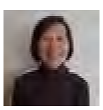
Clock's ticking for businesses to claim $5.5B credit card settlement

usatoday.com/story/money/small-business/2024/12/18/deadline-claim-visa-mastercard-settlement/76948117007

SMALL BUSINESS

Credit cards

Listen up, businesses! Time's running out to claim your share of a $5.5B settlement



Medora Lee

USA TODAY

Businesses still have time, but not a lot, to claim their part of a $5.5 billion class action settlement stemming from Visa and Mastercard's alleged fee overcharges, attorneys said.

The deadline to file a claim is Feb. 4, extended from Aug. 30. Any nonprofit or business is eligible to file a claim if it accepted Visa and/or Mastercard credit or debit payments between Jan. 1, 2004, and Jan. 25, 2019. This includes businesses that have since closed or gone bankrupt.

The settlement was a result of a long-running antitrust case in which the two credit card network giants allegedly overcharged merchants by exacting excessive interchange fees, also called swipe fees. Merchants pay these fees, often a percentage of the sale amount, to bank card issuers and the networks each time a card is swiped.

“The goal (of the extension) is to get this money into hands of merchants who were allegedly overcharged over this long period of time,” said Alexandra "Xan" Bernay, partner at Robbins Geller Rudman & Dowd LLP, a co-lead counsel with Berger Montague and Robins Kaplan lawfirms on the case. "We want to make sure people have the time to get their claim in.”

How can businesses file a claim?

Eligible claimants can file online at the official website. From there, enter and submit business details, transaction data, and proof of Visa/Mastercard payment processing during the eligible period. Businesses will have an opportunity to upload supporting documents. You don’t need to hire a lawyer.

If merchants changed their business name or structure over the 15-year period the settlement covers, there would be multiple entries grouped under the same taxpayer ID.

“The extension has been beneficial,” said Chad Anglin, owner of San Diego, California-based Pigment, which has been selling design savvy gifts, flora and furniture since 2007. “It’s given me time to go through my records.”

The settlement administrator that verifies claims and assesses them also helps, said Ryan Marth, partner at Robins Kaplan.

The administrator “has access to a lot of credit card and bank data. So, for many merchants, they can just go to the site, create an account with a taxpayer ID, and after a few days, their information will show up based on the administrator’s data,” he said. “If the administrator doesn’t have the records, (businesses also) have the opportunity to ask the administrator to provide additional resources to help search for sales data.”

Most merchants will find their data pre-populated in the database. In some cases, merchants are asked to provide the available data that they have, supporting a claim.

How much money will businesses get back?

Amounts will vary depending on the size of the business and how many valid claims are submitted, Bernay said.

But “most will find it’s worth their time to file,” she said.

When will businesses get paid?

There’s no date for when checks will get sent, the attorneys said.

“There’s a process that has to take place by the claims administrator to vet and audit claims to make sure they haven’t’ been wrongly submitted and everything’s above board and correct,” Bernay said. “We tell businesses to remain patient.”

Is this related to the Credit Card Competition Act?

This case is separate from this battle merchants are currently waging against Visa and Mastercard over credit card swipe fees.

Merchants claim Visa and Mastercard, which control more than 80% of the market for card purchases, comprise a duopoly that gets to set swipe fees. They’ve been asking Congress for years to pass the Credit Card Competition Act to lower fees. The Act would require merchants have a choice of at least one card network that’s not Visa or Mastercard to process their transactions.

Credit card payments groups oppose the legislation, saying the fees support fraud-prevention technology and consumer rewards programs. Retailers also benefit from accepting credit cards because people tend to spend more, they said.

Back in 2005, when this case was filed Visa and Mastercard were bank associations, meaning groups of banks owned and governed each of them, Marth said. Those banks set the fees collectively, instead of competing, which is why this was an antitrust case.

Since then, Visa and Mastercard each spun out into their own public companies.

Medora Lee is a money, markets and personal finance reporter at USA TODAY. You can reach her at mjlee@usatoday.com and subscribe to our free Daily Money newsletter for personal finance tips and business news every Monday through Friday morning.

Brooge Energy investors file fraud complaint against Ernst & Young

reuters.com/legal/brooge-energy-investors-file-fraud-complaint-against-ernst-young-2024-12-18

Anna Hirtenstein

The logo of Ernst & Young is seen at a branch in Zurich, Switzerland October 24, 2018. REUTERS/Arnd Wiegmann/File photo Purchase Licensing Rights, opens new tab

- Plaintiffs invested in company that bought Brooge
- Brooge agreed settlement over US SEC fraud charges in 2023
- Ernst & Young audited Brooge

Dec 18 (Reuters) - Some shareholders in Brooge Energy have filed a fraud complaint in the United States against Ernst & Young, alleging the auditor failed to identify fabricated revenues in two years of the oil storage firm's annual reports.

The plaintiffs are Stephen Cannon, Bryant Edwards and Neil Richardson, who were investors in a so-called special purpose acquisition company (SPAC) that bought Brooge in 2019, according to the filing with the United States District Court in the Southern District of New York.

The plaintiffs allege Brooge fabricated revenues amounting to tens of millions of dollars and that Ernst & Young's audit of the company was fraudulent.

Ernst & Young said it is unable to comment on legal proceedings. Brooge also did not respond to an email seeking comment.

Brooge agreed to a settlement with the U.S. Securities and Exchange Commission in 2023 over fraud charges, which involved paying a $5 million penalty.

"The fundamental financial picture presented by Brooge to plaintiffs was a fraud: in fact, Brooge fabricated between 30% and 80% of its 2018, 2019 and 2020 revenues," the filing said.

"Brooge could not have effectuated this scheme without critical support from Ernst & Young."

Brooge, an oil-storage leasing company based in the United Arab Emirates' Fujairah, was set up in 2013 and counts Mohammed bin Khalifa, the eldest son of the previous president of the UAE, among its shareholders.

Brooge's shares closed at $1.585 on Tuesday, down from a peak of $12.99 in March 2020.

The board of Dubai-listed shipping firm Gulf Navigation (GNAV.DU), opens new tab in September approved an acquisition of companies and assets owned by Brooge, including a capital increase, according to UAE state news agency WAM.

One of Brooge's lines of business was with Coral Energy Pte. Ltd., according to the filing. Coral was later rebranded as 2Rivers and was sanctioned by Britain on Tuesday for allegedly playing a key role in the Russian oil trade.

Reporting by Anna Hirtenstein Editing by Mark Potter

Bloomberg Law News 2024-12-18T13:13:30600037567-05:00

Drugmaker Sued Over Optimistic Statements Before FDA Rejection

By Gillian R. Brassil 2024-12-18T11:34:20000-05:00

- **COURT**: S.D.N.Y.
- **TRACK DOCKET**: No. 1:24-cv-09715 (Bloomberg Law subscription)

Applied Therapeutics, Inc. concealed problems with the clinical trial of its metabolic disorder treatment, prompting an 80% stock selloff the week investors learned the FDA wasn't approving the company's new drug application, a proposed class action said.

In 2024, the biopharmaceutical company and two key executives touted trial results and confidence in its application to the US Food and Drug Administration for Govorestat, its drug targeting Galactosemia, a rare metabolic disorder that prevents someone from processing sugars found in many founds and dairy products, investor Adrian Alexandru alleged. Applied Therapeutics also announced at the same time it was seeking the equivalent new drug approval in Europe, according to the lawsuit filed Tuesday in the US District Court for the Southern District of New York.

In reality, there were hidden issues with its Phase III INSPIRE trial related to electronic data capture and a dosing error in the dose-escalation part of the study, Alexandru said.

Investor enthusiasm collapsed on Nov. 27 when Applied Therapeutics said in a press release that the FDA determined it couldn't approve the company's application, the complaint said.

Applied Therapeutics stock plummeted more than 80% in a week, according to Alexandru, falling from $10.21 per share on Nov. 26 to $8.57 on Nov. 27. It closed at $1.75 per share on Dec. 2. That day Applied Therapeutics said in a federally-required disclosure it received an FDA "warning letter" about those clinical trial issues. The stock landed at $1.29 on Dec. 5.

The proposed class includes people who invested from Jan. 3, the day Applied Therapeutics announced it had submitted its new drug application, to Dec. 2. The plaintiff said there could be anywhere from hundreds to thousands of class members.

Alexandru, who is represented by Levi & Korsinsky, LLP, seeks damages on behalf of the class. The case is assigned to Judge Denise L. Cote.

Applied Therapeutics didn't respond to an email seeking comment. Neither did Alexandru's attorney.

The case is Alexandru et al v. Applied Therapeutics, Inc. et al , S.D.N.Y., No. 1:24-cv-09715, complaint filed 12/17/24 .

To contact the reporter on this story: Gillian R. Brassil in Washington at gbrassil@bloombergindustry.com

To contact the editor responsible for this story: Andrew Harris at aharris@bloomberglaw.com

Bloomberg Law

Request a Demo Login

Securities Law News
December 17, 2024, 12:43 PM PST

Liquor Company Misled on Post-Pandemic Demand Dip, Investor Says

By Gillian R. Brassil

- **COURT**: S.D.N.Y.
- **TRACK DOCKET**: No. 1:24-cv-09685 (Bloomberg Law subscription)

MGP Ingredients, Inc. misled investors about its handling of declining alcohol demand after the pandemic, spurring three significant stock drops and hundreds of millions of dollars in losses, a proposed class action lawsuit says.

MGP and certain current and former executives touted strong demand and normal inventory levels when really there had been a slowdown and oversupply since 2023, said plaintiff Operating Engineers Construction Industry Miscellaneous Pension Fund, which administers benefits on behalf of of construction equipment engineers.

"Worse, Defendants had assured investors that they were positioned differently than their competitors, and that this was a non-issue, because the Company had already taken steps to mitigate the risk," said the complaint filed Monday in the US District Court for the Southern District of New York, "when in fact it had not."

The liquor supplier had enjoyed the benefits of heightened pandemic drinking, "ramping up their production and reporting favorable results earnings call after earnings call," said the fund.

But demand for liquor dissipated in 2023. And while shareholders understood that phenomenon, executives said that MGP was "was ahead of the game, having already sold much of, or 'cycled through,' its inventory," the complaint read. Executives expressed that the company's peers had greater exposure to overstocking than MGP, that it had properly managed inventory, and that destocking wasn't a "core issue," the fund said.

After CEO David Bratcher said destocking would be an issue for the industry in 2024, but remained positive about MGP, the stock price fell nearly 15%, closing at $78.14 per share on Feb. 22, 2024. That was the largest drop since pandemic lockdowns started in March 2020, according to data compiled by Bloomberg, and it erased "more than $193 million worth of market capitalization," per the complaint.

MGP remained outwardly optimistic—until Oct. 17, when the company said soft demand and high inventories were undercutting sales, the fund said. Then on Oct. 31, executives said excess inventories would have a larger impact on 2025 sales than previously thought, the lawsuit said, and the company had to scale back certain operations to save money.

Analysts expressed surprise that MGP leadership was apparently slow to catch on to industry-wide issues, the fund said.

The stock suffered significant drops, the fund said. Over the course of three trading days after Oct. 17, the share price plummeted 29.5% to close at $57.50 on Oct. 22; on Oct. 31, the stock slipped almost 15% and closed at $48.04. "Investors suffered losses of approximately $457 million as a result of these declines," the suit said.

The fund seeks damages. It alleged the executives knew or recklessly disregarded the misleading nature of their rosy statements.

The proposed class would include people who invested in MGP from May 4, 2023 through Oct. 30, 2024.

Grant & Eisenhofer PA represents the fund and didn't respond to an email seeking comment. MGP did not immediately respond to a media submission on its website.

The case is Operating Eng'rs Construction Indus. Miscellaneous Pension Fund v. MGP Ingredients, Inc. et al , S.D.N.Y., No. 1:24-cv-09685, complaint filed 12/16/24 .

To contact the reporter on this story: Gillian R. Brassil in Washington at gbrassil@bloombergindustry.com

To contact the editor responsible for this story: Brian Flood at bflood@bloombergindustry.com

Securities Law News

December 17, 2024, 3:57 PM PST

Bumble Faces Another Investor Lawsuit for Misleading Forecast

By Ryan Autullo

- COURT: W.D. Texas
- TRACK DOCKET: No. 1:24-cv-01540

Bumble Inc.'s officers and board of directors made false or misleading statements projecting revenue growth from adding new features to the dating app, a shareholder alleges in a lawsuit Tuesday.

The statements from Bumble founder Whitney Wolfe Herd and others caused an investor, Carmela Harnum, to purchase stock "at prices that were artificially inflated," the lawsuit alleges.

Harnum, represented by Kendall Law Group PLLC and Rosen Law Firm PA, filed the suit in the US District Court for the Western District of Texas on Tuesday.

Her lawsuit follows at least two others Bumble investors have brought for the alleged misstatements in the last three months.

In 2023, Bumble introduced two new subscription tiers aimed at elevating users' experience. Then, in early 2024, it announced it would be relaunching its app geared toward capturing a broader audience. During this time, Wolfe Herd and the board repeatedly informed the investing public that these changes would result in revenue growth, the suit says.

"However, the truth began to emerge on February 27, 2024, when the company reported disappointing financial results for the fourth quarter of 2023 and decreased its guidance for 2024," the lawsuit said. "On this news, Bumble's stock price declined from $13.18 per share on February 27, 2024 to $11.23 per share on February 28, 2024."

The stock tumbled again, from $8.06 per share to $5.71 per share on Aug. 8, after the company reported financial results for the second quarter of 2024, the suit says.

Bumble didn't respond to request for comment Tuesday.

The case is Harnum v. Wolfe Herd , W.D. Tex., No. 1:24-cv-01540, 12/17/24 .

Bloomberg Law News 2024-12-18T13:03:2052193761-05:00

Bitcoin Miner Singularity Must Defend Investor Suit Over CEO

By Ufonobong Umanah 2024-12-18T10:23:33000-05:00

- Investors said statements about partner firms could be false
- CEO may have been in position to know statements were false

Singularity Future Tech. Ltd failed to convince a federal court to fully dismiss a proposed securities class action filed after short sellers saidd its CEO was wantedin China for running a Ponzi scheme.

Singularity shareholders sufficiently alleged that the logistics and Bitcoin mining venture made false statements about its supposed business partners, which the US District Court for the Eastern District of New York said were “potentially set up” to siphon funds away from a failing business. Singularity’s stock dropped 30% and then 11% after the short sellers published their reports, the shareholders said.

Judge Brian M. Cogan said that only Singularity and CEO Yang Jie could be held liable for those claims. Otherwise, the court granted motions to dismiss from other defendants, after saying that the shareholders’ complaint was “unwieldy.”

As part of Singularity’s pivot to Bitcoin mining, it said that it partnered with an American electricity provider—Golden Mainland Inc—with access to 10 gigawatts of power. According to the short sellers, “10 gigawatts of power could supply 7.5 million homes” and would double the output of America’s largest hydro plant, the court said.

Singularity also partnered with Rich Trading, said to be a high-tech computer parts dealer, “to reverse its declining business” outside of Bitcoin mining. But the short sellers said there was no evidence Rich Trading dealt in computer parts, rather “two shipments of towels from China,” according to court documents.

And if Singularity’s statements were false, one could say Jie was “grossly reckless in representing that a six-month-old company with almost no infrastructure owned the resource rights to power 5% of all American homes,” Cogan said. Jie could also have known Rich Trading wasn’t really a computer parts dealer, the court said.

The short sellers said Jie had attracted Chinese legal attention after taking hundreds of millions of dollars from investors in a prior venture, "Nowhere does Singularity represent that Jie had a clean record, and Singularity did not selectively omit Jie's" prior business venture, the court said, ruling it couldn't form the basis of a Section 10(b) claim, unlike those about Golden Mainland and Rich Trading.

If the shareholders are right, "the corrective disclosures contributed, at least in part, to the sudden decreases," in stock value, Cogan said. The extent to which Jie's potential criminal history contributed to the stock losses couldn't be resolved at the motion to dismiss phase, the court said.

Berger Montague PC and Kirby McInerney LLP represent the shareholders.

Hunter Taubman Fischer & Li LLC represented Singularity. Becker & Poliakoff LLP represented Jie.

The case is Crivellaro v. Singularity Future Tech. Ltd. , E.D.N.Y., No. 1:22-cv-07499, 12/17/24 .

To contact the reporter on this story: Ufonobong Umanah in Washington at uumanah@bloombergindustry.com

To contact the editor responsible for this story: Drew Singer at dsinger@bloombergindustry.com

Securities Law News

December 17, 2024, 8:00 AM PST

AIG Unit Settles D&O Coverage Dispute With Luggage Brand Away

By Olivia Alafriz

- Parties agree to settle before summary judgment hearing
- Away sued National Union over D&O coverage in January

Premium luggage company Away and an American International Group Inc. unit agreed to settle a dispute over whether the insurer owed legal costs for a lawsuit alleging Away's co-CEOs had allowed an unauthorized securities sale and failed to properly execute a 2019 tender offer.

The parties have reached a confidential settlement agreement in the case, National Union Fire Insurance Co. told Delaware Superior Court Judge Eric M. Davis in a Monday letter.

Away sued the insurance carrier in January, asking the court to declare the AIG unit had to pay its legal defense and settlement costs for the underlying suit under a directors and officers policy.

The insurer argued that an exclusion for claims arising out of contractual liability barred coverage for the underlying suit. It asked the court to dismiss Away's suit and to allow for resolution in a parallel action in New York state court.

Away pushed back, arguing the exclusion didn't apply to the underlying dispute, and filed a motion for partial summary judgment on whether the exclusion barred coverage.

Davis denied National Union's motion to dismiss after the New York judge stayed that case pending the partial summary judgment motion in the Delaware court.

A hearing on the summary judgment motion was set for Tuesday, but the parties requested it be canceled after settling and said they expected to file a joint motion to dismiss within 30 days.

Cohen Ziffer Frenchman & McKenna LLP and Potter Anderson & Corroon LLP represent Away. Kennedys represents National Union.

The case is JRSK Inc. d/b/a Away v. Nat'l Union Fire Ins. Co. , Del. Super. Ct., No. N24C-01-162, letter filed 12/16/24 .

Judge advances LA County opioid crisis lawsuit against prescription drug middlemen

courthousenews.com/judge-advances-la-county-opioid-crisis-lawsuit-against-prescription-drug-middlemen

Pharmacy benefit managers have enormous influence over which prescription drugs are covered by insurance companies. Until recently, they've escaped blame, and legal liability, for the opioid epidemic.

Hillel Aron / December 17, 2024

OxyContin pills are seen at a pharmacy in Montpelier, Vt., in 2013. (AP Photo/Toby Talbot, File)

LOS ANGELES (CN) — A public nuisance lawsuit filed by Los Angeles County against two pharmacy benefit managers — middlemen in the chain between drug makers and insurance companies — cleared its first major legal hurdle on Tuesday, when a Los Angeles Superior Court judge declined to dismiss the complaint.

Los Angeles County sued two dominant pharmacy benefit managers — Express Scripts and OptumRx — in August of last year, accusing the companies of operating behind the scenes to fuel the opioid crisis, which has claimed the lives of more than 650,000 Americans since 1999.

According to the county, the pharmacy benefit managers, or PBMs, colluded with drugmakers, like the embattled Purdue Pharma, by placing certain opioids on their formularies, or lists of approved drugs, giving them preferred status and declining to impose limits on their approval in exchange for rebate payments — which the county calls "kickbacks."

At a hearing on Tuesday for their request to dismiss, attorneys for the PBMs argued that even if the facts in the complaint were true, they still hadn't done anything wrong.

"Collusion alone cannot cause a public health crisis," said Express Scripts attorney Sage Vanden Heuvel of Quinn Emanuel. "There has to be some wrong or illegal act, like spilling noxious fumes. What is the wrongful act here?"

"It’s a little more than collusion if you look at the complaint," Superior Court Judge David Cunningham said. "Allowing Purdue Pharma to edit medical guidance — that certainly triggers potential liability from the court’s perspective, assuming it's true."

The county claims in its complaint that Express Scripts allowed Purdue Pharma to make key changes to its clinical guidance on the use of opioids to one of its worker's compensation clients, removing the sentence: "Opioids appear to be no more effective than safer analgesics."

Vanden Heuvel pressed on, noting that the county is not trying to remove opioids from formularies.

"Collusion, for it to be wrongful, has to have some kind of wrongful result. Here, collusion resulted in opioids on formulas," the attorney said.

"Half a million died," Cunningham replied. "That’s a fairly significant, I’d say almost mind-blowing result."

Vanden Heuvel also argued that drug formularies are sent to state and federal regulators for approval, which he said gave the PBMs a "safe harbor" from liability. In other words: the government can't sue over something the government is tasked with regulating.

But Mimi Liu, an attorney with Motley Rice representing LA County, said that regulators weren't approving the contents of the formularies.

"It is incorrect to say that anyone in the state reviewed and approved the substance of the formularies and agreed that certain opioids needed to be in a preferred status or higher tier, with no limitations on its use," Liu said. "They were looking at the format of formularies. They were reviewing, 'is there a table of contents?' None of it was a substantive review."

Besides, Liu argued, the regulators weren't getting the full picture. Liu said the PBMs had deceived their employers and insurance companies, and that they had "kept their collusion with Purdue confidential from their clients ... When clients took those formularies to regulators, of course that deception was passed down to regulators."

"Reviewing and approving formularies is different than giving PBMs permission to collude with manufacturers … in return for kickbacks," Liu said. "There was no approval of the fact that PBMs imposed no limitations on the use of Oxycontin."

Cunningham overruled most of the PBM's dismissal motion but agreed with the safe harbor argument — to a certain extent. The judge effectively ordered a rewrite, telling the county to amend their complaint, for a third time, to include more details on how state and federal regulators were deceived by the PBMs.

"The extent of the deception — what information was or was not disclosed to the regulators — is a factual question," Cunningham wrote in his tentative ruling, later made permanent. "But, first, plaintiff needs to amend to actually plead that the deception occurred. The court believes the amendment would suffice to overcome defendants' safe-harbor defense."

Cities, states and individual plaintiffs have filed innumerable lawsuits against prescription drug manufacturers like Purdue Pharma, maker of Oxycontin, as well as pharmacies like CVS and Rite Aid, over their role in fomenting and fueling the opioid epidemic.

But PBMs — which are hired by insurance companies and employees to negotiate with pharmaceutical companies, and come up with lists of drugs that the insurers will pay for — have received far less scrutiny.

In theory, they are meant to control the costs of prescription drugs. But the companies have been accused of anticompetitive practices by the Federal Trade Commission, including the charge that they received kickbacks from drug makers like Purdue.

According to the county's complaint, Express Scripts and OptumRx amassed a trove of data on what kind of patients were taking which drugs, data which they then misused.

"Through that data, Defendants could effectively track the opioid epidemic, pill-by-pill, as it unfolded over decades and chronicle the opioid epidemic in real time," the county says in its complaint. "However, instead of using their data to guard against diversion and public harm, or to report suspicious prescribers, defendants used it to further their own profits. This included offering services, in exchange for lucrative 'administrative fees' ostensibly associated with administering benefits or contracts, to Purdue and other manufacturers of opioids to help them plan their marketing efforts and boost their sales."

Follow @hillelaron

Categories / Consumers, Government, Health, Regional

In prosecution first, consultants on hook for $650 million for role in opioid epidemic

courthousenews.com/in-prosecution-first-consultants-on-hook-for-650-million-for-role-in-opioid-epidemic

Joe Dodson

Fake pill bottles with messages about Purdue Pharma are displayed during a protest outside the courthouse where the bankruptcy of the company took place in White Plains, N.Y. in 2021. (AP Photo/Seth Wenig)

ABINGDON, Va. (CN) — The Justice Department announced on Friday a deferred prosecution agreement with McKinsey & Co., a management consulting firm charged with helping a pharmaceutical company maximize profit for OxyContin at the expense of public health.

"This global resolution shows the department's commitment to holding accountable those who played key roles in fueling the opioid crisis," Principal Deputy Assistant Attorney General Brian M. Boynton, head of the Justice Department's Civil Division, said in a statement. "Consulting companies cannot advise their clients to break the law, and then skirt responsibility when their clients do so."

McKinsey will pay $650 million over the next five years for civil claims and criminal charges relating to the firm's work with Perdue Pharma. An agreed statement of facts shows McKinsey advised Perdue in 2013 to increase profits by targeting prescribers who were writing opioid prescriptions for uses that were unsafe, ineffective and medically unnecessary.

"We should have appreciated the harm opioids were causing in our society and we should not have undertaken sales and marketing work for Purdue Pharma," the firm said in a statement. "This terrible public health crisis and our past work for opioid manufacturers will always be a source of profound regret for our firm."

Along with the payout, McKinsey agreed to implement a compliance program, including policies designed to identify and assess high-risk client engagements. McKinsey will also implement new document retention procedures and training.

The charges came following an investigation by Virginia's Medicaid Fraud Control Unit and the U.S. Attorney's Offices for the Western District of Virginia and the District of Massachusetts.

The Justice Department filed criminal charges against McKinsey in a Virginia-based federal court, accusing the firm of one felony obstruction of justice charge and a misdemeanor count of knowingly conspiring with Purdue to abet the misbranding of OxyContin.

On the civil side, the government accuses the firm of violating the False Claims Act and failing to disclose conflicts of interest to the U.S. Food and Drug Administration arising from the firm's concurrent work for Purdue and the FDA.

"For the first time in history, the Justice Department is holding a management consulting firm and one of its senior executives criminally responsible for the sales and marketing advice it gave resulting in the commission of crime by a client," U.S. Attorney Christopher R. Kavanaugh for the Western District of Virginia said. "This ground-breaking resolution demonstrates the Justice Department's ongoing commitment to hold accountable those companies and individuals who profited from our Nation's opioid crisis."

A former consultant for the firm, Martin Elling, will plead guilty in Virginia for obstruction of justice after the government found Elling had communicated with Perdue about deleting potentially incriminating emails.

"By holding McKinsey accountable for its role in enabling Purdue Pharma's reckless promotion of OxyContin, an addictive opioid that devastated communities across Virginia and the nation, treating innocent lives as mere chemistry experiments, this historic $650 million resolution sends a clear message: no one, not even the world's largest consulting firm, is above the law," Virginia Attorney General Jason Miyares said in a statement.

McKinsey worked with Perdue from 2004 to 2019. In 2007, a Purdue affiliate pleaded guilty to misbranding OxyContin from 1996 through 2001 by falsely marketing it as less addictive, less subject to abuse and diversion and less likely to cause dependence and withdrawal than other pain medications, and Purdue entered into a five-year corporate integrity agreement. In 2010, McKinsey worked with Purdue to obtain FDA approval for a less addictive version of OxyContin.

Perdue quickly saw a drop in profits, primarily attributed to a decline in prescriptions for individuals abusing OxyContin and increases in regulatory safeguards intended to hinder medically unnecessary prescribing. In 2013, Perdue retained McKinsey to assess the underlying drivers of OxyContin's performance, identify opportunities to increase near-term revenue and develop plans to capture priority opportunities.

McKinsey called the 2013 effort Evolve to Excellence, advising Perdue that by targeting prescribers prone to prescribing the opioid, they could "turbocharge" sales.

Nearly 108,000 people died from drug overdose in 2022 and approximately 82,000 of those deaths involved opioids, according to the Center for Disease Control. Opioids are substances that work in the nervous system of the body or in specific receptors in the brain to reduce pain.

All opioids, including heroin, are chemically similar, with the same biological mechanism and similar effects, meaning addiction to one opioid can be satisfied by another opioid. Often, people turn to illegal opioids like heroin after running out of their prescription opioids following surgery or injury.

"Aiding and abetting in the potential misbranding and illegal distribution of controlled substances poses a danger to U.S. consumers," special agent in charge George A. Scavdis of the FDA Office of Criminal Investigations Metro Washington Field Office said in a statement. "We will continue to investigate and bring to justice companies whose actions put profits over patient safety."

Categories / Business, Consumers, Criminal, Health

'Transforming Children Into ATMs'?: Roblox, Epic Games Sued for Allegedly Fueling Addictive Behavior in Minors

law.com/therecorder/2024/12/17/transforming-children-into-atms-roblox-epic-games-sued-for-allegedly-fueling-addictive-behavior-in-minors

Kat Black

What You Need to Know

- Gaming companies Roblox and Epic Games were sued for allegedly driving addictive behavior in adolescents.
- The complaint asserts that the companies deliberately failed to implement safety features and designed their games to promote obsessive and repetitive use.
- A cluster of similar suits have been filed nationwide, but the JPML rejected a proposal to consolidate them in June.

Gaming companies Roblox and Epic Games were sued last week in Los Angeles state court for allegedly promoting excessive video game use, stoking a "public health crisis" among minors and failing to safeguard against or warn consumers about the psychologically addictive features baked into their product design.

Bradley Grombacher and Aylstock, Witkin, Kreis & Overholtz filed the suit on behalf of "IHG," a minor, and their parent and guardian ad litem, Evette Gibson, on Dec. 13 in the Superior Court of the State of California in Los Angeles. The plaintiffs allege negligence, product liability, intentional misrepresentation, fraud and violations of California's Unfair Competition Law, among other claims.

"Roblox Corporation and Epic Games are transforming children into ATMs by failing to implement simple safety measures such as adequate parental controls, warnings, or even something as simple as opt-in limits on time minors can spend in these games," said lead plaintiffs attorney Kiley Grombacher of Bradley Grombacher in a news release emailed to The Recorder. "Studies clearly show the dangers posed to young minds, but these corporations are putting profits over children every single day."

This action was surfaced by Law.com Radar.

The complaint contended that Roblox, a San Mateo-based company that allows users to program and play their own games, and Epic Games, the North Carolina-based maker of the online gaming juggernaut Fortnite, are strategically "profiting from youth addiction" and frequently serve as the gateway "to an addiction cycle and disordered relationship with video games." Users can make in-game purchases on both platforms.

The suit asserted that there are easy solutions to preventing addictive engagement with video games that Roblox and Epic Games have deliberately chosen to bypass in order to drive sales and keep adolescents hooked on their products. Additionally, it said, game developers have intentionally consulted with behavioral psychologists and child development specialists to formulate game designs that employ operant conditioning, a reward-and-punishment-based learning system, to trigger the release of the neurotransmitter dopamine —which is associated with hyperfocus and obsessive or addictive behavior.

The companies also use patented algorithmic programming technologies to provide spending incentives to users and fuel in-game purchases, it said.

According to the complaint, IHG—who was 12 at the time of filing—began playing video games at eight years old and has since developed an addictive relationship with both Roblox and Fortnite that has resulted in "severe emotional distress," "diminished social interactions," "lack of interest in other hobbies" and "withdrawal symptoms."

Bryan Aylstock, founding partner at Aylstock, Witkin, Kreis, & Overholtz and counsel for the plaintiffs, said that the legal action was prompted by the publication of "recent literature and news reports about how the gaming industry has really preyed upon some of our youth."

"It's come to the point where the mental health community has come up with the [Diagnostic and Statistical Manual of Mental Disorders] criteria for video game addiction," he said. "And that's really an outgrowth, I think, of the intentional nature of what the companies are doing to keep eyeballs on the screen so that they can sell their product and make more money."

The complaint cites studies, including 2020 research published in The Oxford Handbook of Digital Technologies and Mental Health, finding that "gaming disorder" can lead to addictive behaviors and impact cognitive function. Though the World Health Organization classifies "gaming disorder" as a legitimate health condition, it notes that "studies suggest" it "affects only a small proportion" of online or video game users. According to a 2024 Pew Research Center study cited in the suit, 85% of American teens said they played video games and reported a mixed bag of positive and negative gaming experiences, including online bullying and harassment, poor sleep, and improved problem-solving and social skills.

Though a cluster of suits targeting the gaming industry espouses concerns and arguments similar to the ongoing social media adolescent addiction multidistrict litigation in California, the Judicial Panel on Multidistrict Litigation rejected the proposal to consolidate 15 such cases, which were filed in 10 federal courts and aimed at companies like Roblox, Epic Games and Activision Blizzard, in an MDL in June. Though plaintiffs predicted there would be "10,000 additional actions," the panel said its decision to deny centralization was "not based on an insufficient number of actions, but rather the lack of common factual questions in this litigation."

The plaintiffs in the complaint against Roblox and Epic Games are seeking general, exemplary and punitive, past and future economic and special damages; medical and related expenses; prejudgment interest; attorney fees and costs; and injunctive relief.

"We're trying to make sure that the gaming industry is held accountable for the damage that's already been done to so many of our children," said Aylstock. "But ultimately, what they need to do is make the changes that need to happen to make sure that our kids don't get addicted to these games. It's within their capability. They know how to do it, they just need to do it. So I think it's a very important case. It's not unlike social media, which has some of the same characteristics as it relates to addiction and corrupting the minds of our youth."

Roblox and Epic Games did not immediately respond to requests for comment.

"Video games are among the most dynamic, widely enjoyed forms of entertainment in the world," said the Entertainment Software Association, a U.S. trade association advocating for the video game industry, in an emailed statement.

"We prioritize creating positive experiences for the entire player community and provide easy-to-use tools for players, parents and caregivers to manage numerous aspects of gameplay. Claims that say otherwise are not rooted in fact and ignore the reality that billions of people globally, of all ages and backgrounds, play video games in a healthy, balanced way."

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

Editor's Note: The story has been updated to include a comment from the Entertainment Software Association.

Latest

Mark Joseph Stern @mjsdc.bsky.social · 52m

Whoa—the Montana Supreme Court holds that its state constitution protects the right to "a stable climate system," and strikes down a law that barred consideration of greenhouse gas emissions when permitting new fossil fuel projects.
juddocumentservice.mt.gov/getDocByCTra...

¶73 Plaintiffs have standing to challenge the injury to their constitutional right to a clean and healthful environment. Montanans' right to a clean and healthful environment was violated by the MEPA Limitation, which precluded an analysis of GHG emissions in environmental assessments and environmental impact statements during MEPA review. The MEPA Limitation, § 75-1-201(2)(a), MCA, is unconstitutional and the State is enjoined from acting in accordance with it. Additionally, the State did not appeal the District Court's finding that § 75-1-201(6)(a)(ii), MCA (2023), is unconstitutional and its order enjoining the State from acting in accordance with it and it is thus affirmed.

60 711 2.4K ···

Mark Joseph Stern @mjsdc.bsky.social · 48m

The Montana constitution includes the right to a "clean and healthful environment." Today the court holds that residents have standing to challenge laws that threaten this right by accelerating climate change and invalidates one such statute. A big decision.
juddocumentservice.mt.gov/getDocByCTra...

3 34 220 ···

Mark Joseph Stern @mjsdc.bsky.social · 45m

The Montana Supreme Court says the framers who enacted the state's constitution refused to "grant the State a free pass to pollute the Montana environment just because the rest of the world insisted on doing so." A lot here about climate change in Montana.
juddocumentservice.mt.gov/getDocByCTra...

showed at trial—without dispute—that climate cha
ronmental life support system now and with increasing
re. The State and its agencies have previously acknowled
cts to the Montana environment stemming from climate
ly be increasingly seen today.[1] Plaintiffs showed that clim

Environmental Impact Statement Highwood Generating Sta
ality, Jan. 2007) (available at https://archive.legmt.gov/con
0202_2007004.pdf [https://perma.cc/AAP4-8EQA]). For ex
ver future harms stemming from GHG emissions particular to M
glaciers within Montana. *See, e.g.*, *Glacier Repeat Photos*, Na
ug. 12, 2024), https://www.nps.gov/glac/learn/nature/glacier-
rma.cc/L5B7-5L9H].
snowpack and stressed water supplies for human use (in
) and cold-water fish. *See, e.g.*, *Governor's Drought and Wate*

... "Anthropogenic climate change is impacting, degrading, and depleting Montana's environment and natural resources, including through increasing temperatures, changing precipitation patterns, increasing droughts and aridification, increasing extreme weather events, increasing severity and intensity of wildfires and increasing glacial melt and loss."

2 19 164 ...

Mark Joseph Stern @mjsdc.bsky.social · 43m

This decision is eminently reasonable under the state constitution's unusually strong protections for the environment. It's a very different beast from federal climate lawsuits, rooted squarely in the text of Montana law and precedent.
juddocumentservice.mt.gov/getDocByCTra...

¶22 Article II, Section 3, of the Montana Constitution guarantees all persons certain inalienable rights, "includ[ing] the right to a clean and healthful environment." Significantly, Article IX, Section 1, of the Montana Constitution further provides that:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
> (2) The legislature shall provide for the administration and enforcement of this duty.
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

¶23 We have previously addressed these constitutional provisions—including a detailed historical review of the 1972 Montana Constitutional Convention—and have "determined that the framers of the Montana Constitution intended it to contain 'the strongest

Mark Joseph Stern
@mjsdc.bsky.social

+ Follow

BTW the Montana government retaliated against the young people who brought this lawsuit by attempting to subject them to wildly unnecessary and intrusive psychiatric examinations. The court emphatically blocked that move in today's decision, too.
juddocumentservice.mt.gov/getDocByCTra...

> ¶9 On July 19, 2022, the State moved for a psychiatric examination of eight of the youth plaintiffs under M. R. Civ. P. 35. It sought to thoroughly interview eight of the plaintiffs about their "psychological and behavioral history, alcohol and drug use, school performance, and exposure to trauma." The District Court denied the motion because Plaintiffs' mental health was not genuinely in controversy, nor had the State established good cause for the examinations as required under Rule 35.

December 18, 2024 at 10:28 AM

34 reposts **3** quotes **190** likes

9 37 190

Write your reply

Mark Joseph Stern @mjsdc.bsky.social · 37m
Today's decision from the Montana Supreme Court is 6–1, with one justice concurring in the judgment and one justice dissenting on standing grounds. It is not reviewable by SCOTUS because it is entirely about state law. This court gets the last word.
juddocumentservice.mt.gov/getDocByCTra...

6 14 138

Crary @crary.bsky.social · 33m
You say SCOTUS won't get involved, and under Michigan v Long et al. and the entire history of Federalism, I would agree. But I think the current SCOTUS majority may well balk at that limitation soon.

1 14

Geoff Bowser @geoffbowser.bsky.social · 25m

We give them too much power by accepting the premise that we're no longer a nation of laws. Make them take it apart brick by brick and fight them on every step.

1 12

Aleks, no X @aleksnotx.bsky.social · 23m

The bought-and-paid for ideologues on SCOTUS can make whatever decision they want but let's see them try to enforce it.

4

Matt @differentmatt.bsky.social · 32m

Even the justice who seems most skeptical about the overall case called it ridiculous in his concurrence.

¶79 I finally wholeheartedly concur with the Majority holding that the District Court did *not* abuse its discretion in denying the State's patently ridiculous and overly-intrusive request for court-ordered psychological evaluations of a selected eight Plaintiffs in this case. For the foregoing reasons only, I thus concur at bottom with the Court's ultimate issue holdings in this case.

/S/ DIRK M. SANDEFUR

ALT

7

Rudely Van Gelder @rudelyvangelder.bsky.social · 35m

<< ...attempting to subject them to wildly unnecessary and intrusive psychiatric examinations. >>

Wait... what?

4

LostBoyJim @lostboyjim.bsky.social · 25m

You want clean air and water? You must be craaaaazzzzy!

2

Consumers sue Exxon, Dow, others over plastic recycling claims

reuters.com/legal/litigation/consumers-sue-exxon-dow-others-over-plastic-recycling-claims-2024-12-17

Mike Scarcella

A Chevron gas station sign is shown after Chevron Corp said it would buy Hess Corp in a $53 billion all-stock deal, in Encinitas, California, U.S., October 23, 2023. REUTERS/Mike Blake Purchase Licensing Rights , opens new tab

Dec 17 (Reuters) - Exxon Mobil (XOM.N) , opens new tab, Chevron (CVX.N) , opens new tab and other top plastics producers and manufacturers misled the public for years about the viability of plastic recycling, causing consumers to pay higher prices and contributing to global waste, a new lawsuit alleged.
Four residents of Missouri, Kansas, California and Florida filed the lawsuit on Monday in federal court in Missouri on behalf of a proposed class of millions of purchasers of plastic products nationwide.

The complaint , opens new tab alleged Exxon and other companies, including DuPont (DD.N) , opens new tab and Dow Chemical (DOW.N) , opens new tab , violated antitrust law through a coordinated campaign to misrepresent how much and which types of plastic could be recycled.
The alleged conspiracy artificially increased demand for plastic products, driving up profits, according to the lawsuit.

“These calculated efforts have effectively protected and expanded plastic markets, while stalling legislative or regulatory action that would meaningfully address plastic waste and pollution,” the lawsuit said. The consumers also alleged violations of state consumer protection laws.

Exxon in a statement said the lawsuit does "nothing to advance solutions to plastic waste and pollution." The company said it is "transparent and meticulous in our product claims, and we have been direct with our customers about the plastics and products we sell."

A lawyer for Chevron in a statement on Tuesday said there was no basis for the company to be named as a defendant.

“The plaintiff in this meritless action fails to include a single allegation of wrongdoing by Chevron in the entire complaint," Theodore Boutrous Jr of law firm Gibson, Dunn & Crutcher said.

DuPont, Dow and a lead attorney for the plaintiffs did not immediately respond to requests for comment.

In September, California and several environmental groups sued Exxon in California state court, accusing the oil giant of participating in a decades-long campaign to mislead consumers about the limitations of recycling plastic.
Exxon in response to California's lawsuit said advanced recycling and other solutions work and that California had failed to correct problems in its recycling system.

The consumer lawsuit asked a judge to allow class-action status for people who indirectly purchased plastics from January 1990 to now.

The lawsuit seeks an injunction barring the companies from advertising their plastics as recyclable, and unspecified monetary damages for the increased cost of plastic products that consumers purchased from the companies.

"Defendants should be required to repay the consumers they lied to and defrauded," the lawsuit said.

The case is Rodriguez v. Exxon Mobil Corp, U.S. District Court for the Western District of Missouri, No. 4:24-cv-00803.

For plaintiffs: Rex Sharp of Sharp Law

Read more:

Plastics industry group loses bid to block California AG's subpoena
California says Exxon's recycling claims created a 'public nuisance.' What does that mean?
California sues Exxon over global plastic pollution

College students seek $685 million in damages in US financial aid lawsuit

reuters.com/legal/litigation/college-students-seek-685-million-damages-us-financial-aid-lawsuit-2024-12-17

Mike Scarcella

By Mike Scarcella
December 17, 202411:32 AM PSTUpdated 20 hours ago
People walk outside the Library of Columbia University in New York, U.S., December 16, 2017. REUTERS/Eduardo Munoz Purchase Licensing Rights, opens new tab

Dec 17 (Reuters) - Current and former U.S. college students have asked a judge to grant class-action status and said they deserve at least $685 million in damages in a lawsuit claiming 17 elite universities favored wealthy applicants for admission in order to court donor dollars.

In a court filing, opens new tab in Chicago on Monday night, the students said they met the legal criteria to sue as a class on behalf of more than 224,000 students who were allegedly short-changed on financial aid over a 20-year period.

The students first sued in 2022, claiming the schools violated U.S. antitrust law by breaching a pledge not to consider students' finances in making admissions decisions.

Antitrust law provides for triple damages, which could push the plaintiffs' request for $685 million to over $2 billion if the lawsuit succeeds. The university defendants have all denied wrongdoing.

Ten schools, including Brown, Yale and Columbia, so far have settled with the students for a total of $284 million while continuing to deny the allegations. The remaining defendants include the University of Pennsylvania, Georgetown and Cornell.

In a statement, Penn called the lawsuit "meritless" and said "the actual evidence in the case makes clear that Penn does not favor in admissions students whose families have made or pledged donations to Penn, whatever the amount."

Penn, Cornell, Georgetown and other schools in a court filing, opens new tab on Monday said the plaintiffs' damages estimate was "fundamentally unreliable and should be excluded." Robert Gilbert of Gilbert Litigators & Counselors, a lead lawyer for the plaintiffs, in a statement said the students present “very substantial evidence supporting our claim that the defendants colluded with each other for twenty years on financial aid, and that the illegal collusion resulted in the defendants providing far less aid to students than would have been provided in a free market.”

In opposing the lawsuit, the schools argued their coordination and development of common financial aid "principles" was shielded from liability by a since-expired 1994 federal law. The plaintiffs countered that the universities are not entitled to the federal shield, which provided immunity to "need-blind" schools.

The plaintiffs contend that evidence shows that the schools did consider applicants' financial history in making decisions about admission.

The case is Henry v. Brown University, U.S. District Court for the Northern District of Illinois, No. 1:22-cv-00125.

Read more:

US judge approves $284 mln in settlements in financial aid litigation
U. Chicago first to settle financial aid price-fixing claims in U.S. court

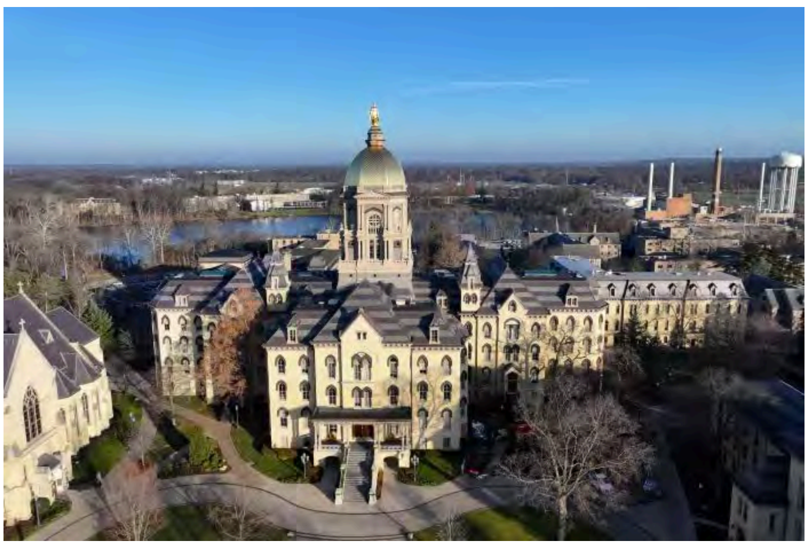
https://www.wsj.com/us-news/education/college-financial-aid-lawsuit-rich-students-families-c1a3a41c

Lawsuit Reveals How Colleges Really Talk About Rich Applicants

'Sure hope the wealthy raise a few more smart kids!' wrote one college enrollment officer, according to the suit

By Douglas Belkin Follow

Dec. 17, 2024 4:18 pm ET



The Notre Dame campus in South Bend, Ind. PHOTO: KIRBY LEE/GETTY IMAGES

A lawsuit alleging universities colluded to determine students' financial-aid packages provides a glimpse into the ways top schools assess children of privilege differently from the rest of the applicant pool.

At Georgetown University, a former president selected students for a special admission list by consulting their parents' donation history, not their transcript, according to the suit. At Massachusetts Institute of Technology, a board member got the school to admit two applicants who were children of a wealthy former business colleague, the suit alleges. And at Notre Dame, an enrollment official in charge of a special applicant list wrote to others, "Sure hope the wealthy next year raise a few more smart kids!", according to the suit.

The motion, filed Tuesday in Illinois federal court, is the latest salvo in a lawsuit that began in January 2022. The plaintiffs, former students, initially accused more than a dozen elite universities with price fixing. Twelve schools have since settled. The motion on Tuesday seeks class-action status for the case against the remaining five schools: MIT, Notre Dame, University of Pennsylvania, Georgetown and Cornell University.

For families embroiled in the college-application process and facing ever steeper odds to win entry to elite schools, the records feed suspicions that colleges have different standards for children of means.

At Notre Dame, the university's Institutional Risk and Compliance Committee said the admission of so many children of major donors represented a major risk to the institution's brand should it become public, according to the motion. In 2020, the school admitted 86 applicants who were connected to large donors, or about 4% of the incoming class. Within that group, 76% of those donor admissions needed special consideration to get in, the motion said.

Speaking about the class of 2016, Donald Bishop, then the associate vice president for undergraduate enrollment, noted a decline of 30 top academic students at the same time the donor list was used.

"We allowed their high gifting or potential gifting to influence our choices more this year than last year," Bishop said in a 2012 email provided in the lawsuit.

Spokespeople for Georgetown, Notre Dame and MIT said that the schools plan to fight the suit in court and that their students all earned their places. A Notre Dame spokesman said the school is confident "every student admitted to Notre Dame is fully qualified and ready to succeed."

It is a precarious time for elite universities, which have become the targets of growing public frustration. President-elect Donald Trump has threatened to investigate internal university operations and tax the endowments of elite schools.

Some of the anger directed at the nation's most prestigious schools comes from perceived hypocrisy.

Elite universities often present themselves as meritocracies that admit the best and brightest. The motion filed Tuesday, which draws from years of speeches at exclusive gatherings, depositions and internal university reports, shows officials bowing to financial pressures to admit wealthy students over potentially more qualified candidates.

Discovery in a separate court case about race-based preferences in college admissions revealed Harvard University had a "Z list," a route through which weaker, but wealthy or connected, applicants could gain admission.

In the past few years several schools, including Amherst College, have gotten rid of legacy admission. Additionally several states, including California, have banned the practice.

Inside the suit

Tuesday's filing seeks class-action certification and asks for $685 million in damages. If awarded, that figure would triple to more than $2 billion under U.S. antitrust laws. Ten schools including Dartmouth College, Northwestern University and Rice University have settled for a total of $284 million, and two more have settled for amounts that haven't been disclosed.

The lawsuit also includes testimony from Sara Harberson, Penn's associate dean of admission from 1999 to 2008, who was deposed for the case in October 2023. She said that the school had a "bona fide special interest" tag for students from families who were big donors or knew someone on the board of trustees.

Those students were assured of admission.

If the school was over-enrolled, they were protected, regardless of their academic record. "You had absolutely no power as an admissions officer," Harberson said in her deposition.

A spokesman for Penn said it sees no merit in the lawsuit.

"The actual evidence in the case makes clear that Penn does not favor in admissions students whose families have made or pledged donations to Penn, whatever the amount," said the spokesman.

At Georgetown, a former president selected students for an annual president's list after reviewing information about the parents' donation history and capacity, but without reviewing the applicant's transcript, teacher recommendations or personal essays. Atop the list he often wrote "Please Admit," according to the motion.

Write to Douglas Belkin at Doug.Belkin@wsj.com

Appeared in the December 18, 2024, print edition as 'Suit Shows Glide Path To Top Schools for Rich'.

Videos

BHP Group Ltd

BHP faces class action over sex harassment and discrimination

Miner says representative class action has been filed in Australian federal court

BHP's stock exchange statement said the class action was at a 'preliminary stage' and the amount of damages being sought was not yet specified © Bloomberg

Robert Wright in London and **Nic Fildes** in Sydney 7 HOURS AGO

Mining company BHP has said it is facing legal action from women alleging sexual harassment and sex discrimination over a period of more than two decades, as the industry grapples with a reckoning over workplace culture.

BHP said in a stock exchange statement on Wednesday that it had been served with a "representative class action" filed in Australia's federal court related to allegations of sexual harassment and discrimination.

The case had been filed on behalf of all women who worked in the company's Australian workplaces between November 12 2003 and March 11 this year who were affected by the "alleged conduct", it added.

Filing of the claim against BHP comes weeks after a report from rival Rio Tinto found the number of employees reporting attempted sexual assault or rape at its own operations had risen in the past two years, despite efforts to stamp out the behaviour.

Serious sexual misconduct has been recognised in the past few years as a significant problem for mining companies, many of whom send employees to remote areas and camps where men vastly outnumber women. However, efforts to tackle the problem have been met with only limited success.

BHP revealed in 2021 to a parliamentary inquiry in Western Australia, the centre of the country's iron ore industry, that it had dismissed 48 employees for sexual harassment at its "fly-in, fly-out" mines in the state since 2019 and that the alleged misconduct included six confirmed sexual assaults.

In 2022, a report commissioned by Rio Tinto found that 21 women said they had been subject to actual or attempted rape or sexual assault over five years.

BHP's stock exchange statement said the class action was at a "preliminary stage" and the amount of damages being sought was not yet specified. However, in a representative class action lawyers acting for the claimants typically seek to establish strong similarities between the circumstances facing a relatively small number of claimants and to show that further people in the same category deserve compensation.

In a press statement on Wednesday following announcement of the court action, BHP said that in 2018 it had identified sexual harassment as a workplace health and safety risk subject to the same focus and oversight as other workplace health and safety risks.

"Over many years, we have been focused on identifying, calling out and dealing with instances of disrespectful behaviour, including sexual harassment, racism and bullying," it said.

BHP's shares were down 8p — 0.4 per cent — in early trading in London, at £20.02.

$25M Grubhub Settlement Sheds Light on How Other Gig Economy Firms Can Avoid Regulatory Trouble

law.com/nationallawjournal/2024/12/18/25m-grubhub-settlement-sheds-light-on-how-other-gig-economy-firms-can-avoid-regulatory-trouble-

James Palmer and Greg Andrews

Regulators challenged tactics Grubhub employed amid a fierce battle for market share with DoorDash and Uber Eats. Photo: Diego M. Radzinschi/ALM

Analysis
“There is no ‘gig platform’ exemption to the laws on the books," Federal Trade Commission Chair Lina Khan said.

December 18, 2024 at 01:40 PM

The original version of this story was published on Corporate Counsel

The $25 million settlement that regulators announced with the food delivery service Grubhub on Tuesday should serve as a cautionary tale for other gig economy businesses tempted to engage in deception in their zeal to become a market leader, a Federal Trade Commission staff attorney says.

"So, you've developed a technology-driven delivery platform connecting businesses to customers, powered by gig workers doing the driving. Now you need to convince businesses to offer products on your platform, customers to use the platform, and workers to make the deliveries," staff attorney Julie Solomon Ensor wrote on the FTC blog Tuesday.

"With so many competitors out there, you may be considering whether there are any creative tactics you can use to gain an edge. Resorting to deceptive advertising claims or unfair business practices isn't the answer.," she wrote, citing as evidence the $25 million fine her agency and the Illinois Attorney General's Office have extracted from Grubhub following a multiyear probe.

According to a federal lawsuit and settlement unveiled Tuesday, Chicago-based Grubhub treated all the key constituencies in its business model unfairly—luring in drivers with widely inflated claims of earnings potential; putting restaurants with which it had no affiliation on its app, leading to service miscues that damaged the eateries' reputations, and drawing in diners bu pitching low-cost or free delivery, but then slipping in hefty "service fees" or "small order" fees at the final stage of checkout.

“Our investigation found that Grubhub tricked its customers, deceived its drivers, and unfairly damaged the reputation and revenues of restaurants that did not partner with Grubhub—all in order to drive scale and accelerate growth,” FTC Chair Lina Khan said in a statement.

adding, “There is no ‘gig platform’ exemption to the laws on the books.”
Signing the settlement on behalf of Grubhub was CEO Howard Migdal, who joined the company in March 2023 as CEO, and its outside counsel, Sidley Austin partners Mark Hopson and Benjamin Mandel. While in the settlement Grubhub neither admits nor denies the allegations, the company struck a more strident tone in a posting on its website Tuesday.

"While we categorically deny the allegations made by the FTC, many of which are wrong, misleading or no longer applicable to our business, we believe settling this matter is in the best interest of Grubhub and allows us to move forward," the statement said.

Grubhub said that "complying with all laws and regulations where we operate is something we have always taken very seriously, and we hold ourselves to the highest standards of ethics and integrity." While the company said it already was committed to transparency, in the wake of the settlement Grubhub said it will make changes to its platform "to make it even easier for diners" to understand its fees.

Under the settlement, the monetary judgment against Grubhub is $140 million, but all but $25 million was suspended because of the company's inability to pay the larger amount. However, if the FTC and Illinois Attorney General's Office were to find that Grubhub misrepresented its financial status during negotiations, the full amount would become immediately due.

The deal with regulators comes as Grubhub is in the process of changing hands. Last month, Amsterdam-based Just Eat Takeaway.com agreed to sell Grubhub to New York-based food ordering company Wonder Group for $150 million in cash and $500 million in senior notes.

In 2020, with the COVID-19 pandemic giving food delivery services an unprecedented boost, Just Eat Takaway.com agreed to buy Grubhub for $7.3 billion, a deal that became a colossal failure as rivals DoorDash and Uber Eats outdueled GrubHub for customers. An analysis of March 2024 sales by the data analytics firm Bloomberg Second Measure found Grubhub had a U.S. market share of just 8%, compared with 67% for DoorDash and 23% for Uber Eats.

Grubhub was founded in 2004 by software engineers Matt Maloney and Mike Evans. In 2023, its revenue was $2.1 billion, down from $2.5 billion a year earlier—its first-ever annual decline.

The statement Grubhub posted on its website said the company has "engaged cooperatively" with the FTC "as they reviewed our business and specific offerings that are prevalent in our industry." Though the statement doesn't elaborate on "offerings that are prevalent," information investigators turned up in their inquiry showed Grubhub executives incessantly watched how rivals addressed customer "pain points," such as the size of delivery fees, and were reluctant to stand pat when a competitor gained an advantage.

For example, the suit states that Grubhub had no hidden fees before 2019, when it began engaging in what an executive at the time described as "a pricing shell game" that divided the actual delivery fee into a delivery fee and a service fee that did not show up until the end of the transaction. The suit quotes a former Grubhub executive as saying that the tactic “is working for [Uber Eats] and others and we need to figure out how to make this stuff work for us ASAP because we are just leaving opportunity on the table (literally) while likely losing out on potential new diners that react to this messaging.”

According to the suit, Grubhead chose "to chase scale through misleading and mistreating consumers ... rather than through honest competition" in a host of ways, including overselling the earnings potential of drivers. For example, in the New York area Grubhub ran ads claiming drivers could make up to $40 an hour, even though the median for the area was about $10 and only one in 1,000 made $40.

The suit also zings Grubhub for listing restaurants on its site with which it had no affiliation—eager to capitilize on the reality that the more restaurants appear on a delivery app, the more likely consumers are to use it. At one point, more than half of all restaurants on Grubhub’s platform—more than 320,000 of the 610,000 restaurants—were unaffiliated restaurants listed without authorization, the FTC said.

Without any integration into Grubhub's ordering system, the unaffiliated restaurants were bombarded with orders from Grubhub drivers—who had to manually type orders into the delivery platforms used by the restaurants. Grubhub didn't disclose to its customers which restaurants were affiliated and which weren't, even though it charged diners higher service fees for nonaffiliated restaurants.

The chaotic system led to regular service problems that were Grubhub's fault. But because the company's ordering platform didn't distinguish between affiliated and unaffiliated restaurants, diners blamed the restaurants and put negative reviews on Google, Yelp and other websites, damaging the restaurants’ reputations.

The suit quotes from a 2019 letter to shareholders in which Grubhub executives call adding unaffiliated restaurants "the wrong long-term answer" because doing so leads to a "sub-optimal" experience for diners, restaurants and shareholders. But in the same letter executives said the company would continue to add them because they provided an “extremely efficient and cheap” way to boost restaurant inventory and fuel growth.

FTC attorney Ensor, the writer of Tuesday's blog post, distills five lessons from the enforcement action against Grubhub:

—"Tell the truth. Whoever your audience, good advertising starts with the truth. Don’t exaggerate what your product can do, how much it costs, who you’re affiliated with, or any fact that might be important to someone deciding whether to buy what you’re selling."

—"Recruiting gig workers? Don't inflate potential earnings," and make terms of any bonus payouts are crystal clear. Ensor said the latter was a lesson from the $2.1 million settlement the FTC announced in October with Lyft over its driver-recruitment advertising. Investigators said the ride-hailing company calculated the amount drivers could expect to earn using data from just the top-performing 20!% of drivers, and it failed to make clear that those figures included tips. And while Lyft pitched "earnings guarantees," the company did not make clear that it would pay only the difference between what the driver earned and the guarantee, not the entire amount.

—The FTC alleged that Grubhub provides diners with a quick, painless sign-up process for its subscription-based Grubhub+ service, but obstructed their ability to cancel, burying "the option behind a series of pages in consumers' account settings that many consumers have difficulty locating." Ensor said that any company selling auto-renewing products or services should make sure they're disclosing all material terms before obtaining billing information, and provide a simple way for customers to unsubscribe.

—"Highlighting an association with another business? Don't misrepresent the connection."

—"Get a Notice of Penalty Offense? Clean up your act." The lawsuit says that the FTC in October 2021 sent Grubhub such a notice but that its violations continued.

OpenAI seeks dismissal of lawsuit over copyrights

dailyjournal.com/articles/382553-openai-seeks-dismissal-of-lawsuit-over-copyrights

Intellectual Property

Dec. 18, 2024

OpenAI's legal team argued in their motion that the plaintiffs' three state law claims -- unjust enrichment and unfair competition under California and Massachusetts law -- should be dismissed, as they are preempted by the fourth claim for direct copyright infringement under the Copyright Act of 1976.

OpenAI Inc. has asked a federal judge to dismiss most claims in a proposed class action claiming the company unlawfully used copyrighted transcriptions from millions of YouTube videos to train the AI model powering its popular chatbot, ChatGPT.

The plaintiffs claim that these transcriptions were used to train ChatGPT's large language model so that the software could continue improving its output of "convincingly naturalistic texts" in response to users' prompts. *Millette v. OpenAI, Inc.*, 5:24-cv-04710 (N.D. Cal. filed Aug. 2, 2024).

OpenAI's legal team, represented by Latham & Watkins LLP and Morrison & Foerster LLP, argued in their motion that the plaintiffs' three state law claims -- unjust enrichment and unfair competition under California and Massachusetts law -- should be dismissed, as they are preempted by the fourth claim for direct copyright infringement under the Copyright Act of 1976.

The company's attorneys argue that the lawsuit is a "carbon copy" of a similar putative class action filed by a group of authors in the Northern District of California. In that case, U.S. District Judge Araceli Martínez-Olguín dismissed the authors' claims for unjust enrichment and unfair competition in two orders issued on Feb. 12 and July 30. That case remains pending. Tremblay et al. v. OpenAI, Inc., 3:23-cv-03223 (N.D. Cal. filed June 28, 2023).

The following attorneys from Bursor & Fisher P.A. represent the plaintiffs and could not be reached for comment Tuesday regarding the new motion: L. Timothy Fisher and Joshua B. Glatt from Walnut Creek, Joseph I. Marchese and Julian C. Diamond from New York City.

The motion will be heard on May 15 by U.S. District Judge Edward J. Davila.

In the amended complaint, the plaintiffs' legal team argued that OpenAI could have paid a reasonable licensing fee to use the copyrighted YouTube videos, including those uploaded by the two lead plaintiffs, but deliberately chose not to.

"Defendants could have 'trained' their LLMs using works in the public domain. They could have paid a reasonable licensing fee to use those works. What Defendants could not do is ignore protections afforded by virtue of Plaintiffs' ownership rights in their respective works," the attorneys wrote.

Plaintiffs' counsel contended that the alleged "scraping" of their YouTube content violated state law, as well as federal copyright law, arguing that its benefit to consumers does not justify the harm it causes to creators.

"Defendant's conduct is unfair under the [California] Unfair Competition Law if it is immoral, unethical, oppressive, or unscrupulous and the conduct outweighs any benefits to consumers. Defendants' conduct was unfair because it relied on non-consensual use of Plaintiffs' works for Defendants' gain," the attorneys wrote. "The conduct outweighs any benefits to consumers. Defendants knowingly and secretively trained ChatGPT using unauthorized transcriptions and copies of Plaintiffs' videos. Defendants deceptively marketed their product in a manner that fails to attribute the success of their product to the work on which it is based."

OpenAI CEO Sam Altman was called to testify before a U.S. Senate subcommittee on artificial intelligence in May 2023 over concerns about the technology's impact on intellectual property rights. A portion of his testimony, included in complaint, details the company's approach to intellectual property rights

"Notably, Mr. Altman knows that OpenAI's unauthorized use of a creator's content for the company's benefit is problematic," the attorneys wrote. "In testimony to Congress, Mr. Altman explained that 'ensuring that the creator economy continues to be vibrant is an important priority for OpenAI. ... OpenAI does not want to replace creators. We want our systems to be used to empower creativity, and to support and augment the essential humanity of artists and creators.' And, in a subsequent interview, Mr. Altman explained that 'creators deserve control over how their creations are used.'"

The following attorneys from Latham & Watkins represent Open AI: Andrew M. Gass, Joseph R. Wetzel, Elana Nightingale Dawson, Michael David, Allison L. Stillman, Rachel R. Blitzer, Herman Yue. The following attorneys from Morrison & Foerster also represent OpenAI in the matter: Joseph C. Gratz, Vera Ranier, Melody E. Wong, Carolyn M. Homer, Max I. Levy

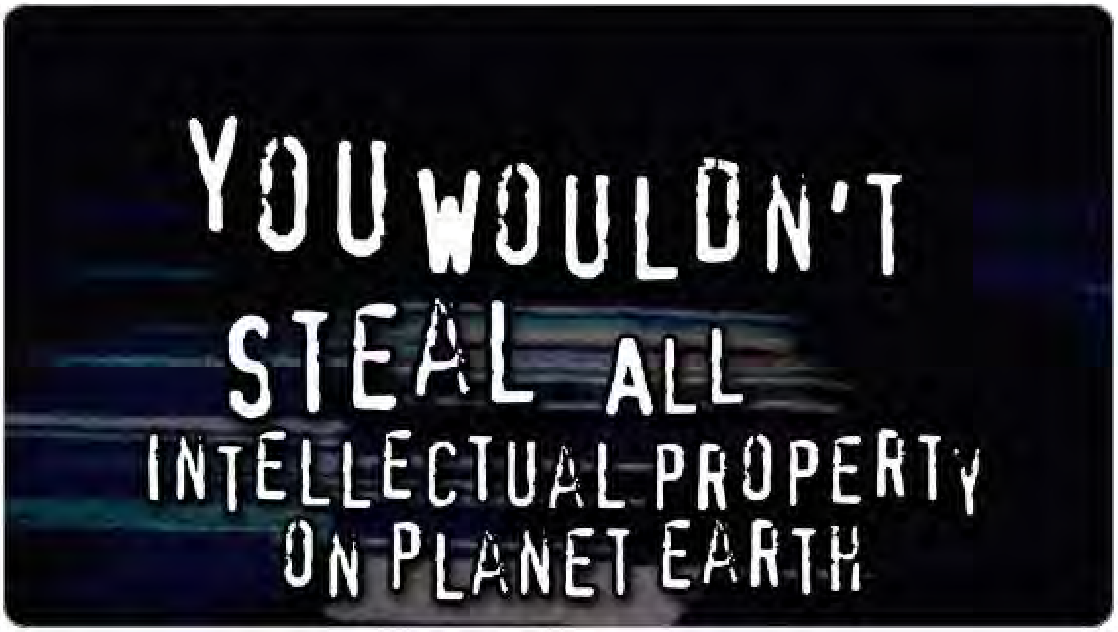
#382553

Wisdom Howell

Daily Journal Staff Writer
wisdom_howell@dailyjournal.com

ESG Hound
@bsky.esghound.com

+ Follow



Nick Land Acknowledgement PS @lonestartallboi.bsky.social · 11mo
20 years ago we were suing teenagers for millions of dollars because they were torrenting a single Metallica album and now billionaires are demanding the free right to every work in history, so that they can re-sell it.

The law only ever serves capital.

December 18, 2024 at 4:05 AM Everybody can reply

1.8K reposts **6** quotes **5.1K** likes

23 1.8K 5.1K

Dan Hassler-Forest
@danhf.bsky.social

+ Follow

In 2010, anti-copyright activist Aaron Swartz hanged himself after being prosecuted to the full extent of the law for making copyrighted academic publications freely available. Today, academic publishers are insisting those copyrights be lifted to feed the corporate AI slop machine.

Please Follow the Official Guardian Account @guardian-world-r... · 11mo
'Impossible' to create AI tools like ChatGPT without copyrighted material, OpenAI says

'Impossible' to create AI tools like ChatGPT without copyrighted material, OpenAI says

Pressure grows on artificial intelligence firms over the content used to train their productsBusiness live – latest updatesThe developer OpenAI has said it would be...

www.theguardian.com

December 18, 2024 at 5:25 AM Everybody can reply

806 reposts **29** quotes **1.4K** likes

32 835 1.4K

'We've Got a Good Thing Here in Delaware': Glasscock Reflects on Rewards of Equity Work, Clerks and the Delaware Way

law.com/delbizcourt/2024/12/18/weve-got-a-good-thing-here-in-delaware-glasscock-reflects-on-rewards-of-equity-work-clerks-and-the-delaware-way

Ellen Bardash

After 25 years with the Delaware Court of Chancery, Vice Chancellor Sam Glasscock III is in his final weeks on the bench, with plans to officially retire Jan. 7.

Glasscock, who has not announced any post-retirement plans but said he'll be taking a few weeks off before taking on anything else, sat down to discuss how the court's workload has changed, the most pivotal chancery cases resolved during his tenure and his experience working with law clerks and members of the Delaware bar.

During your time with the court, what have some of your proudest moments been?

The most important work that I've done for the Court of Chancery is probably not in the areas you would expect. It's more in the traditional equity arena where everyday Delawareans have issues that consume their lives. I'm talking about things like guardianships where a parent is disabled and may need help, disputes over will contests and easements so that farmers can get into farmland and just a whole range of equitable considerations.

Those are the things we do that make a huge difference to the people of Delaware. That's not to say that the corporate side is not important, too. It's very important, and those equity cases in the corporate arena are really fun to work on because the transactions themselves are interesting to understand and businesses are interesting to understand. But really, the most important thing that I have done has been in the traditional equity arena because it's not just about money. It's about preserving families or trying to get estates settled. That makes me happy to have been in public service.

Over the years, have you seen a difference in the balance of those types of cases versus the corporate cases or in what's been on the docket generally?

What I've seen is a shift from corporate equity cases to contractually based commercial disputes. That's really the big change. When I first started on the bench, most of the corporate work we did involved mergers and acquisitions, and it was almost always fiduciary duty-based. We still do those, but we see far more payout agreements or disputes about LLC agreements, which are contractual.

That's the way the docket has been moving. That's been a continual shift from the time I started. There are two things going on. There are a lot more of these earnout type cases, and there's also been a move toward more contractual obligations, both inside corporations and of course in the LLC and the limited partnership arenas. Those tend to be explicitly contractual. It's not a sudden shift, but it's been a pronounced shift over the last 14 years.

What other shifts in the docket have you seen?

I think there has been a growing desire for players in the corporate arena to set up bespoke arrangements among investors and stockholders and directors instead of relying on the default corporate form. That gives them more flexibility, but it also changes how the court must analyze what would be otherwise straight up fiduciary duty claims. It's something we're dealing with on an ongoing basis.

The big shift followed (former Chancellor Andre) Bouchard's *Trulia* decision. Before that, every public merger seemed to attract numerous fiduciary duty cases that were largely settled as disclosure only settlements. The court had created a market for those. It's not that the lawyers were doing something nefarious—they were reacting to the market that the court had set by allowing settlements that offered defendants virtual deal security because the releases were broad. It allowed the plaintiffs and the plaintiff's firm to allow some disclosures that may or may not have been valuable, get some of their time paid for, then move on to something else.

It was a bad system, not because the litigants and the lawyers were bad people, but because the incentives the court created were not good incentives. The *Trulia* decision changed that and really limited the number of M&A cases that we had. That was a tremendous change in the law and a deliberate change by the court, because we recognized that we'd set a bad incentive.

How much of a shift in your workload did you see after *Trulia*?

Very little. The number of cases on my docket dropped, but those cases hadn't required anything on the part of the court other than considering a settlement. The courts were routinely approving those. So we had less of those cases, but they weren't a meaningful workload.

What *Trulia* did was clean up a system that really was problematic. One of the problems with it, of course, was these broad releases. We couldn't be sure what we were authorizing the stockholders to give up.

Are there any other cases from your time as vice chancellor that you think have had a similarly big impact like that?

Well, we have increasingly relied on ratification type actions to return to business judgment rule, both in the controller arena, where conditions are met—a fully empowered, appropriately constituted arm's length negotiation by a special committee and a vote of the minority deal to get you around entire fairness—and also in breach of duty cases that don't involve a controller and have a fully informed vote of the stockholders in favor.

Those have cleaned up our docket. They weren't a big change. I think they were just a recognition of how the business judgment rule should apply. That's probably going back eight or 10 years.

All these things, what they really are, is a balancing of interests. What a perfect rule would do would be to eliminate frivolous cases and preserve meritorious cases. We can approach that. We can't achieve that without omniscience, which I don't think anybody here thinks we have, but we're trying, and that's the idea of these changes.

I think most of our litigation now is pretty serious stuff. I haven't seen anything to rival those disclosure only settlements or even approach that kind of problem.

Part of your reasoning for announcing your retirement in advance was to allow time for the court to reallocate its workload as needed. How has that workload grown over time?

It has increased. I would say the same thing I did about the move toward contacts as the focus of our litigation efforts. It's not been abrupt, but it's been gradual, steady over time.

It's a burden. It's a lot of work being on this court. It's enjoyable work, and I'm certainly not complaining about the workload as such, but it really is kind of a strain, and it has increased.

The current chancellor and Chancellor Bouchard have worked diligently, with the help of the chief justice and the governor, to get additional personnel on the Court of Chancery, from five to seven (judges) during my tenure. And we've expanded the number of magistrates and expanded what the magistrates have done. That's been a tremendous help. Nonetheless, the workload is steadily—not abruptly, but steadily—increasing over time.

What do you think has led to that increase?

I talked about the shift from fiduciary duty cases to contract cases. Fiduciary duty cases tend to fall out early in the process because the standard of review is so nearly case determinative that early on it becomes clear what the incentives are, and they tend to settle.

The contractual cases are all bespoke, they're very often fact specific, and they tend to go to trial, so we have more trials than when I started. The trials tend to be multi-day trials, and since we don't have a jury, we have to write on everything.And the post trial opinions, as anybody who's watched the court knows, are not brief. They're extensive reviews of the factual record and then the legal analysis, so that I think is really what's going on, as much as anything else.

Is there anything that you wish you had known when you joined the court that you can pass on to future vice chancellors?

I'll tell you the most unexpected thing to me. When I was what we called a master in those days, we had no clerks. Now, the magistrates do have clerks. I had some trepidation about whether I would be able to even know how to use my clerks, whether they would be worthwhile.

It has proven to be the best part of the job, interacting with my clerks and getting to know these people who are very, very bright and very interested in equity and corporate law. It's just been a joy to work with my clerks, and I never would have expected that.

I think I have without exception hired one-year clerks, so in 14 years, I guess I've had 28 of them. I have a reunion every summer, and people who can make it come out to my house and we have crabs and talk about the old days. I remain very close to my ex-clerks. It's tremendously rewarding. Even though these people come to me mostly fully formed, I can't take credit for their success. Nonetheless, many of them have become very successful, and it's very gratifying to watch.

What’s your impression of Delaware’s corporate bar?

Being a judge in the Court of Chancery is such a great gig, and not a small part of that is the fact that we get such great lawyers. The Delaware corporate bar is superb. We also get the privilege to have great lawyers from all around the country come into our court to argue cases and try cases. But particularly, the Delaware bar is first rate.

It is no joke to talk about the Delaware way and civility and a way of practice that allows for vigorous representations of clients without devolving into personalities and feuds and needless motions. We tend to avoid that. We've got a good thing here in Delaware. It is a real thing, the Delaware way. And I know that because sometimes local counsel has to advise out of state counsel how we do things.

If you're a vice chancellor or a chancellor in the Court of Chancery and you don't think you're getting good lawyers in front of you, you don't understand what other courts and other jurisdictions are like. We’re very fortunate, privileged to have the quality of minds and preparation that we see in our courtrooms.

I'm down here in Georgetown. I mean, I'm sitting in this town of a few thousand people, and I get these great lawyers from all over the country to come into my courtroom. That's just kind of incredible when you think about it.

Any other thoughts on your chancery career as a whole?

My philosophy was always to take cases as they came. I've tried to give people a fair shake and convey to everyone that I respect their opinions and arguments and decide the case based on the merits. I guess if I've done that, I've done what I was supposed to do.

It's always been my rule that there's enough misery in this world without gratuitously adding to it. Even though, as a judge, you're always disappointing somebody, and even though I'm a blunderer and sometimes blunder into causing people pain, too, I expect, I try never to gratuitously inflict it.

Albertsons’ case against Kroger is latest in Delaware's history of busted-deal litigation

reuters.com/legal/litigation/column-albertsons-case-against-kroger-is-latest-delawares-history-busted-deal-2024-12-17

Alison Frankel

Traders work as screens display the trading information for Kroger Co and Albertsons Cos Inc. on the floor of the New York Stock Exchange (NYSE) in New York City, U.S., October 14, 2022. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights, opens new tab

Dec 17 (Reuters) - The line between love and hate is rarely thinner than in litigation over M&A deals gone bad.

The latest example: Albertsons' newly unsealed complaint, opens new tab in Delaware Chancery Court against its erstwhile merger partner Kroger.
The two grocery chains appeared to be working together for more than two years to complete the $25 billion merger they announced in October 2022, litigating together against state and federal regulators who sought to block the allegedly anticompetitive deal. But according to Albertsons’ lawyers in the Delaware case – Williams & Connolly, Selendy Gay, Dechert and Richards, Layton & Finger – Kroger (KR.N), opens new tab secretly used its control over the antitrust review process to undermine a merger that was unpopular with its investors, its workers and Congress.

Albertsons (ACI.N), opens new tab and Kroger, as you know, ended up terminating their deal on Dec. 11, after the merger was blocked by judges in state and federal court.
The Albertsons complaint lays blame entirely on Kroger. The lawsuit asserts that Kroger knew going into the deal that it would have to sell off hundreds of stores — perhaps as many as 650 properties, under the merger agreement — to appease the U.S. Federal Trade Commission. But according to Albertsons, Kroger repeatedly proposed “plainly indefensible” divestment plans to the FTC, allegedly disregarding Albertsons’ exhortations to suggest divestments that would satisfy regulators. Kroger’s refusal to propose a viable divestment package, according to Albertsons, “squandered its credibility with regulators.”

Kroger also allegedly shut Albertsons out of the “disorganized [and] protracted” process of picking a purchaser for the properties it planned to sell off. According to the complaint, Kroger turned away potential purchasers with solid track records in the retail grocery business and instead insisted on a deal to sell all of the divested properties to a grocery wholesaler. Albertsons contends that Kroger’s choice ended up creating new regulatory obstacles rather than assuaging the FTC’s concerns.

Even after the FTC and several states filed lawsuits to block the deal, Albertsons alleged, Kroger “failed to cooperate” with its merger partner. It picked a lead economics expert without listening to input from Albertsons, according to the complaint, then refused to give Albertsons a meaningful chance to review the expert’s work. Kroger’s hand-picked expert, according to Albertsons, proceeded to give testimony that did more harm than good.

Albertsons’ complaint accuses Kroger of breaching three merger provisions requiring Kroger, as the buyer, to escalate its efforts to get the deal done as regulators' concerns deepened. Under the agreement's so-called hell-or-high-water provision, Kroger was supposed to do everything possible once regulators threatened to block the merger, Albertsons said, but failed to live up to its commitment.

Albertsons said Kroger’s breaches have cost the company and its shareholders billions of dollars. It’s asking for a $600 million contractual break-up fee and additional damages.

Kroger, meanwhile, insisted in an email statement to me that it went to “extraordinary lengths” to uphold the merger agreement over the last two years – and that it is actually Albertsons that breached the deal, not Kroger.

“Kroger refutes these allegations in the strongest possible terms,” the statement said. “This is clearly an attempt to deflect responsibility following Kroger’s written notification of Albertsons’ multiple breaches of the agreement, and to seek payment of the merger’s break fee, to which they are not entitled.”

A Kroger spokesperson declined to elaborate on Albertsons’ alleged breaches and said the written notification is not publicly available. So we don’t yet know Kroger’s side of this story.

But if Delaware's busted-deal history is any guide, it would not be surprising to see Kroger respond to Albertsons' complaint with its own lawsuit alleging merger contract breaches.

That’s what happened in the last megabillion-dollar merger to be tanked by antitrust concerns. In 2017, after the U.S. Justice Department won an injunction blocking a $54 billion merger between Cigna and Anthem, both companies filed lawsuits in Delaware Chancery Court blaming the other for the merger’s failure and seeking billions in damages.

In an exhaustive 147-page decision, opens new tab in 2020, Vice Chancellor Travis Laster held that Cigna, the seller in the M&A deal, breached its obligation to try to close the merger, derailing the deal when its CEO realized he would not be picked to lead the post-merger company.
But Laster also found that the merger would probably have been enjoined anyway, so Anthem wasn’t entitled to recover damages.

“Each party,” he concluded, “must bear the losses it suffered as a result of their star-crossed venture.”

Albertsons declined to comment on its Kroger lawsuit, but I’m sure the company would argue that its case is distinguishable from Cigna's because the Kroger deal, in Albertsons' telling, could have been cleared by the FTC if Kroger had proposed a reasonable portfolio of stores to sell off and a more appropriate purchaser for the divested stores.

Every busted deal, after all, is unique — a truism that runs through the recent history of Delaware litigation over failed mergers. To cite just a handful of examples, there's the story of a seller that backed out of a merger, then lost its bid, opens new tab for a $1.8 billion breakup fee and the case of the Chinese hotel developer that sought unsuccessfully, opens new tab to enforce a merger, despite allegedly deceiving its acquirer during the sale process.

Then there’s the 2018 ruling, opens new tab that Fresenius Kabi was justified in ditching a deal to acquire a generic drugmaker with big regulatory problems – but the contrary 2021 decision, opens new tab forcing private equity purchasers to complete their deal to acquire a cake decorating business.

My point is just that litigation over mergers gone awry tends to turn on idiosyncratic facts that take a long time and (a lot of money in legal fees) to unravel. As the Delaware Supreme Court wrote in its 2023 decision resolving a decade of litigation over The Williams Companies failed merger with Energy Transfer, “although failed mergers are not uncommon, a failed merger without consequence is virtually unheard of.”

Albertsons and Kroger spent nearly a billion dollars on merger costs in 2024 before their deal failed. But with Albertsons’ new suit, the litigation consequences of their busted deal have only just begun.

Read more:

Albertsons demands billions from rival Kroger after terminating merger bid
Kroger's $25-billion deal for grocery rival Albertsons blocked by US courts
Kroger-Albertsons US anti-trust trial to end but other legal blocks loom
Get a quick look at the days breaking legal news and analysis from The Afternoon Docket newsletter. Sign up here.

Opinions expressed are those of the author. They do not reflect the views of Reuters News, which, under the Trust Principles, is committed to integrity, independence, and freedom from bias.

Alison Frankel
Thomson Reuters

https://www.wsj.com/articles/macys-accounting-scandal-raises-questions-about-which-errors-matter-fdebaa17

CFO JOURNAL

Macy's Accounting Scandal Raises Questions About Which Errors Matter

The retailer lowered its 2023 net income by 57% to correct the effect of false bookkeeping entries, but didn't withdraw past financials

By Mark Maurer Follow

Dec. 18, 2024 6:00 am ET

Macy's has had to make several adjustments to its fiscal year 2023 earnings, among other periods. Above, shoppers outside Macy's Herald Square on Nov. 29 in New York. PHOTO: HEATHER KHALIFA/ASSOCIATED PRESS

Macy's decision to not withdraw old financial statements despite making sizable adjustments to earnings figures after finding $151 million in false bookkeeping entries has some accountants scratching their heads.

The retailer last month said an employee responsible for small-package delivery expense accounting intentionally made erroneous bookkeeping entries since late 2021. The discovery led Macy's to delay reporting its quarterly results for two weeks and spurred a selloff of shares.

Last week, Macy's said an internal investigation found no material impact or needed restatements to previously filed financials. The errors didn't affect net sales, vendor payments, operating cash flows or compliance with debt covenants, the company said in a filing, so it treated the errors as a minor revision.

The decision is questionable given the weight of revisions on the retailer's 2023 earnings, academics and accountants said.

Macy's, in an 8-K filing, made several adjustments to its fiscal year 2023 earnings, among other periods. The company corrected its net income for the period as $45 million, down 57% from an initially reported $105 million.

The retailer also fixed its pretax income at $43 million, down 65% from the $124 million it had booked.

"Macy's says it did not impact trends in profit and that's true, but only because the trend was already downward," said Douglas Carmichael, an accounting professor at Baruch College and former chief auditor for the Public Company Accounting Oversight Board. "It dramatically increased the downward trend."

The company's 2023 net income was far lower than in previous years, $1.42 billion in 2021 and $1.15 billion in 2022, in part due to a previously disclosed $1 billion asset write-down.

"Their disclosure that [the errors] had no material impact on any historical annual or interim period is, to me, not supported," Carmichael added.

Macy's considered an $81 million reduction to its $8.95 billion gross margin and $2.32 billion in adjusted earnings before interest, taxes, depreciation, and amortization, or adjusted Ebitda, that it reported for 2023 weren't material amounts, said people familiar with the company's thinking.

The reduction represented about 1% of gross margin and 3.5% of adjusted Ebitda.

Companies must report earnings without significant errors. If such mistakes are found, companies must disclose them within four business days. A major restatement, also known as a "big R," involves reissuing financials reflecting corrections to one or more errors that materially affect those statements.

Serious errors can result in a falling stock price, difficulty accessing funding or regulatory fines.

In a revision, or "little r," a company addresses minor problems by correcting errors in forthcoming financial statements without needing to alert investors.

"The 'big R' restatements tend to have a larger stock price reaction to it and that in my mind means the error is more serious, but also markets might pay attention to it a bit more," said Matthew Glendening, an associate accounting professor at the University of Missouri-Columbia.

U.S. public businesses, including special-purpose acquisition companies, filed 186 major restatements this year as of Dec. 12, compared with 173 minor revisions, according to research firm Ideagen Audit Analytics. "Big R" reissuances represented 52% of restatements, compared with an average of 34% between 2010 and 2023.

Macy's last week also said longtime auditor KPMG's blessing of its financial-reporting controls should no longer be relied upon because of the material weaknesses the retailer found, and that it is making changes to its controls to address the weaknesses. Such weaknesses are defined as one or more deficiencies that could lead to a major misstatement. KPMG declined to comment.

"I'm happy that Macy's has at least told us what's going on, but I'm not happy with their not restating," said Ed Ketz, an associate accounting professor at Pennsylvania State University.

The Securities and Exchange Commission in recent years has warned companies and their auditors against improperly casting large adjustments as immaterial based on non-numeric factors. When an adjustment is large, such as 5% or more of pretax net income, the SEC and courts require companies to assess if it is significant in other ways, said Lynn Turner, a former SEC chief accountant and an author of SEC guidance on materiality.

"The larger the number gets, such as in the case of Macy's where it is over 10%, it's very hard to justify as being immaterial," Turner said, referring to the company's 2023 net income and pretax income. "It's just out of the ballpark."

The SEC’s materiality guidance leaves discretion on such an issue up to company executives, audit committees and auditors, and allows aspects of rationales to go undisclosed, said Rachel Thompson, an assistant accounting professor at North Dakota State University.

“It’s not really black and white,” Thompson said.

Write to Mark Maurer at mark.maurer@wsj.com

Securities Law News

December 17, 2024, 5:59 AM PST

MicroStrategy’s Nasdaq Entry Kicks Off New Era of Momentum Risk

By Lu Wang and Isabelle Lee

- Much-coveted inclusion adds new fuel to the crypto mania
- Price-agnostic index flows can be damaging when momentum turns

MicroStrategy Inc.’s entry into the Nasdaq 100 opens up the largest corporate holder of Bitcoin to a new — and untapped – investor: the index-tracking juggernauts.

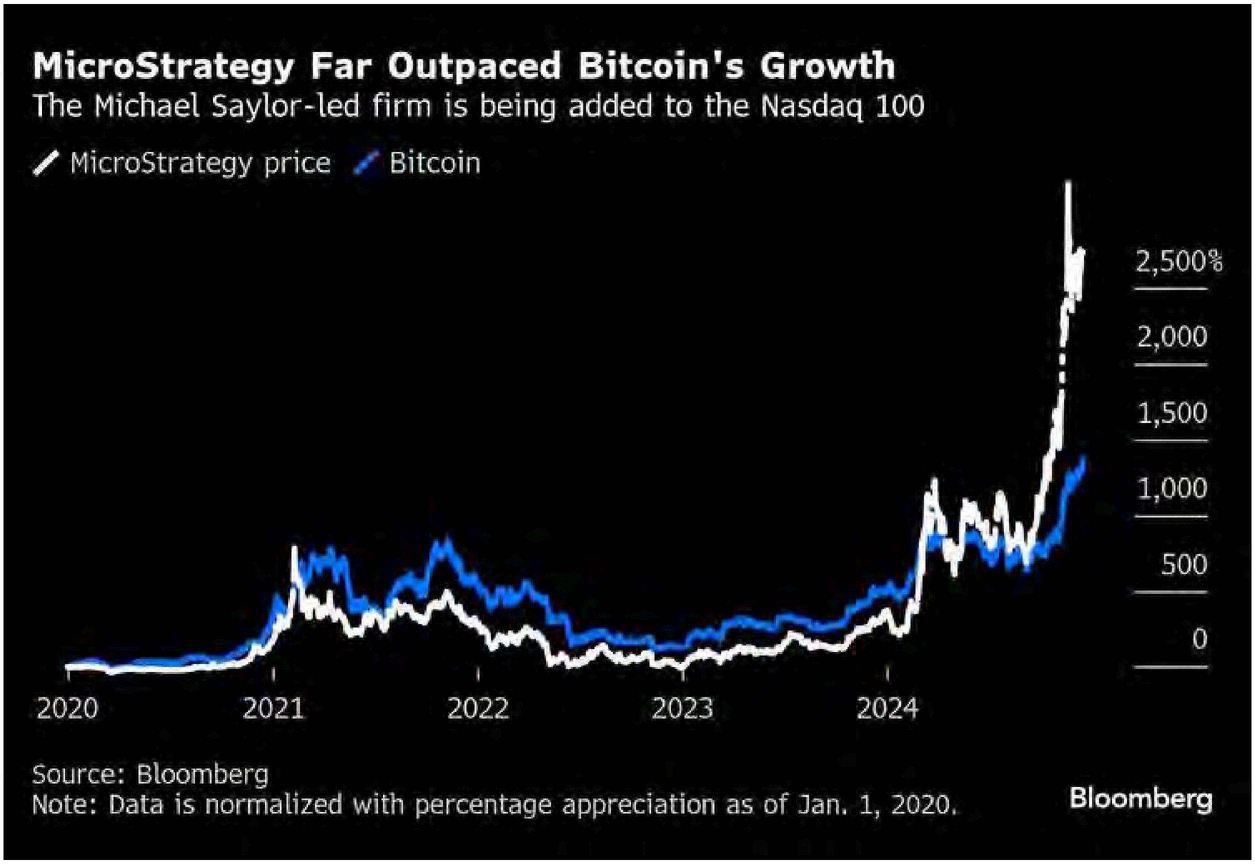
Yet Wall Street pros warn the oncoming march of these price-insensitive investors threatens a new source of vulnerability in a stock that has soared more than 500% this year on booming demand from retail investors, as well as hedge funds capitalizing on its volatility.

MicroStrategy’s Nasdaq admittance, scheduled for after the close of trading Friday, looks poised to prompt passive investors to buy roughly $2 billion of shares, a Bloomberg Intelligence estimate shows. The incorporation was cheered by crypto bulls as further evidence of mainstream adoption.

At the same time, price-agnostic indexing flows can work against a stock — exacerbating declines once momentum turns. For evidence, look no further than Super Micro Computer Inc., which will be dropped out of the tech-heavy benchmark at the same rebalancing event, after winning a prestigious spot in July amid the craze over artificial intelligence. The stock fell 8.3% Monday despite broad market buoyancy.

While Super Micro remains an extreme case — with concerns over corporate governance fueling a big stock rout — the index round trip serves as a reminder of the risks involved in passive investing.

Research earlier this year by Dimensional Fund Advisors, an active manager, found that this so-called index effect remains a feature of the investment landscape, with benchmark-tracking vehicles often systematically buying when the price is high and selling during the lows.



Bloomberg

What constitutes the negative catalyst for MicroStrategy is hard to tell for now. To bulls, it appears to be the flywheel trade, where controversy-courting founder **Michael Saylor** sells more shares to buy Bitcoin, which pushes up the price of the digital currency and bolsters the stock anew — in turn allowing for further capital raising. But all that can't last forever, according to **Mike Bailey**, director of research at FBB Capital Partners.

"Getting added to a widely-held basket of stocks will likely raise the profile of MSTR," Bailey said. "But this is a double-edged sword, especially if we get a reversal in market speculation for crypto and other high risk/return assets."

MicroStrategy, the dot-com-era software maker turned leveraged Bitcoin proxy, has become a major investment story this year as it accelerated an unconventional plan to raise capital solely to purchase and hold the cryptocurrency. It has announced multibillion-dollar acquisitions every Monday over the past six weeks, surging along with the token's price — and raising questions in some circles about the strategy's sustainability. It holds around $45 billion in Bitcoin.

Bloomberg

Saylor “has made a massive winning bet on Bitcoin. It’s different in that there’s not a company producing or operating a product,” said **George Cipolloni**, a portfolio manager at Penn Mutual Asset Management. “As an investor from a risk standpoint, I get a little nervous with concentration.”

A spokesperson for MicroStrategy didn’t immediately respond to a request for comment.

Tom Lee at Fundstrat Capital is considering MicroStrategy for his Granny Shots US Large Cap ETF (GRNY), an actively-managed fund that focuses on multiple investment themes. At Bloomberg’s ETF in Depth conference Thursday, Lee said an inclusion in major indexes such as the Nasdaq 100 would make them officially consider holding the stock. As of Monday, the fund has not purchased the stock.

To some market participants, Saylor’s model is mostly hinged on a market where the spigot of money raising is widely open and Bitcoin has enjoyed a cacophony of tailwinds from regulatory approval on crypto-linked ETF products and a friendly incoming Donald Trump administration. With the buy-and-hold strategy, Bitcoin doesn’t generate any income for the company.

Anyone betting what’s so far a perfectly virtuous cycle for MicroStrategy to continue may need to heed the lesson from Super Micro. In an example of the outcome where reality fails to live up to euphoria, the stock tumbled as much as 80% after its July entry to the Nasdaq 100, with accounting concerns overwhelming the AI frenzy. The stock fell four straight days in the run-up to the latest Nasdaq announcement on its removal, plunging 17% over the stretch.

Any bad news for MicroStrategy could unleash a wave of selling by this new band of price-agnostic investors, according to **Art Hogan,** chief market strategist at B. Riley Wealth.

"The sword is going to cut both ways — additive now," Hogan said, referring to passive flows. "If there's a risk-off phase, which is completely natural and likely expected at the beginning of the year, and the Nasdaq 100 goes down, you're going to delete market cap in what is a levered play on a very volatile asset class to begin with."

--With assistance from **Vildana Hajric** and **Katie Greifeld**.

To contact the reporters on this story:
Lu Wang in New York at lwang8@bloomberg.net;
Isabelle Lee in New York at ilee204@bloomberg.net

To contact the editors responsible for this story:
Chris Nagi at chrisnagi@bloomberg.net

Dave Liedtka, Sid Verma

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

BDO Asks 2nd Circ. To Rethink AmTrust Investor Suit Ruling

By **Katryna Perera**

Law360 (December 17, 2024, 10:31 PM EST) -- Auditing firm BDO USA LLP has asked the full Second Circuit to review an earlier decision that allowed a lawsuit brought by AmTrust Financial Services Inc. investors to move forward on claims that the auditor did a poor job reviewing the insurer's financial statements.

BDO filed a **petition** for a rehearing or rehearing en banc on Monday, arguing that its false audit certification of AmTrust's financial statements was not material because it did not alter the "total mix of information" about the company's financials made available to investors.

The petition comes after the Second Circuit **reversed course** in October and issued an amended opinion, finding that BDO was actually not off the hook for certifying the insurer's financial statements.

A three-judge panel for the Second Circuit vacated a district court's **dismissal** of securities fraud claims against BDO — which the appellate court itself had **affirmed** in August 2023. While the district court had found that potential misstatements made in BDO's audit opinion of AmTrust's financials were immaterial, the Second Circuit said in October that they "subjected unknowing investors to the risk that AmTrust's financial statements were unreliable."

On Monday, BDO argued that this reversal by the appeals court has established an "extraordinary per se rule of materiality."

"As the panel sees it, a reasonable investor would find it significant whether a company's outside auditor followed each and every [Public Company Accounting Oversight Board]-prescribed procedure, even where, as here, any noncompliance did not affect the audit's substantive conclusions," the petition stated. "This per se materiality standard is irreconcilable with Supreme Court precedent, creates a clear circuit split, and undermines the materiality requirement. Rehearing en banc is warranted."

BDO noted that the investors did not allege issuer fraud by AmTrust based on the financial statements at issue in the case, and the auditor said when it realized it had not performed certain PCAOB procedures, it "swiftly completed them and determined that its opinion would have been the same had it done so on time."

"Investors invest in companies, not in audits," BDO said, and the Second Circuit should not depart from other court precedents that false certifications of compliance with professional standards are immaterial when the statement has no bearing on the audit's outcome or underlying financial statements.

BDO further claimed that if the Second Circuit's current holding is left unchecked, there will be "severe consequences."

"Now, even minor lapses in the performance of an audit, with no possible impact on investors, are material in this circuit," the petition stated.

The Second Circuit panel also erred in disregarding BDO's "prompt" correction of its certification in addressing the suit's claims of scienter and loss causation, the petition stated.

"The allegations show that BDO took reasonable steps to correct its audit opinion by completing it and confirming its accuracy as originally submitted. BDO thus believed in good faith that the information presented to investors was reliable," the petition stated. "At most, once BDO completed the PCAOB procedures, its audit report was simply misdated by several weeks. That fact comes far short of showing that BDO intended to defraud the investing public."

Additionally, it is "impossible" to link any inflation in AmTrust's stock price to BDO's initial false certification, according to the petition.

"Once BDO realized its mistake and completed the omitted procedures, the 'subject' of the only remaining alleged 'fraudulent statement or omission' was simply the time gap between the certification and the conducting of the certified-to procedures," the petition stated. "Plaintiffs offer no plausible allegation that this time gap itself could have possibly caused any losses."

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

The investors are represented by Samuel Rudman, Andrew Love, David Rosenfeld, Mark Millkey, William Geddish and Robert Gerson of Robbins Geller Rudman & Dowd LLP, Jeremy Lieberman of Pomerantz LLP, Thomas McKenna of Gainey McKenna & Egleston and Kim Miller of Kahn Swick & Foti LLC.

BDO is represented by Timothy Hoeffner, Jason Gerstein, Ludwig von Rigal, Paul W. Hughes, Andrew A. Lyons-Berg and Emmett Witkovsky-Eldred of McDermott Will & Emery LLP.

The case is In re: Amtrust Financial Services Inc., case number 20-1643, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Sarah Jarvis. Editing by Dave Trumbore.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Drug Co. Investor Sues In Del. Over $140M Insider Windfall

By **Jeff Montgomery**

Law360 (December 17, 2024, 5:49 PM EST) -- A pension fund investor in Cerevel Therapeutics Holdings Inc. has sued Bain Capital Investors LLC and other alleged insiders of the company in Delaware's Court of Chancery, accusing them of lining up a secondary offering in the biopharmaceutical venture before disclosure of its planned sale to AbbVie.

According to the complaint, filed on Monday, Cerevel began an effort to sell the business almost immediately after Bain partner Ron Renaud was named Cerevel's CEO on June 12, 2023. Months later, in October 2023, Bain and an affiliated fund acquired $145 million in Cerevel stock in a secondary offering while the company was in discussion with AbbVie about a take-private merger.

When agreement on the $8.7 billion, $45-per-share Cerevel sale to AbbVie was reached two months later, in December 2023, the Bain parties along with purported insider Perceptive Advisors LLC saw their newly acquired Cerevel shares jump in value to $286 million, a 97% gain on investment in less than two months, the lawsuit said.

Also benefiting and named in the suit was Perceptive Advisors LLC, which sponsored the special purpose acquisition company that took Cerevel public in October 2020.

"The issuance of stock in the October offering — while defendants knew there was concrete, third-party interest in acquiring the company — was a breach of fiduciary duty that also infected the fairness of the merger process and price," the complaint filed by Service Employees International Union Pension Plans Master Trust said.

At the time of the deal, Cerevel was developing a promising new drug for schizophrenia and Alzheimer's disease psychosis, among other conditions.

Alleged in the suit were breaches or aiding and abetting breaches of fiduciary duty, along with unjust enrichment. Damages sought include the $141 million windfall received by Bain's insiders as well as other recoveries.

SEIU's complaint said a deal proxy disclosed conversations between Cerevel and AbbVie on Sept. 25, 2023, about Cerevel's acquisition by a partnership of AbbVie and a Japanese business. The proxy suggested that the first mention of a whole-company acquisition of Cerevel by AbbVie alone occurred later, on Oct. 19, at $35 per share.

"That was false," the complaint said. "As of September 23, 2023, Cerevel management was expecting a term sheet from AbbVie for a whole-company proposal," with Cerevel's board discussing the whole company deal at its Sept. 27, 2023, meeting.

"This false disclosure" regarding the later, whole-company offer "was also material, given that it hid from Cerevel's public stockholders that the Board, Bain, and Perceptive knew there was takeover interest for the company in September, but still proceeded with the October offering," the complaint noted.

In connection with the merger, and after only a little more than a year on the job, Renaud received nearly $74 million in compensation, the suit said. The figure includes $47.7 million in equity, about $1.8 million in cash and a $24.3 million tax reimbursement.

Also named in the suit is BC Perceptions Holdings LP, the fund through which Bain held and managed its Cerevel investment. In addition, three current or former Bain partners, including Renaud, were named.

Bain as the company's controlling stockholder, Cerevel's directors and Renaud in his capacity as a company officer all were accused of breaching their fiduciary duties. Perceptive and Bain were, in addition, accused of aiding and abetting fiduciary breaches as well as unjust enrichment.

Cerevel was founded by Bain and Pfizer in 2018, with Bain providing $350 million in funding at the time and receiving 75% of Cerevel's equity. By the time of the AbbVie merger, Bain held 36.2% of Cerevel.

Bain also benefited generally from the Cerevel sale, which closed at a 73% premium to the company's price on Dec. 1, 2023, with Bain's stake worth an estimated $2.7 billion.

A spokesperson for Bain said the company would decline to comment.

SEIU Pension Plans Master Trust is represented by Christine M. Mackintosh and William G. Passannante II of Grant & Eisenhofer PA, Andrew E. Blumberg, Benjamin M. Potts, Daniel E. Meyer, Jeroen van Kwawegen, Christopher J. Orrico and James Janison of Bernstein Litowitz Berger & Grossmann LLP and Robert E. Bishop and Frank Partnoy of Bishop Partnoy LLP.

Counsel information for Bain Capital Investors LLC and others named in the suit was not immediately available.

The case is SEIU Pension Plans Master Trust v. Bain Capital Investors LLC, et al., case number 2024-1274, in the Court of Chancery of the State of Delaware.

--Editing by Emily Kokoll.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Quinn Emanuel, Keller Postman Want To Lead Live Nation Suit

By **Rae Ann Varona**

Law360 (December 17, 2024, 8:52 PM EST) -- Quinn Emanuel Urquhart & Sullivan LLP and Keller Postman LLC attorneys told a California federal court that they are best suited to represent proposed classes of consumers accusing Live Nation and Ticketmaster of monopolizing the ticketing services space, saying they "developed the heart" of the consumers' claims.

In a Monday application for appointment as interim co-lead class counsel, the firms contend that they were also the ones who "set the stage" for a **parallel suit** pending in New York federal court that the U.S. Department of Justice and state attorneys general lodged.

"Quinn Emanuel and Keller Postman developed the substantive antitrust theories at issue here, and their successful challenges to defendants' arbitration provisions are what made it procedurally possible for the classes to pursue those theories in court and on a collective basis," the firms say in their application.

They are seeking to represent two classes of consumers in a putative class action filed against Live Nation Entertainment Inc. and Ticketmaster LLC in California federal court nearly three years ago. A group of customers **accuses** the "behemoth" companies, which merged in 2010, of using their dominance to stifle competition and jack up ticket prices, ultimately having consumers shoulder the anticompetitive harm and costs "simply because they want to see their favorite artists perform live."

In describing their case as "unusual," the customers also in their complaint challenge Live Nation and Ticketmaster's sudden switch from using Judicial Arbitration and Mediation Services as an arbitration provider to digital startup New Era ADR — a switch the plaintiffs claim ultimately required them to "engage in a novel and one-sided process that is tailored to disadvantage consumers."

The consumers seek to represent both a "primary ticketing" and "secondary ticketing" services consumer class.

U.S. District Judge George H. Wu in August 2023 **denied** Live Nation and Ticketmaster's bid to compel arbitration of the customers' antitrust claims, saying that their failure to tell customers of the arbitration switch-up was "procedurally unconscionable to an extreme degree" given that it was significant.

A three-judge panel at the Ninth Circuit **affirmed** that ruling in late October, finding that the underlying arbitration agreement linked to "borderline unintelligible" arbitral rules was unenforceable.

The panel also criticized New Era's mass arbitration rules as being "internally inconsistent, poorly drafted, and riddled with typos," noting that Live Nation's counsel had struggled to explain the rules during **oral argument** earlier this year.

The rules and terms, read together, were "so 'overly harsh or one-sided' ... as to unequivocally represent a 'systematic effort to impose arbitration ... as an inferior forum' designed to work to Live Nation's advantage," the panel stated.

Quinn Emanuel and Keller Postman's application to be interim class counsel comes after the full Ninth Circuit earlier this month **refused** to **reconsider** the panel's October ruling.

In their application, the firms point the court to their "deep experience" in antitrust cases and class actions and their "unmatched resources."

They note that Quinn Emanuel, for instance, has racked up recognitions for its work, including being among Law360's **class action Groups of the Year**.

Antitrust and class action victories under Quinn Emanuel's belt include a **$110 million deal** reached for Live Nation rival Songkick, which alleged antitrust violations in the wake of Live Nation and Ticketmaster's merger.

In the six years since it was founded, Keller Postman has also amassed experience in antitrust cases, the firms say. Keller Postman, for example, currently represents a coalition of states in an antitrust case **against** Google, challenging the tech giant's allegedly anticompetitive conduct in the ad tech space. The firm is also representing plaintiffs in a putative class action **against** Amazon.com Inc.

Pointing the court to their resources, the firms say the type of litigation before them is "Quinn Emanuel's life blood." They add that over the last several years, the firm has made "significant financial contributions" on behalf of the consumers, "including investing substantial attorney time helping to develop the substantive claims at issue and to overcome defendants' arbitration provisions at both the trial court and appellate levels."

Keller Postman has also committed extensive resources to the case, they say, adding that "cases of this magnitude are nothing new for the firm."

"Keller Postman was founded with the mission of taking on the most complex and resource-intensive litigation challenges," the firms add.

Counsel for Live Nation and Ticketmaster did not immediately respond to a request for comment Tuesday.

The customers are represented by Kevin Y. Teruya, Adam B. Wolfson, William R. Sears, and Brantley I. Pepperman of Quinn Emanuel Urquhart & Sullivan LLP, and by Warren D. Postman and Albert Y. Pak of Keller Postman LLC.

Live Nation and Ticketmaster are represented by Tim O'Mara, Roman Martinez, Sadik Huseny, Robin L. Gushman, Alicia R. Jovais, Andrew Gass, Nicholas R. Rosellini and Uriel Hinberg of Latham & Watkins LLP.

The case is Skot Heckman et al. v. Live Nation Entertainment Inc. et al., case number 2:22-cv-00047, in the U.S. District Court for the Central District of California.

--Additional reporting by Joyce Hanson, Rachel Scharf, Ali Sullivan, Craig Clough, Nadia Dreid and Bryan Koenig. Editing by Kristen Becker.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Alcohol Co. Sued Over Biz Hangover After COVID Lockdowns

By **Sydney Price**

Law360 (December 17, 2024, 8:57 PM EST) -- Alcoholic beverage manufacturer MGP Ingredients Inc. has been hit with a proposed investor class action alleging the company misled the public about the continued success of its business following its exponential growth during the COVID-19 pandemic and related lockdowns.

Operating Engineers Construction Industry Miscellaneous Pension Fund **said in a complaint** filed Monday beverage company MGP Ingredients benefited from an uptick in alcohol retail sales as a result of pandemic-related lockdowns from 2020 to 2022.

MGP Ingredients had ramped up its production in response to the lockdowns, but it failed to adjust its tactics once demand fell, the pension fund alleged. As a result, MGP Ingredients was left with an oversupply of product and did not reveal the full extent of its problem to investors until October, according to the suit.

"Defendants had assured investors that they were positioned differently than their competitors, and that this was a non-issue, because the company had already taken steps to mitigate the risk, when in fact it had not," MGPI said Monday.

In addition to defendant MGP Ingredients, its CEO David S. Bratcher, former CEO David Colo and Chief Financial Officer Brandon M. Gall are individual defendants in the suit.

The class period begins May 4, 2023, the day MGP Ingredients announced its financial results for the first quarter of 2023, the pension fund noted. On that day, the company told investors that demand for products in its three segments — distillery solutions, branded spirits and ingredient solutions — remained strong, and that inventory levels would normalize by the end of the year, according to the complaint.

Throughout the rest of the class period ending Oct. 30, 2024, MGP Ingredients continued to mislead investors about demand and its inventory levels, the pension fund alleged.

For example, during a November 2023 earnings call, the defendants said MGP Ingredients' strong sales of brown liquor was "driven by strong demand for our new distillate and aged whiskey," when there had actually been a slowdown in consumption and oversupply in their products, the investor said.

The truth began to emerge on Feb. 22, 2024, during a quarterly earnings call, according to the complaint. During the call, the defendants confirmed recent industry reports indicating inventory destocking will remain an issue for the liquor industry for the rest of the year, but downplayed investors' concerns by assuring them MGP Ingredients had prepared for this decline beginning in 2023, according to the complaint.

On this news, the price of MGP Ingredients shares fell $13.65, or about 15%, to close at $78.14 on Feb. 22, according to the complaint.

After continuing to make light of its issues publicly for the next several months, MGP Ingredients finally revealed in October its sales were expected to decline 14% from the prior year's third quarter and revised its guidance downward, according to the suit. The pension fund noted Bratcher said during an Oct. 31 earnings call that "slower growth and higher inventories are leading to lower demand, lower prices and reduced visibility on our contract distilling sales."

On this news, the price of MGP Ingredients shares fell $8.27, or about 15%, to close at $49.04 on Oct. 31, according to the complaint.

The suit claims MGP Ingredients and the individual defendants acted with scienter, or with actual knowledge of wrongdoing or reckless disregard. It also claims they violated the Exchange Act and are not protected under the safe harbor provisions of the securities laws.

Counsel for the pension fund and a representative for MGP Ingredients did not respond to requests for comment Tuesday.

Operating Engineers Construction Industry Miscellaneous Pension Fund is represented by Daniel L. Berger, Caitlin M. Moyna and Timothy Clark B. Dauz of Grant & Eisenhofer PA.

Counsel information for MGP Ingredients and the individual defendants was not immediately available on Tuesday.

The case is Operating Engineers Construction Industry Miscellaneous Pension Fund v. MGP Ingredients Inc. et al., case number 1:24-cv-09685, in the U.S. District Court for the Southern District of New York.

--Editing by Lakshna Mehta.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Del. Justices Won't Revive Investors' $2.4B EV SPAC Deal Suit

By **Rachel Scharf**

Law360 (December 17, 2024, 9:57 PM EST) -- The Delaware Supreme Court has declined to reinstate a proposed class action in the state's Chancery Court that accused a blank-check company of withholding key information from investors ahead of its $2.4 billion go-public deal with electric-vehicle maker Canoo Holdings Ltd.

The decision came in a one-page **order** Monday that affirmed the Delaware Court of Chancery's dismissal of securities litigation against Hennessy Capital Acquisition Corp. IV, a special-purpose acquisition company that **took Canoo public** in 2020.

A proposed class, led by Hennessy shareholder Paul L. White Jr., alleged in a 2022 complaint that the SPAC misled investors by touting an outdated business model for Canoo. Three months after its $2.4 billion initial public offering, the electric-vehicle company announced it would pivot away from subscriptions and "de-emphasize" engineering services, leading to a 21% drop in stock prices.

Vice Chancellor Lori W. Will **axed the lawsuit** in June this year after finding that White's claims rested entirely on post-closing developments. The judge said she couldn't reasonably infer that Hennessy was aware before the deal of Canoo's plans to change its business model.

While Delaware's top court did not explain its reasoning for affirming the vice chancellor's dismissal, the five justices of the court **seemed to agree** during oral arguments earlier this month that Hennessy can't be held liable for information it didn't know.

During the arguments, Justice Gary F. Traynor pointed to the U.S. Securities and Exchange Commission's **$1.5 million settlement** with Canoo in 2023. That deal included a report determining that the car company concealed some important details from Hennessy ahead of their merger.

Counsel for White and Hennessy did not immediately respond to requests for comment on the justices' decision.

In addition to the Hennessy suit in Delaware, Canoo itself is also facing securities litigation of its own over its business model changes following the SPAC merger. A proposed class action against Canoo remains pending in California federal court.

White is represented by P. Bradford deLeeuw of deLeeuw Law LLC and Robert C. Schubert and Willem F. Jonckheer of Schubert Jonckheer & Kolbe LLP.

Hennessy is represented by Kevin R. Shannon, Christopher N. Kelly and Daniel M. Rusk IV of Potter Anderson & Corroon LLP and James W. Ducayet, Heather Benzmiller Sultanian and Thomas H. Collier of Sidley Austin LLP.

The case is In re: Hennessy Capital Acquisition Corp. IV Stockholder Litigation, case number 245,2024, in the Supreme Court of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Covey Son.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Express Scripts, OptumRx Can't Ditch LA County Opioid Suit

By **Rachel Scharf**

Law360, Los Angeles (December 17, 2024, 7:47 PM EST) -- A California judge ruled Tuesday that Los Angeles County can keep pursuing a lawsuit claiming pharmacy benefit managers Express Scripts and OptumRx colluded with drugmakers to fuel the opioid epidemic, though the county must rework its complaint to specify how regulators were allegedly deceived.

Los Angeles Superior Court Judge David S. Cunningham III announced his ruling from the bench during a morning hearing in the **public nuisance case** against Express Scripts, OptumRx and various related entities. LA County alleges that these pharmacy benefit managers, or PBMs, accepted hefty rebates from Purdue Pharma LP as kickbacks for giving OxyContin preferred status and few restrictions on healthcare coverage rubrics.

The PBMs deny the allegations and moved for dismissal based on preemption, arguing that LA County is impermissibly seeking to interfere with federal health insurance plans regulated under the Employee Retirement Income Security Act, Medicare Act and Affordable Care Act.

"There are federal preemption defenses to their allegation that we failed to implement restrictions early enough," Sage Vanden Heuvel Quinn Emanuel Urquhart & Sullivan LLP, a lawyer for Express Scripts, said during Tuesday's hearing. "Express Scripts does not decide those things … Those safeguards need to be approved [by the federal government.]"

But the judge was unconvinced, pointing to a recent **Alaska federal court ruling** that rejected federal preemption in a similar opioid nuisance lawsuit against PBMs. Like in the Alaska case, Judge Cunningham said LA County's complaint goes far beyond the plans themselves.

"There's a lot more," the judge said of the lawsuit. "It really goes into false messaging, and allowing Purdue to edit the medical guidance. That certainly triggers potential liability from the court's perspective."

The judge did, however, say the current complaint does not do enough to overcome safe harbor protections created by California state regulators' involvement in approving the PBM coverage rubrics. He ordered LA County to file an amended pleading fleshing out their allegations that the PBMs deceived those regulators.

"We can provide that amendment, certainly," said an attorney for the county, Mimi Liu of Motley Rice LLC, though she argued that they've already adequately alleged the regulators were told lies "passed down" from the PBMs to health insurers.

The PBMs have separately moved to escape the suit due to lack of personal jurisdiction. Judge Cunningham said Tuesday that he's delaying a decision on that issue until the parties complete targeted discovery related to the PBMs' activities within California.

LA County's amended complaint is due in February, and the parties are scheduled to return to court for a status conference in April.

The attorneys declined to comment after the hearing. .

The cases in Los Angeles and Alaska are among **dozens of lawsuits** accusing PBMs of helping fuel the nationwide opioid crisis. Many of these claims have been consolidated into multidistrict litigation in Ohio federal court, with **bellwether discovery** underway now.

LA County is represented by Brendan C. Austin, Elizabeth Smith, Linda Singer, Mimi Liu and Frederick C. Baker of Motley Rice LLC and Scott Kuhn and Andrea Ross of the Los Angeles County Office of the County Counsel.

Express Scripts is represented by Danielle L. Gilmore, Sage R. Vanden Heuvel, Michael Lyle, Jonathan G. Cooper, Kiel B. Ireland and Charles B. Straut II of Quinn Emanuel Urquhart & Sullivan LLP.

OptumRx is represented by Kimberly K. Chemerinsky, Alexander Akerman, Brian D. Boone, Andrew Hatchett, Omar A. Morquecho, Noah Texter and Caitlin Van Hoy of Alston & Bird LLP.

The case is People of the State of California v. Express Scripts Inc. et al., case number 23STCV20886, in the Superior Court of the State of California, County of Los Angeles.

--Editing by Kelly Duncan.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Sandoz Cuts $275M Deal For More Price-Fixing Claims

By **Matthew Perlman**

Law360 (December 17, 2024, 7:44 PM EST) -- Swiss drugmaker Sandoz said Tuesday it has reached a $275 million settlement to end claims from consumers, insurers and others in the sprawling multidistrict litigation over alleged price-fixing in the generic-drug industry.

Sandoz Group AG said in a statement that its subsidiaries Sandoz Inc. and Fougera Pharmaceuticals Inc. have entered into a settlement agreement with a proposed class of end payors in the generic-drug pricing case, which is pending in the Eastern District of Pennsylvania. The agreement includes no admission of wrongdoing but resolves claims from consumers, insurers and benefit funds that allegedly overpaid for generic prescription drugs between 2009 and 2019.

"This settlement underscores Sandoz['s] commitment towards integrity and sound governance, and it is an encouraging step toward resolving allegations of legacy conduct," Tuesday's statement said.

Sandoz reached a **$265 million settlement** with pharmacies and other direct buyers in the MDL in February, saying the deal showed the new public company's commitment to integrity following its **spinoff last year** from Swiss pharmaceutical giant Novartis AG.

The MDL accuses companies including Sandoz, Teva, Actavis and Mylan of participating in schemes to fix prices for dozens of generic pharmaceuticals, along the same lines as a **criminal probe** into the industry by the U.S. Department of Justice. Apotex Corp., Breckenridge Pharmaceutical Inc. and Heritage Pharmaceuticals Inc. have reached settlements with direct purchasers in the MDL totaling around **$45 million**.

In the statement on Tuesday, Sandoz said it has set aside an additional $265 million on top of the settlements for claims from **state enforcers** that were separated from the private cases earlier this year, along with claims from any settlement opt-outs.

"Sandoz US continues to defend itself vigorously in those cases, and has raised a number of defenses, including whether downstream purchasers were actually damaged due to the alleged conduct," the statement said. "As the litigation progresses, Sandoz will continue to assess the overall situation and may increase or decrease the provision as appropriate."

Sandoz entered into a **deferred prosecution** agreement with the DOJ in 2020 over price-fixing allegations that included a $195 million criminal penalty. The DOJ also reached a $185 million civil settlement with Sandoz in 2021 to resolve **additional claims**.

Teva and Glenmark agreed to pay around $305 million last year as part of deferred prosecution agreements with the DOJ to end the investigation of their roles in the alleged schemes.

Representatives for the end payors did not respond to a request for comment Tuesday.

The end-payers are represented by Roberta D. Liebenberg of Fine Kaplan and Black RPC.

The Sandoz subsidiaries are represented by Jeffrey Fuisz, Margaret Rogers, Ada V. Añon, Laura Shores and Robert Katerberg of Arnold & Porter Kaye Scholer LLP.

The MDL is In re: Generic Pharmaceuticals Pricing Antitrust Litigation, case number 2:16-md-02724, in the U.S. District Court for the Eastern District of Pennsylvania.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Authors Seek OpenAI Docs About Its Future Models In IP Case

By **Bonnie Eslinger**

Law360 (December 17, 2024, 10:18 PM EST) -- Authors alleging that ChatGPT creator OpenAI Inc. is copying protected works asked a California federal judge Tuesday to order the company to produce documents about its large language models in development, information OpenAI argued would be burdensome to produce and not relevant to the proposed class action.

The dispute unfolded during a virtual discovery hearing Tuesday before U.S. Magistrate Judge Robert M. Illman. In a letter to the court, the authors said "despite multiple meet and confers" OpenAI had refused their request for documents related to all OpenAI GPT models, "including those models in development." GPT stands for generative pre-trained transformer.

Judge Illman said at the start that it seemed like a "pretty reasonable request."

A lawyer for OpenAI, Paven Malhotra of Keker Van Nest & Peters LLP, said the request relating to models being developed are not relevant. "There's no indication that any future or in-development model was actually trained on the plaintiffs' works," Malhotra said.

Furthermore, he said, OpenAI can submit a declaration from one of the company's engineers stating that the future models are not trained on the same works as the GPT-3.5 model, which was the latest one publicly available when the suit was filed in June 2023.

"We're talking about our future models, and on that point, there's just no indication that the plaintiffs' works were actually used to train those models," Malhotra said.

The request also burdens OpenAI, he said.

"When developing models, OpenAI does lots and lots of research, there's lots of models that are generated," Malhotra said. "Some of them come to fruition, some of them are dead ends."

Compiling general discovery on all models in development would be a giant task, he said.

A lawyer for some of the writers, Christopher Young of the Joseph Saveri Law Firm LLP, told the judge that the GPT models that have been in development since the filing of the case are relevant to the litigation. The test for relevance isn't whether the authors' works were used in the later iterations of the model, it's whether the information could be relevant to a claim or defense, Young said.

"If OpenAI decided to no longer use infringing works for later models, I think that's highly relevant," Young said. "And if it turns out that they are still using infringing works and have just renamed the datasets ... that's also highly relevant to the claims of defense."

Malhotra said that materials from the earlier datasets were not used after GPT-3.5, "so they wouldn't be used in the development models."

Regarding the claimed burden on OpenAI, Young told the judge that the requested discovery is proportional to the needs of the case.

"I think everyone would agree this is a monumentally significant case," he said, "not just monetarily, but for societal impact, and for property rights."

Judge Illman responded that he was conflating the needs of the case with its importance and suggested the request be narrowed.

Young said that all the authors were seeking was existing documents with information about the data sets that OpenAI is planning to use for its future GPT models.

"This is how we're going to license the data ... or not license the data for these GPT models, these are the people we're going to try to contract with," the lawyer said. "It would be bizarre for me that some of these documents do not already exist."

The judge ordered the authors to submit a narrower request and see if there are any objections to it.

"Have a little bit of a back and forth and then submit that request to me," Judge Illman said. "Along with the declaration you were talking about with regard to your engineer."

The litigation is brought by author-comedian Sarah Silverman, Pulitzer Prize winners Junot Díaz and Andrew Sean Greer, horror writer Paul G. Tremblay and journalist-novelist Ta-Nehisi Coates, among others. They allege that OpenAI ripped off their works to train ChatGPT without permission or compensation. **Tremblay filed suit in June 2023**, and that action was later consolidated with Silverman's case.

The authors say ChatGPT relies on "copying massive amounts of text" to "emit convincingly naturalistic text outputs in response to user prompts." In addition, ChatGPT generates summaries of the authors' writings, something only possible if OpenAI "trained" the bot on their copyrighted works, the complaint says.

In March, the judge overseeing the case, U.S. District Judge Martínez-Olguín, held that the authors **cannot bar OpenAI** from defending itself against a similar suit in New York federal court, rejecting their argument that OpenAI was forum-shopping. The **New York suit** was filed in September and is led by the Authors Guild, a writers' trade group, and novelists including John Grisham, Jonathan Franzen, Mary Bly, Jodi Picoult, David Baldacci and George R.R. Martin.

The judge later rejected the authors' pick for interim lead counsel in a case, saying **the request must wait** until class certification has been decided.

Most recently, Judge Martínez-Olguín **cut an unfair competition claim** from the case, leaving only the suit's claim for direct copyright infringement.

The authors are represented by Joseph R. Saveri, Cadio Zirpoli, Christopher K.L. Young, Holden Benon and Aaron Cera of Joseph Saveri Law Firm LLP, Matthew Butterick of Butterick Law and Bryan L. Clobes and Alexander J. Sweatman of Cafferty Clobes Meriwether & Sprengel LLP.

OpenAI is represented by Joseph C. Gratz, Allyson R. Bennett, Tiffany Cheung, Rose S. Lee, Joyce C. Li, Melody E. Wong, Vera Ranieri, Max I. Levy, Eric K. Nikolaides and Alexandra M. Ward of Morrison Foerster LLP, Andrew M. Gass, Joseph R. Wetzel, Sarang V. Damle, Elana Nightingale Dawson and Allison L. Stillman of Latham & Watkins LLP and Robert A. Van Nest, Christopher Sun, R. James Slaughter, Paven Malhotra, Michelle Ybarra, Nicholas S. Goldberg, Thomas E. Gorman and Katie Lynn Joyce of Keker Van Nest & Peters LLP.

The case is In re: OpenAI ChatGPT Litigation, case number 3:23-cv-03223, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hailey Konnath, Lauren Berg, Ivan Moreno, Andrew Karpan and Kelly Lienhard. Editing by Brian Baresch.

LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

AGs Can File Opposition To Clearview AI BIPA Deal

By **Celeste Bott**

Law360 (December 17, 2024, 7:18 PM EST) -- An Illinois federal judge is allowing 22 states and the District of Columbia to challenge a deal to end multidistrict litigation over Clearview AI's practice of automatically collecting biometric facial data online, with attorneys general arguing the settlement would provide no meaningful injunctive relief and give plaintiffs an unknown financial stake in the company.

On Monday, U.S. District Judge Sharon Johnson Coleman denied the plaintiffs' motion to bar the states and the district from filing briefs opposing their settlement with Clearview AI Inc. in the Illinois Biometric Information Privacy Act litigation, a **docket entry** showed. The attorneys general have told the court the agreement, which won preliminary approval in June, warrants further judicial scrutiny and contains severe flaws that "undermine consumers' fundamental right to privacy" and calls for only a "highly unusual and speculative form of recovery."

They also asserted that the 39% attorney fee award sought for class counsel is significantly higher than what courts would normally approve.

The deal in question would provide the class of consumers a 23% stake in the facial recognition technology company, as of its September 2023 capitalization, if it goes public or is sold. At current potential valuations, that would be about $52 million, and the class could also decide to take 17% of the company's revenue through September 2027, according to a motion seeking the initial approval for the settlement.

An attorney representing the class told Law360 earlier this year that a creative solution was necessary because Clearview did not have "anywhere near" the cash needed to pay fair compensation to class members. The proposed deal allows class members to recapture the ownership of their biometrics to some extent, he said.

But the opposing states and D.C. have contended that there's no evidence that an initial public offering or acquisition is imminent or likely to occur in the future, and there's no support for the assertion that Clearview lacks sufficient funds to pay those it harmed. There are no financial statements or documents showing the firm's current or predicted financial position, or declarations from witnesses, such as an independent accountant, they said.

"Indeed, plaintiffs fail to even describe any discovery undertaken to determine Clearview's financial position, when Clearview previously raised over $30 million from investors and as recently as August 2024, Clearview's founder stated Clearview had the potential to make $1 to 2 billion in annual revenue," the attorneys general wrote in a **motion** filed Thursday. "More proof should be required."

Class counsel should provide much more support for why this relief is fair, reasonable and adequate before it is given a final sign-off, they added.

"To receive any relief, class members will be forced to rely on the continued success of Clearview's invasive business practices, and in turn, will be forced to support Clearview's continued harms," the amici states and D.C. said. "This goes against the very essence of this lawsuit, is the height of unfairness under [Seventh Circuit] law, and if approved, would send a signal to class members that Clearview's nefarious business practices will not only go unpunished, but will be rewarded."

And while the plaintiffs insist that injunctive relief obtained in collateral litigation brought by the American Civil Liberties Union is sufficient without further injunctive terms in their settlement, many of the terms in the ACLU deal apply only to Illinois residents, according to the request for leave to file opposition briefs.

"Importantly, a pivotal injunctive term — that Clearview provide a means for consumers to request that their images be excluded from Clearview's database — is limited solely to Illinois residents," the attorneys general said. "The notable lack of a nationwide opt-out in the proposed settlement renders the settlement unfair."

The states and the district also alleged that since the ACLU settlement, Clearview has added about 20 billion images scraped from websites to its database, and to date, has collected and processed over 50 billion images.

"Under the settlement, this conduct — again, the central conduct underlying plaintiffs' claims — will continue, and class members that reside outside of Illinois will continue to have no ability under the settlement to remove their images from Clearview's database," they said. "Thus, class members will be in the same position they were prior to the settlement."

Similar BIPA suits against Facebook, TikTok and Snapchat have led to multimillion-dollar deals that provide injunctive relief "well beyond" anything provided by the ACLU settlement the plaintiffs rely on in the current case, according to the motion.

In addition to D.C., the amici states are Vermont, Arizona, California, Colorado, Connecticut, Delaware, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, Oregon, Rhode Island, Tennessee and Washington.

Illinois resident David Mutnick filed the first BIPA suit against Clearview in January 2020, accusing it of violating the state's biometric privacy law by failing to obtain informed consent from him and other consumers before collecting, storing, using and profiting from their biometric data. Several other Illinois residents joined Mutnick as named MDL plaintiffs, as did California resident Andrea Vestrand, New York resident Aaron Hurvitz and Virginia resident Shelby Zelonis Roberson.

Similar claims against Macy's were consolidated into the current MDL and would be released in the proposed settlement, the consumers said.

Judge Coleman refused to dismiss the case against Clearview in February this year, saying the company's contention that the capture and analysis of "faceprints" from public images is protected speech — and that the biometric privacy law violates the First Amendment by inhibiting the collection of public information — "oversimplifies" the allegations it faces from Illinois residents.

The judge will consider granting final approval for the settlement at a Jan. 30, 2025, hearing.

Neither class counsel nor attorneys representing Clearview could be immediately reached for comment Tuesday.

The class is represented by Jon Loevy, Michael Kanovitz and Thomas Hanson of Loevy & Loevy.

Clearview is represented by Daniel Lynch and James Thompson of Lynch Thompson LLP and Joel Kurtzberg, Floyd Abrams, John MacGregor, Jason Rozbruch and Britney R. Foerter of Cahill Gordon & Reindel LLP.

The case is In re: Clearview AI Inc. Consumer Privacy Litigation, case number 1:21-cv-00135, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauraann Wood. Editing by Covey Son.
