underscored in March 2023, when two banks that did have significant cryptocurrency exposure failed. At that time most retirement and pension funds had minimal exposure, in part because guidance dissuaded fiduciaries from offering crypto options in 401(k) plans, and in part because of the unavailability of crypto assets via traditional brokerages.

Some of these protections have already eroded as the SEC—despite its reputation as an industry nemesis—approved exchange-traded products linked to Bitcoin and Ether, making them more available to traditional investors and funds. More retirement account administrators, including those managing employer-sponsored 401(k) plans, are offering crypto exposure.

The industry has been working hard to dismantle restrictions on regulated banks getting involved with crypto, lobbying to overturn SEC Staff Accounting Bulletin 121, which instructs banks to disclose the crypto assets they hold on behalf of customers and to maintain sufficient assets to secure those holdings. The industry denounced the bulletin, saying it made it "impossible" for banks to hold cryptocurrencies. It persuaded national lawmakers to introduce a bill in February 2024 that would not only overturn the commission's guidance wholesale but prevent it from putting up similar guardrails going forward. The attempt to revoke the bulletin passed in Congress but was ultimately vetoed by President Joe Biden, who expressed concern that it would "jeopardize the well-being of consumers and investors" and hamstringing the SEC.

Under Trump, no such vetoes are likely to prevent Congress, with its increasing ranks of pro-crypto lawmakers, from peeling back the SEC's authority. Congress can also be expected to try again to move regulatory authority to the Commodity Futures Trading Commission, a much smaller and underfunded regulator with limited experience overseeing markets composed primarily of retail investors. This shift, combined with the likely appointment of a crypto-friendly CFTC chair, would end any hope of meaningful oversight of the crypto industry.

The incoming administration is also likely to target the Consumer Financial Protection Bureau, which was created in the wake of the 2008 crisis to combat predatory behavior in the finance industry. Venture capitalist and recent political megadonor Marc Andreessen has railed against the CFPB, erroneously claiming it was responsible for a campaign of "debanking" that unfairly targeted cryptocurrency and fintech firms. (Incidentally, CFPB director Rohit Chopra has condemned "shady practices" at Synapse, a company that Andreessen's firm, Andreessen Horowitz, had invested in. When Synapse filed for bankruptcy in April, tens of thousands of people were left without access to their money.) After the election, Elon Musk said the government should "delete CFPB." Doing so could dramatically limit, if not eliminate, the government's ability to ensure fairness in consumer financial services, including in areas where it's already expressed concern, such as digital payments and crypto gaming.

The industry's lobbying is strikingly similar to that of former FTX Chief Executive Officer and current federal inmate Sam Bankman-Fried. Before his company's collapse and the exposure of the massive fraud lurking just under its surface, Bankman-Fried hobnobbed with congresspeople to pitch his vision for legislation that he claimed would fill regulatory gaps while allowing the crypto industry to flourish. He publicly spent around \$40 million on campaign contributions. Later it came out that he had spent closer to \$100 million, funneling the difference through "dark money" channels and illegal straw donors.

Although Bankman-Fried and others in crypto said his lobbying would benefit both the industry and consumer protection, critics worried that his efforts were merely self-serving attempts to pay off lawmakers to elevate FTX's business interests. In reality, the proposals would have reduced regulatory oversight of crypto firms, in some cases leaving it up to the industry to "self-regulate" or follow self-imposed "standards." No amount of self-regulation prevented Bankman-Fried from squandering billions of dollars of his customers' money, which has left millions of people without access to their funds for more than two years now.

While the industry has declared itself ready for its mainstream and institutional debut, little has changed to prevent the fraud that's still rampant within it. Lawmakers who promised to prevent anything like FTX from happening again never passed any legislation to do so. Some of them have since cozied up to the industry and agreed to work to undermine any real protections. And although crypto executives condemned the 2022 events and lamented the damage to their reputation, they've opposed new ideas for legislation to increase consumer protections.

As more institutions turn their eyes to cryptocurrencies, and as surging prices tempt a wave of retail investors to buy in as they hope for huge returns, the stakes have never been higher. Prices could continue to go up, powered by the sugar high of having believers in power continues. But the industry's massive influence campaign hasn't changed the fundamental risks or the widespread fraud. Another washout could be more devastating to even more people. It could threaten retirement savings and pension funds, even the broader banking system and economy.

There's a chance that when that happens, crypto will have grown so enmeshed with the rest of the financial world that a collapse in once-fringe speculative digital assets must be prevented at any cost. Will the industry's endemic fraud and risk-taking ultimately be backstopped by government bailouts, funded by taxpayers who may themselves have no exposure to crypto assets? It certainly seems that the believers now descending on Washington are closer than ever to their goal of taking over the financial system. At that point, they may be too big to fail.

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Joshua Brustein

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# Texas Bitcoin Mining Execs Sued for Alleged 'Deception and Brazen Self-Dealing'

 [law.com/texaslawyer/2024/12/17/texas-bitcoin-mining-execs-sued-for-alleged-deception-and-brazen-self-dealing](https://www.law.com/texaslawyer/2024/12/17/texas-bitcoin-mining-execs-sued-for-alleged-deception-and-brazen-self-dealing)

Michael A. Mora

## What You Need to Know

- Executives from Rhodium Enterprises have been hit with a lawsuit.
- Plaintiffs claim millions were invested without disclosure of the facility's sale to Riot Blockchain.
- The lawsuit highlights growing legal disputes in the Bitcoin mining and cryptocurrency industries.

Executives from Rhodium Enterprises have been hit with a lawsuit in Texas state court over allegations of “deception and brazen self-dealing” by several investors who claimed the Bitcoin miner attempted to conceal the sale of the company's operational facilities to a competitor, which led to its bankruptcy filing earlier this year.

Anna Olin Richardson, Joshua Iacuone and Chase Potter, partners at Iacuone McAllister Potter in Dallas, Texas, represent 345 Partners SPV2 LLC, the Grant Fairbairn Revocable Trust and over a dozen additional plaintiffs against the defendants, the Rhodium executives and Imperium Investments Holdings Inc.

“We are seeing a growing number of legal issues and lawsuits in the bitcoin mining/cryptocurrency industry—many of which involve multimillion-dollar damages claims,” Potter said in an emailed statement. “We will work tirelessly and tenaciously to prosecute the individual claims of our clients asserted in this lawsuit. We believe our lawsuit is only the tip of the iceberg with respect to potential claims against the defendants.”

The defendants did not respond to a request for comment.

Rhodium is part of a large Bitcoin mining operation in Rockdale, Texas, which consists of multiple holding companies, operating entities and investment vehicles. Whinstone US Inc., the owner of the facilities for Rhodium's Bitcoin mining operation in Rockdale, was being sold to one of Rhodium's direct competitors, Riot Blockchain Inc.

And soon afterward, the defendants allegedly “conned plaintiffs into investing millions of dollars into Rhodium,” according to the complaint. The plaintiffs claimed that the defendants failed to disclose the sale, as they were required by law, to secure the investment.

This was notable because “the wildly dysfunctional and adversarial relationship between Rhodium and Riot (which includes shutdowns led by Riot’s armed security) is one of, if not the, key reasons behind Rhodium’s bankruptcy filing and substantial harm to plaintiffs,” according to the complaint.

And the defendants further induced the plaintiffs to swap their economic interests at Rhodium Encore for interests at Rhodium Enterprises based on the defendants’ promises of further project completion at the Rockdale facility, per the complaint. As a result, the plaintiffs were structurally subordinated to Imperium’s recoveries and gave Imperium an over-inflated “control premium” as part of the transaction.

The plaintiffs claimed in the complaint that the defendants consistently attempted to conceal their alleged fraud and created an “illusion of transparency” by providing false assurances in over 10,000 personal text messages to the plaintiffs in 2021 and over 1,000 emails from non-Rhodium email addresses.

At the same time, the defendants allegedly repeatedly denied the plaintiffs access to the company’s books and records. In July, Whinstone, led by a team of Am Law 100 firm partners at Foley & Lardner, sued Imperium, Rhodium and Rhodium executives for forming entities to divert revenue from the crypto mining company.

The next month, Rhodium filed for bankruptcy in the U.S. Bankruptcy Court for the Southern District of Texas, where the company revealed debts of up to \$100 million and total assets of \$100 million to \$500 million. However, the plaintiffs in the underlying complaint are not seeking to recover indirect damages from the defendants’ mismanagement and alleged self-dealing.

And in that case before the Tarrant County 342nd District Court, Potter said it is his hope that “Rhodium’s special committee will fully investigate and pursue any and all viable estate claims against the defendants, and that individuals who have pertinent information and evidence will present same to the special committee.”

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[Opinion Lex](#)

## Thought ESG was hard to define? Try its antithesis

Investors who want to bet against progressive values have a few options, none straightforward



US President-elect Donald Trump. Constructing an 'unwoke' portfolio requires careful choreography © Reuters

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The ESG movement has always faced a definition problem. Investors, providers and regulators differ widely on what makes the “environmental, social and governance” grade. But if that debate seemed complex, the anti-ESG movement gives it a run for its money.

Stock-pickers eager to bet against liberal or left-wing values have a few options. Exchange traded funds such as the God Bless America ETF and the America First ETF have sprung up to provide a counterweight to what their sponsors see as a blurring of the line between progressive politics and finance.

Constructing an “unwoke” portfolio requires careful choreography. God Bless America — stock-market ticker YALL — takes the biggest US companies and excludes those where executives have expressed left-leaning opinions unconnected to their business. That approach would screen out a company whose chief executive expresses support for abortion access, but not necessarily one with a quota-based diversity policy.

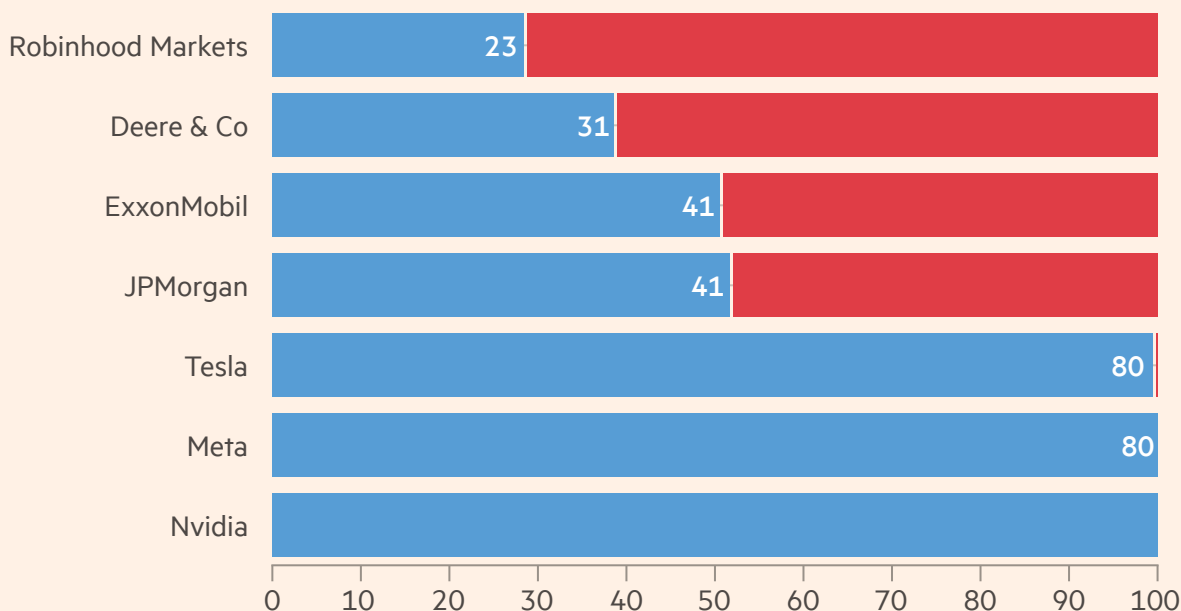
Elsewhere, the America First ETF from Point Bridge Capital — also known as MAGA — takes a different tack: it weighs companies based on employees’ political donations. That, too, takes no account of what a company actually does to make money. But it rules out some high performers, such as stock-market darling Nvidia, whose workforce donated overwhelmingly to the Democrats.

Then there’s Strive Asset Management, co-founded by Vivek Ramaswamy, an ally of President-elect Donald Trump, which attempts to change companies rather than blacklist them: its S&P index tracker casts the votes that come with its holdings against proposals that support stakeholders rather than shareholders. With \$1.6bn of assets under management, its equity funds are more than 10 times bigger than YALL and MAGA combined.

## Corporate America can't help picking a side

Donations by employees to federal political campaigns, by party (%)

Democrat Republican



FINANCIAL TIMES

Source: OpenSecrets

Pro- and anti-ESG shareholders both have to reckon with the \$1.4tn headache that is Tesla. YALL includes it. MAGA skips it, because while boss Elon Musk is a committed Trumper his employees are not, according to data from Open Secrets. Deciding whether Tesla is ESG, anti-ESG, liberal or conservative matters, since its stock has done three times as well as the S&P 500 this year.

Perhaps the biggest challenge in avoiding so-called wokeness is that finance is a small town. ETFs rely on the same few Wall Street names to structure products and make markets. That often leads back to companies like Goldman Sachs and JPMorgan which — while walking a fine line politically — are shunned by many anti-ESG investors.

Meanwhile, white-label providers such as Tidal are happy to structure and advise ETFs with tickers like YALL and KRUZ. But Tidal and peers tend to welcome customers of all stripes — making God Bless America an accidental stablemate of the Adasina Social Justice ETF and more than one ESG-screened index. Casting a vote for president is simple enough; creating a portfolio to match is harder than it sounds.

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**Chemring Group PLC**

## Chemring shares sink 13% as US plant problems overshadow record order book

Snags at Tennessee factory and legacy contract with US government weigh on operating margins



Chemring reported a record order book of £1.04bn in its results for the year ending in October © Timon Schneider/Alamy

**Philip Georgiadis** in London AN HOUR AGO



Shares in British defence specialist Chemring fell sharply as problems at a US factory knocked its margins and overshadowed a record high order book and forecasts of a decade of growth from increased defence spending.

Michael Ord, chief executive of the FTSE 250 company that supplies materials and components for missile systems as well as explosives, said the outlook for the global defence industry was “increasingly robust”.

He predicted “strong growth” over the next 10 years amid the [war in Ukraine](#) and heightened geopolitical tensions in the Asia-Pacific region.

“A lot of commentators will say the age of globalisation is over and we are now in an age of great power competition, certainly in our conversations with our customers that feels the case,” Ord said.

In its results for the year ending in October, released on Tuesday, [Chemring](#) reported a record order book of £1.04bn, and rises in revenue and underlying profits.

But it also said its operating margin had fallen to 13.9 per cent, down from 14.6 per cent a year earlier.

The company said this was in part caused by the impact of “operational challenges” in a Tennessee factory that builds infrared devices to counter enemy attacks.

## Chemring's shares lose ground

Share price, pence



Source: LSEG via markets.ft.com

Production at the factory was disrupted “due to adverse weather conditions”, while there were “delays in the ramp up of its automated facility”, it said.

Margins were also affected by a “legacy” US government contract for the supply of countermeasures from 2016, which was extended into 2025, Chemring added.

Analysts at Barclays also flagged uncertainty over UK government funding for Roke, Chemring’s data and engineering business.

“While we remain confident in the medium to long-term value opportunity in the stock . . . there is no denying that the details of today’s results have generated even more questions than we previously had over the 2025 fiscal year,” Barclays said in a note.

Shares fell 13 per cent to 314p, their lowest level in 12 months.

Still, analysts at Investec agreed the longer-term prospects for the company remained “strong”.

“Customers were last week called by the Nato [secretary-general] to spend more and shift to a wartime mindset,” Investec said in a note.

European Nato members are [holding talks](#) about increasing the alliance’s target for defence spending to 3 per cent of GDP, in response to Russia’s war against Ukraine.

The rise in military spending has strained the industry’s supply chain, which has suffered from decades of under-investment since the end of the cold war.

Ord said it was therefore “critical” that Chemring had delivered “all of our commitments and our promises to our customers” in the financial year.

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## Chinese Fintech 9F Partially Beats Investors' IPO Suit

By **Katryna Perera**

Law360 (December 16, 2024, 8:18 PM EST) -- A New Jersey federal judge has partially dismissed a securities fraud class action against 9F Inc. that accused the Chinese financial technology company of hiding its financial woes and not disclosing an "illegal arrangement" that investors said it had with an insurance carrier.

U.S. District Judge Michael E. Farbiarz issued an **opinion and order** Thursday that dismissed a claim the investors asserted under Section 11 of the Securities Act of 1933 that allows investors to sue if they have been misled by a company's registration statement.

Craig J. Holland, a 9F investor, **alleged in a complaint** brought in early 2021 that 9F's shareholders bought stocks based on the registration statement the company filed in connection with its initial public offering. However, Judge Farbiarz determined Thursday that the investors' assertion "stands alone," and that they have offered no other factual information to support the claim.

"Nothing is fleshed out or further specified in the complaint. There are no details as to how the stock that was bought might allegedly be 'traceable' to the registration statement," the judge wrote. "Bottom line: The plaintiffs' assertion that the stock was 'traceable' does not purport to rest on any factual allegations."

Judge Farbiarz found that under the standard outlined in the 2009 U.S. Supreme Court case *Ashcroft v. Iqbal*, "bare assertions" — such as Holland's in the instant action — are "not enough to go on."

"In light of *Iqbal*, 'legal conclusions 'done up' as factual allegations must be put aside.' And when they are 'put aside' here, there is nothing left," the opinion said.

However, the judge refrained from dismissing the suit's claim that 9F sold unregistered securities, saying the investors "have suggested they may walk away" from the claim.

He also declined to rule on the investors' control person liability claim since it can only go forward by "piggy-backing" on one of the suit's other claims.

"As noted, there is a good deal of flux in this case ... it is therefore premature to address [investors' control person liability] claim," according to the ruling.

Counsel for the investors told Judge Farbiarz they intend to replead to establish facts showing that their purchased shares are traceable to the registration statement.

In the complaint, Holland alleged that a July 2019 registration statement made before 9F's Aug. 14, 2019, IPO didn't disclose that most of the accounts receivable listed by the company as uncollectible was money that Property and Casualty Co. Ltd., 9F's insurance partner, owed.

The investors have argued that the registration statement also failed to disclose that 9F had a contractual dispute with the insurer over payment of service fees. The dispute was the subject of multiple legal actions in China.

In the IPO, the company sold 8.9 million American depository shares at \$9.50 per share. On Monday, the stock was trading at around \$1.50 a share.

The fintech company, headquartered in Beijing, offers various financial products and services,

including loan products, online wealth management and payment facilitation.

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

The investors are represented by James E. Cecchi, Donald A. Ecklund and Kevin Cooper of Carella Byrne Cecchi Olstein Brody & Agnello PC, Robert V. Prongay, Ex Kano S. Sams II, Charles H. Linehan and Pavithra Rajesh of Glancy Prongay & Murray LLP, and Howard G. Smith of the Law Offices of Howard G. Smith.

9F is represented by Scott D. Musoff, Robert A. Fumerton, Michael C. Griffin, Isaiah Strong, Steve Kwok and Beatriz (Bea) Paterno of Skadden Arps Slate Meagher & Flom LLP.

The case is Holland v. 9F Inc. et al., case number 2:21-cv-00948, in the U.S. District Court for the District of New Jersey.

–Additional reporting by Ryan Harroff. Editing by Covey Son.

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# Ginkgo Bioworks Investors Get Final OK Of \$17.8M Settlement

By **Emilie Ruscoe**

Law360 (December 16, 2024, 10:08 PM EST) -- Investors in biotech company Ginkgo Bioworks Holdings Inc. have gotten final approval for their \$17.75 million deal to end proposed class action claims that the company and its leaders distorted Ginkgo's finances, mischaracterizing certain related party deals, to garner shareholder support for its merger with a special purpose acquisition company.

In an order Friday in federal court in Oakland, California, U.S. Magistrate Judge Kandis A. Westmore found that the settlement's estimated recovery of 37.6% to 44.56% of the maximum recoverable damages that the investors might see at trial was a percentage range greater than recoveries deemed "fair and reasonable" in the Northern District of California.

"The court finds that this factor favors final approval," the judge said Friday.

The court also approved payments to the investors' counsel of over \$4.64 million, comprising a fee of 25% of the settlement fund, or nearly \$4.4 million, and reimbursement of nearly \$204,000 in litigation costs. Lead plaintiff Sharon Bernstein received an incentive award of \$5,000 for her involvement in the matter.

Judge Westmore's order ends claims that in its 2021 proxy registration statements filed ahead of the company's business combination with special purpose acquisition company Soaring Eagle Acquisition Corp., the company had manufactured "the appearance of economic activity" with its description of transactions with certain businesses described in the suit as related parties.

In the latest version of the suit, from March 2023, Bernstein described the Boston-headquartered company as a synthetic biology company focused on engineering a certain yeast strain to recreate certain scents and flavors via fermentation for extraction and use in various consumer products.

The company's yeast strain engineering lab provides research and development services to other companies, and it maintains a repository of its yeast strains and data on the strains, Bernstein said.

The investor cited the company's SPAC merger filings, which state that the company makes money "in much the same way that cloud computing companies charge usage fees for utilization of computing capacity or contract research organizations charge for services."

But Bernstein claimed that that wasn't the case, asserting that the company's largest outside investors, whose collective stake in the company totaled nearly 43%, had "provided the overwhelming majority of funds that were recirculated by related-party companies back to Ginkgo" as charges for services.

The complaint points to a pair of short-seller reports on Ginkgo in October 2021 pointing out that, among other things, Ginkgo's related-party companies share an address with Ginkgo's headquarters and list few if any employees online.

The investor claimed that the related-party entities were on the other side of so-called round-trip transactions in which funds from Ginkgo and its investors were given to the entities, then returned to Ginkgo, in some cases as purported prepayments for Ginkgo's services.

The dollar sums of these transactions were used in the SPAC merger filings to support what Bernstein

described as "whopping valuation of \$15 billion" for Ginkgo.

Alongside the company, the complaint names eight directors of Soaring Eagle Acquisition Corp., the seven directors of the company after its merger and a Ginkgo corporate development executive.

In a Monday statement, Brian O'Connell, an attorney for Bernstein, told Law360 that "we are very pleased with this settlement, which represents a favorable recovery for the Class and involved novel legal issues related to SPACs. We look forward to completing the claims process and distributing the settlement to the class."

Representatives for Ginkgo did not immediately respond to requests for comment Monday.

Bernstein is represented by Joshua B. Silverman, Brian O'Connell, Genc Arifi and Jennifer Pafiti of Pomerantz LLP, and by Brian Schall and Rina Restaino of the Schall Law Firm.

The defendants are represented by Jordan Eth and David J. Wiener of Morrison & Foerster, and by William Savitt, Graham W. Meli and Anitha Reddy of Wachtell Lipton Rosen & Katz.

The case is Bernstein v. Ginkgo Bioworks Holdings Inc et al., case number 4:21-cv-08943, in the U.S. District Court for the Northern District of California.

--Editing by Karin Roberts.

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# Global Payments' \$3.6M Investor Deal Gets Judge's Final OK

By **Emilie Ruscoe**

Law360 (December 16, 2024, 7:55 PM EST) -- Investors in Atlanta-based Global Payments Inc. have gotten final approval for a \$3.6 million deal ending claims the company harmed shareholders by allegedly misleading consumers into signing up for a program with undisclosed fees.

In a Friday order in Georgia federal court, U.S. District Judge Leigh Martin May signed off on the investor deal, finding that the settlement class — comprising those who bought the company's shares between Oct. 31, 2019, and Oct. 18, 2022 — had reached a deal that is "in all respects, fair, reasonable and adequate."

Judge May also approved attorney fees equal to one-third of the settlement, or about \$1.2 million, plus nearly \$53,500 in litigation costs and \$12,500 awards for each of the three co-lead plaintiffs.

"The relief provided for the settlement class under the settlement is adequate taking into account the costs, risks, and delay of trial and appeal, the proposed means of distributing the settlement fund to the settlement class; and the proposed attorneys' fee award," Judge May said Friday.

The investors **requested** final approval for the settlement in November, telling the court that the deal will see investors receive "a substantial percentage of the maximum damages that could be established at trial."

The case was filed in February 2023, five months after the Consumer Financial Protection Bureau took aim at Global Payments with claims its subsidiary Active Network LLC used deceptively vague website signage to convince users to sign up for its Active Advantage discount membership club.

According to the CFPB, the companies collected over \$300 million in fees from more than three million consumers enrolled in Active Advantage, and the majority of consumers who sought to cancel their membership reported being "unaware" they'd been enrolled. That matter is still ongoing.

The Friday orders resolve claims that Global Payments didn't tell investors that a "material portion" of revenue for Active Network resulted from "tricking consumers" into signing up for Active Advantage.

According to the investors, the program's free trial automatically turned into paid memberships that renew automatically unless canceled, leading to "hundreds of millions of dollars — and thousands of customer complaints" over the years.

The plaintiffs are represented by Jeremy A. Lieberman and Jonathan Park of Pomerantz LLP, James M. Evangelista of Evangelista Worley LLC and Vincent Briganti, Andrea Farah and Alesandra Greco of Lowey Dannenberg PC.

The defendants are represented by Michael R. Smith, Benjamin Lee, Peter Starr and Matthew Rosenthal of King & Spalding LLP.

The case is Shafer v. Active Network LLC et al., case number 1:23-cv-00577, in the U.S. District Court for the Northern District of Georgia.

--Additional reporting by Kelcey Caulder. Editing by Jay Jackson Jr.



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## Conn. Utility Says PFAS Class Claims Belong With Regulators

By **Brian Steele**

Law360 (December 16, 2024, 6:17 PM EST) -- Most of the claims in a proposed class action against a Connecticut water company that allegedly failed to protect customers against "forever chemicals" cannot proceed because they needed to be heard first by state regulators, the utility argued in seeking to trim the complaint.

Aquarion Water Co. asked a state court judge to throw out two counts for breach of implied warranty and one for strict liability from an **amended** complaint that customers Deborah Vincent, Kate Losey and Courtney Ritchotte filed Oct. 29, which would leave only a claim for violation of the Connecticut Unfair Trade Practices Act. The dismissal memorandum filed Friday argues that the named plaintiffs failed to exhaust their administrative remedies with the state Public Utilities Regulatory Authority and the Department of Public Health.

The alleged injury is economic, Aquarion said, noting that the plaintiffs said they would not have purchased the water if they had been aware of trace PFAS chemical contamination. The proper route for dealing with that injury is participation in PURA's ratemaking process, while DPH is in charge of enforcing the Safe Drinking Water Act, the memo said.

"The Connecticut legislature delegated considerable authority to PURA and the DPH to oversee the safe and cost-efficient distribution of drinking water to Connecticut residents," Aquarion said. "For plaintiffs to attempt to bypass these specialized regulatory bodies and their governing processes would upset the carefully crafted statutory scheme enacted by the legislature for the protection, procurement, sale, and distribution of a vital public resource."

The suit seeks damages for economic losses, as well as common law and statutory punitive damages for a class of Connecticut citizens who bought or ingested Aquarion water contaminated with detectable levels of PFAS, plus attorney fees and costs.

"PFOS and PFOA accumulate in humans' blood and organs, including kidneys and the liver, and interfere with the human body's functions, including the functions of organs and immune systems, leading to adverse health outcomes," the complaint said, referring to two types of PFAS chemicals used in clothing, furniture, food packaging and more.

Aquarion provides water to more than 750,000 people in 72 cities and towns in Connecticut, Massachusetts and New Hampshire, the plaintiffs said. The company's 2019 testing of around 70 public water systems in Connecticut found PFAS chemicals in its public water supply in dozens of communities, according to the complaint.

"Despite this knowledge, Aquarion has not taken action to reduce PFAS chemical contamination levels to non-detectable levels," the complaint said.

Aquarion said in its memo that the complaint does not allege that any class member suffered an actual physical harm or that the water "failed to perform any of the myriad functions for which water is employed on a daily basis."

Further, the company said, neither "the Environmental Protection Agency nor the DPH had enforceable testing requirements or maximum contaminant levels for PFOA or PFOS" until a new EPA regulation went into effect in June, setting the limit at four parts per trillion.

"Under the new regulation, however, public water systems have three years within which to complete initial monitoring of PFAS levels and must disclose those monitoring results to the public starting in 2027," the memo said. "Moreover, the EPA rule gives public water systems until 2029 to implement solutions to reduce PFAS if monitoring shows that drinking water levels exceed the MCLs."

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

The customers are represented by David S. Golub, Ian W. Sloss, Johnathan Seredynski, Krystyna Gancoss and Kate Sayed of Silver Golub & Teitell LLP.

Aquarion is represented by Kevin W. Hadfield and Timothy J. Fazio of Manning Gross & Massenburg LLP and Amy Leete Van Dyke of Eversource Energy.

The case is Vincent et al. v. Aquarion Water Co., case number UWY-CV24-6076640-S, in the Waterbury Judicial District of the Connecticut Superior Court.

--Editing by Patrick Reagan.

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# DraftKings Sued In NY For Secret Use Of Meta Tracking Pixel

By **Elaine Briseño**

Law360 (December 16, 2024, 5:43 PM EST) -- A New York City resident filed a proposed class action against DraftKings, alleging the sports betting company intentionally disclosed personal information of its customers to third parties for targeted advertising, in violation of the federal Video Privacy Protection Act.

Plaintiff Jeffrey Wan alleges in his Manhattan federal court lawsuit that DraftKings Inc. shared, without consent, his video viewing habits and other information with Meta Platforms Inc., the parent company of Instagram and Facebook. DraftKings operates an online casino and is classified as a "video tape service provider" under the VPPA.

"Businesses, such as defendant, use Facebook's business tools to monitor and record their website and app visitors' devices and specific activities for marketing purposes," the Friday complaint said.

This is done, according to the complaint, using a Facebook tracking pixel that DraftKings installed on its website and apps. The pixel is not necessary for the website and app to work properly, the lawsuit notes.

"Defendant's motivation for using the Facebook Pixel and related Facebook business tools is simple – it financially benefits defendant in the form of advertising and information services that defendant would otherwise have to pay for," the complaint said.

When a customer uses the defendant's website, it records the audio visual content being used and transmits that to Facebook along with the customers' personal identifiers.

"However, customers are unaware of this because, amongst other things, defendant's transmissions are completely invisible to ordinary customers viewing defendant's webpages," the lawsuit said.

Several other plaintiffs have used the VPPA to sue big-name corporations and organizations, including the National Basketball Association, Paramount and Warner Bros., for sharing their personal information through the tracking pixel.

Congress passed the VPPA in 1988, targeting brick and mortar video tape stores. The act made it unlawful to disclose the "personally identifiable information," including videos someone rented, without consent. The law has been expanded to include "on-demand cable services" and internet streaming services, according to the lawsuit.

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

Wan is represented by Adrian Gucovschi, Benjamin Rozenshteyn and Nathaniel Haim Sari of Gucovschi Rozenshteyn PLLC.

Counsel information for DraftKings was not immediately available.

The case is Wan v. DraftKings Inc., case number 1:24-cv-09557, in the U.S. District Court for the Southern District of New York.

--Editing by Alex Hubbard.



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## NJ Judge Approves Settlement In Artificial Turf MDL

By **Carla Baranauckas**

Law360 (December 16, 2024, 4:57 PM EST) -- A New Jersey federal judge has granted final approval to a proposed nationwide settlement to end a multidistrict litigation brought by consumers who purchased retired artificial fields from FieldTurf USA Inc.

Details of the settlement were not included in the **order** signed Friday by U.S. District Judge Michael A. Shipp. But the order awarded nearly \$6.5 million in attorney fees and costs to the class counsel and ordered the defendants to reimburse more than \$1.8 million in costs and expenses in addition to the compensation available to the class.

Judge Shipp also confirmed the appointment of Seeger Weiss LLP and the Moskowitz Law Firm PLLC as class counsel for the settlement class. Carella Byrne Cecchi Brody & Agnello PC was named liaison counsel for the settlement class.

"All claims against the defendants in the action are hereby dismissed on the merits and with prejudice," the order said.

In July 2023, Judge Shipp **granted class certification** to school districts and local governments in California, New York, New Jersey and Pennsylvania that purchased Duraspine artificial turf from FieldTurf.

The school districts claimed that despite knowing that its artificial turf was defective, FieldTurf sold it anyway. They initially attempted to bring a consolidated suit claiming fraudulent concealment, statutory consumer fraud, implied warranty and unjust enrichment. Judge Shipp denied that effort in August 2022, saying the cases involved predominately individual issues instead of common questions.

But in a filing two months later, the school districts focused on a common inherent defect in the Duraspine turf, which FieldTurf knowingly admitted in sales presentations.

FieldTurf contended that one of its suppliers, TenCate, had provided cheap materials fabricated in a poor manufacturing process. FieldTurf sued TenCate, but the school districts maintained that despite the lawsuit, FieldTurf had knowingly sold faulty artificial turf. FieldTurf discontinued use of the Duraspine product in 2012.

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

The plaintiffs are represented by Christopher A. Seeger, Jennifer R. Scullion and Christopher L. Ayers of Seeger Weiss LLP, Adam M. Moskowitz and Howard M. Bushman of The Moskowitz Law Firm PLLC and James E. Cecchi and Michael A. Innes of Carella Byrne Cecchi Brody & Agnello PC.

The company is represented by Diane P. Sullivan, Konrad Cailteux and Allison Semaya of Weil Gotshal & Manges LLP and Reid Skibell of Glenn Agre Bergman & Fuentes LLP.

The case is In re: FieldTurf Artificial Turf Marketing and Sales Practices Litigation, case number 3:17-md-02779, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Jonathan Capriel. Editing by Rich Mills.