Legal Fee Tracker: Settlements spur big fee awards, with more to come in 2025

reuters.com/legal/legalindustry/legal-fee-tracker-settlements-spur-big-fee-awards-with-more-come-2025-2024-12-19

David Thomas

U.S. one hundred dollar notes are seen in this picture illustration taken in Seoul February 7, 2011. REUTERS/Lee Jae-Won/File Photo Purchase Licensing Rights, opens new tab

Dec 19 (Reuters) - U.S. courts awarded hundreds of millions of dollars in legal fees to class action lawyers and other attorneys in 2024, with hundreds of millions more still hanging in the balance in 2025.

Here are some of the largest awards and outstanding fee bids heading into the new year.

— Two of the biggest attorney paydays of the year came in a sprawling 12-year antitrust litigation over claims that health insurer Blue Cross Blue Shield overcharged subscribers and underpaid healthcare providers.

The U.S. Supreme Court in June declined to hear a challenge to $667 million in fees awarded to lawyers at Boies Schiller Flexner, Hausfeld and other law firms that secured a $2.7 billion antitrust settlement with the insurer in 2020.
Another set of plaintiffs lawyers, led by Joe Whatley and Edith Kallas of Whatley Kallas, are set to request up to $700 million for their work on a separate $2.8 billion settlement that Blue Cross reached in October.

A federal judge in Birmingham, Alabama tentatively approved the $2.8 billion settlement earlier this month. Blue Cross denied wrongdoing.
Whatley Kallas represented hospitals and other health care providers in the cases. Boies Schiller and Hausfeld represented commercial and individual subscribers.

— Winston & Strawn and Hagens Berman Sobol Shapiro are seeking more than $515 million in legal fees after negotiating a landmark multibillion-dollar settlement with the National Collegiate Athletic Association over pay restrictions for student athletes.

The proposed settlement includes payments to former college athletes worth about $2.7 billion and also includes provisions for future athletes to be compensated. The future payments could lead to another $200 million or more in additional legal fee awards for Winston and Hagens Berman over the next 10 years.
The settlement would resolve antitrust lawsuits over longstanding NCAA rules that prohibited payments to athletes, including restrictions on compensation for competing, for the commercial use of players' names, images and likenesses, and payments tied to athletes' academic achievements.

— A federal judge in November said she would continue to set aside more than half a billion dollars for a group of plaintiffs law firms after 3M (MMM.N), opens new tab agreed to pay $6.01 billion to settle the largest mass tort litigation in U.S. history.
The court and the lawyers who worked on the case still have to decide how to distribute about $540 million in legal fees. Lawyers from more than 60 law firms said they spent 364,000 hours working on the case, including 16 trials.

3M agreed to the settlement last August, resolving claims that flaws with the company's earplugs caused hearing damage in hundreds of thousands of U.S. service members and veterans. 3M has said its earplugs are safe and effective and denied allegations that they caused hearing loss.
— A Delaware state judge earlier this month awarded $345 million to lawyers who successfully sued to void Tesla (TSLA.O), opens new tab founder Elon Musk's $56 billion pay package, but the final fate of the award is still unsettled.
Chancellor Kathaleen McCormick last week cleared the way for Musk and Tesla to file appeals to try to reinstate his pay package. Tesla will also be able to appeal the $345 million fee award, the largest ever in Delaware.
The law firms who spearheaded the lawsuit against Tesla — Bernstein Litowitz Berger & Grossmann, Andrews & Springer and Friedman Oster & Tejtel — initially sought more than 29 million Tesla shares, valued at billions of dollars, as a fee award. McCormick rejected the request.
— Delaware's highest court in August upheld a $267 million fee award for five law firms that obtained a $1 billion settlement for Dell Technologies (DELL.N), opens new tab shareholders.
The fee is one of the largest ever for U.S. shareholder litigation. But the Delaware Supreme Court said it was not an improper windfall to the law firms who represented the plaintiffs — Labaton Keller Sucharow, Quinn Emanuel Urquhart & Sullivan, Andrews & Springer, Robbins Geller Rudman & Dowd and Friedman Oster & Tejtel.

The plaintiffs alleged they were short-changed in a controversial $23.9 billion transaction in 2018 that marked Dell's return as a publicly traded company. Dell had denied wrongdoing.

(Legal Fee Tracker is a weekly feature exploring attorney compensation awards and disputes in class actions, bankruptcies and other matters. Please send tips or suggestions to D.Thomas@thomsonreuters.com, opens new tab)
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Securities Law News

December 18, 2024, 12:27 PM PST

Ernst & Young Accused of Helping Brooge Defraud SPAC Investors

By Bernie Pazanowski

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:24-cv-09731 (Bloomberg Law subscription)

Ernst & Young LLP helped Brooge Petroleum and Gas Investment Company FZE fraudulently entice investors into taking part in a merger transaction, a lawsuit filed in federal court says.

EY played a "pivotal role" in Brooge's scheme to defraud the investors in a 2019 special purpose acquisition company merger, the complaint filed Tuesday in the US District Court for the Southern District of New York says. A SPAC is a "publicly-traded shell corporation created to raise capital through an initial public offering ("IPO") with the sole purpose of acquiring or merging with a private company," the complaint says.

Brooge is an oil-storage leasing company in the United Arab Emirates, the complaint says. In 2018, "a group of investors in a NASDAQ-listed SPAC—including Plaintiffs—was introduced to Brooge, and the parties executed a merger agreement in anticipation of a planned December 2019 merger between Brooge and the SPAC," it says.

But the financial picture painted by Brooge was a fraud, the complaint says. Brooge used fake invoices, fake customers, and affiliated parties to fabricate between 30% and 80% of its 2018, 2019, and 2020 revenues, it says.

Brooge couldn't have effectuated its scheme "without critical support from Ernst & Young," the complaint says. EY aided Brooge's scheme by helping devise a way to explain the payments from affiliated parties and the corresponding lack of payments from its sole customer, it says.

EY "blessed the scheme by issuing unqualified audit opinions which falsely stated," that Brooge's financial statements accurately reflected the company's financial position.

Using the inflated numbers, Brooge persuaded the investors to exchange their securities for Brooge's securities in a transaction valued at over $1 billion on NASDAQ, the complaint says. But after the Securities and Exchange Commission investigated Brooge and announced fraud charges against it in 2023, its share price tumbled and the plaintiffs lost "virtually the entire value of their investment," it says.

The plaintiffs accuse EY of fraud and violations of the Securities Exchange Act. They seek compensatory and punitive damages along with pre- and post-judgment interest, attorneys' fees, and costs.

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

The Aegis Law Group LLP represents the plaintiffs.

The case is Anvil Trust v. Ernst & Young , S.D.N.Y., No. 1:24-cv-09731, complaint filed 12/17/24 .

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Bloomberg Law News 2024-12-19T11:35:48910781451-05:00

Hawk Tuah Memecoin Investors Sue Promoters Over US Registration

By Gillian R. Brassil 2024-12-19T10:34:38000-05:00

- **COURT**: E.D.N.Y.
- **TRACK DOCKET**: No. 1:24-cv-08650 (Bloomberg Law subscription)

"Hawk Tuah" cryptocurrency sellers and promoters never registered the US-marketed memecoin with the SEC and left investors out to dry during a 90% crash, a lawsuit filed on Thursday said.

The investors said they lost more than $151,000 combined after investing in the cryptocurrency modeled after "Hawk Tuah Girl" Haliey Welch, whose viral phrase kickstarted her social media fame. They're suing Tuah The Moon Foundation, which collected funds from the $HAWK token; overHere Ltd and its founder Clinton So, which launched the memecoin; and social media influencer Alex Larson Schultz, who promoted it online, in the US District Court for the Eastern District of New York, alleging the defendants are liable for selling unregistered securities.

Memecoins, which rely on cultural references and online fandoms to gain traction, are accessible and have a low barrier to create, said the investors. Marketing began with Welch—who is not a named defendant—announcing the token on her social media. She promoted it on her channels, podcast, and a pre-sale campaign with free or discounted tokens, they said, raising its appeal.

The defendants allegedly fed on her fame and stirred a frenzy before it officially launched on Dec. 4. A pre-sale raised about $2.8 million at a valuation of $16.69 million, the plaintiffs said. These tokens were immediately tradeable when launched. Within hours, the memecoin's market value surged to $491 million, but soon plummeted over 90% to below $100 million.

The next day, So said they had been advised by lawyers to make the Tuah Foundation as an off-shore entity and sold an initial allocation of 17% of the tokens through it to a subset of people, the complaint said, to purportedly skirt securities laws. But, the investors said, defendants continued marketing the other 83% of tokens, making "no serious attempt" to restrict purchasers to those outside the US. "The project clearly was intended to take advantage of the American market," the complaint read.

By So "linking the success of the social media influencer like Welch, he literally said that the Token holders would essentially be shareholders," the investors said.

"Despite these clear indications of its status as a security, the $HAWK Token was not registered by Defendants," they said.

Wolf Popper LLP and Burwick Law PLLC represent the investors.

Attorneys at each firm, overHere, Schultz, and Welch's manager each did not respond to requests for comment.

The case is Albouni et al v. Schultz et al , E.D.N.Y., No. 1:24-cv-08650, complaint filed 12/19/24 .

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Bloomberg Law

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Securities Law News
December 18, 2024, 11:07 AM PST

Intel Officers, Ex-CEO Sued Over Market Dip After Reorganization

By Mallory Culhane

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. 5:24-cv-09121 (Bloomberg Law subscription)

A group of current and former Intel Corp. executives, including former CEO Pat Gelsinger, were accused of violating federal securities law by causing or allowing the company to issue misleading statements, according to a shareholder derivative lawsuit.

The Intel officers named as defendants failed to adequately oversee the company's operations while Intel made false and misleading statements about the reorganization of a manufacturing segment, the complaint filed Tuesday in the US District Court for the Northern District of California alleges.

Intel in 2021 announced a new strategy to expand its semiconductor manufacturing, and in 2022 revealed that it was transitioning to an internal foundry model whereby Intel's product business units would be required to engage in arms-length transactions for services. Intel also recognized revenues from both external companies using its foundries and its internal operations under a new financial reporting segment, Intel Foundry Services, which would be responsible for its own reportable profits and losses.

Intel executives, including Gelsinger, made public statements highlighting the project's momentum and anticipated growth in revenue into fiscal year 2024, the complaint said.

However, Intel suffered its worst stock decline—26%—in nearly 40 years in August 2024 after the company revealed in its second quarter financial results that "IFS' operating losses spiked from $1.87 billion in Q2 2023 to $2.83 billion in Q2 2024," the complaint said. The company also announced it planned to lay off 15% of its workforce and suspend its dividend.

The August dip followed an earlier stock price decline in April, after the company revealed the segment suffered a $7 billion operating loss in 2023, according to the complaint.

Plaintiff LR Trust, which owns 2,000 shares of Intel, claims the individual defendants had a duty to share accurate information about the company's operations and the power to dictate Intel's statements and disclosures to stockholders. But Intel "has sustained substantial damages and irreparable injury to its reputation" as a result of the officers' alleged breaches of fiduciary duty to properly oversee the company and ensure complete and accurate information was disclosed to the public, it said.

The suit brings claims for violations of the Securities Exchange Act of 1934, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, unjust enrichment, and waste of corporate assets. It seeks punitive damages, restitution, and an order requiring the company and individual defendants to reform its internal governance structure.

Intel declined to comment.

WeissLaw LLP represents LR Trust.

The case is The LR Trust v. Intel Corp. , N.D. Cal., No. 5:24-cv-09121, complaint filed 12/17/24 .

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Securities Law News

December 18, 2024, 10:50 AM PST

Vaxart Investors Get Class Status on Second Try Against Insider

By Gillian R. Brassil

- Armistice Capital failed to argue damages model didn't work
- Judge says disputes around liability, timing were for later on

Vaxart Inc. investors secured class certification in their suit against a controlling shareholder that allegedly dumped stock following a supposedly deceptive press release about the company's Covid-19 vaccine, a judge ruled.

This was the investors' second attempt to get class status in their suit against hedge fund Armistice Capital LLC that allegedly used insider information to sell most of its Vaxart shares before others learned its vaccine prospects appeared overhyped. This time, investors were able to explain how price impact and loss causation, among other factors, related to all class members and presented a damages model to account for stock fluctuations in the relevant 2020 period, Judge Vince Chhabria said Tuesday.

"In other words, the plaintiffs have shown that, whether the jury finds no liability, finds that the truth leaked out gradually, or finds that the truth was revealed in a series of discrete corrective disclosures, liability can be resolved and damages apportioned on a class-wide basis," the US District Court for the Northern District of California said.

On the investors' first bid, Chhabria said both their and Armistices' arguments were made in a "cookie-cutter" way that missed the point of class treatment.

This time, Armistice attacks on the plaintiffs' damages model—saying it didn't account for how other factors could have altered the stock price—fell short. The hedge fund had also asked for a shorter class period, which the judge disagreed with. Questions on when the market knew about the vaccine testing, whether that information leaked slowly, or how much certain information affected share prices was an issue down the road, said Chhabria.

Armistice was Vaxart's controlling shareholder when, in June 2020, the company issued a press release about participating in a government-funded Covid-19 vaccine development program called "Operation Warp Speed." Beneath the title, the release clarified that Vaxart was selected for a non-human primate study, "organized and funded by Operation Warp Speed."

Investors alleged Vaxart, pressured by Armistice, plotted to release misleading information to boost the stock price: Armistice dumped almost all of its Vaxart shares when it shot up 28% after the announcement. The stock dropped 11% a month later—the day The New York Times published a story where the government clarified it hadn't given funding to Vaxart or negotiated a funding arrangement, the investors said.

The class includes those who got Vaxart common stock or traded options from June 25 through July 24, 2020. Chhabria also certified a subclass of those who bought stock contemporaneously with Armistice defendants' sale of Vaxart stock on June 26 and 29.

The investors settled their claims against Vaxart for a little more than $12 million, getting final approval in January 2023. Claims against Armistice survived dismissal in May 2023.

Hagens Berman Sobol Shapiro LLP is lead counsel for the investors. Akin Gump Strauss Hauer & Feld LLP and Conrad Metlitzky Kane LLP represent Armistice.

Neither side's representation responded to emails seeking comment.

The case is In re Vaxart, Inc. Sec. Litig. , N.D. Cal., No. 20-cv-05949, 12/17/24 .

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Securities Law News
December 18, 2024, 2:50 PM PST

Bancor DAO Back in Crypto Investors' Suit, Delaying Appeal

By Martina Barash

Bancor DAO, an organization that runs the Bancor digital asset exchange, wasn't among the entities and individuals that asked for dismissal of a cryptocurrency investors' suit and will be reinstated as a defendant, a federal court ruled.

Judge Robert L. Pitman denied the investors' request for a partial final judgment to allow them to immediately appeal the other defendants' dismissal. His ruling was entered in the docket of the US District Court for the Western District of Texas on Tuesday.

- The investors alleged that the exchange, its founders, and related entities touted protection against certain losses from investing crypto assets in an exchange rather than holding the assets, and that they then "suspended" the protection, causing millions of dollars in losses
- Pitman ruled in September that the defendants—all based in Israel or Switzerland—lacked sufficient contacts for personal jurisdiction, and also said extraterritoriality concerns made US securities laws inapplicable
- But Bancor DAO, an unincorporated general partnership "not registered in any jurisdiction," hasn't appeared in the case and didn't ask for dismissal, Pitman said in the new ruling amending the judgment and reopening the case

Hoppin Grinsell LLP and Silver Golub & Teitell LLP are lead counsel for the investors. Bancor DAO hasn't made an appearance. Jenner & Block LLP and Ewell, Brown, Blanke & Knight LLP represent the other defendants.

The case is Basic v. BProtocol Found. , W.D. Tex., No. 1:23-cv-00533, entered 12/17/24 .

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Securities Law News

December 18, 2024, 12:02 PM PST

Kodak Investors Lose Bid to Revive Covid Loan Suit Against Board

By Martina Barash

- Investors said layers of conflicts led board to pass on suit
- Plaintiffs waived argument about lower court's procedure

Eastman Kodak Co. investors can't resume their suit against top executives and directors over alleged self-dealing that doomed a $765 million Covid-19 government loan, the Second Circuit ruled Wednesday.

The investors, who had filed suit against the execs on Kodak's behalf, waived their key argument that the district court shouldn't have resolved the issue of whether the company's board conducted its own probe in good faith before declining to pursue the derivative claim itself, the appeals court said.

The US Court of Appeals for the Second Circuit said the lower court properly tossed the suit pursuant to a New Jersey business law requiring dismissal of derivative actions "if the court finds that independent directors of the corporation made a reasonable, good-faith determination that pursuing those claims would not be in the corporation's best interests."

The appellate panel ruling came in an unsigned, unpublished opinion issued less than a week after oral argument.

The government loan agency backed out of the arrangement—which would have involved Kodak producing an ingredient for Covid-19 vaccines—in August 2020, after reports of allegedly improper stock transactions. A steep decline in Kodak's share price followed.

A subsequent investigation by Akin Gump Strauss Hauer & Feld LLP attorneys found Kodak had mishandled the process, but didn't conclude that the transactions with CEO James Continenza and another director were instances of insider trading.

Akin's ties to Continenza—both as his personal lawyers in other matters and through his work on other company boards that hired the firm—posed conflicts of interest that prevented it from conducting an independent investigation, the investors' attorney argued at the Dec. 12 oral argument.

The Second Circuit said that the lower court resolved factual disputes in the record, with the investors' acquiescence, and concluded that Akin Gump didn't "carry a disabling conflict into its investigation of Kodak," and that any factual errors in the firm's report didn't rise to a level that would render the Kodak board committee's determination "unreasonable under New Jersey law."

The investors "waived any challenge to the district court's procedure by repeatedly inviting the district court to evaluate the record and make factual findings" on those critical questions, the panel said.

Judges Beth Robinson, Myrna Pérez, and Alison J. Nathan served on the panel.

Kessler Topaz Meltzer & Check LLP and Faraci Lange LLP represented the investors. Akin Gump and Nixon Peabody LLP represented Kodak.

The case is In re Eastman Kodak Co. Deriv. Litig. , 2d Cir., No. 23-7571, unpublished 12/18/24 .

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Securities Law News
December 18, 2024, 6:49 AM PST

Advanced Diagnostic $19 Million Stock Plan Settlement Finalized

By Jacklyn Wille

- Suit challenged formation, termination of employee stock plan
- Settlement expected to provide payments for about 185 people

A $19 million class settlement benefiting participants in Advanced Diagnostic Group's employee stock ownership plan received final court approval, as did an award of more than $6.3 million in attorneys' fees.

The deal, which is slated to provide gross payments of more than $100,000 to 185 people who received distributions from the Advanced Diagnostic stock plan, represents between 22% and 28% of the participants' maximum estimated damages, according to the settlement motion.

Judge Tom Barber of the US District Court for the Middle District of Florida granted final approval to the deal in a Tuesday order, following the recommendation of a federal magistrate judge.

The lawsuit challenged the 2015 formation of the Tampa, Florida-based medical imaging company's employee stock ownership plan and the plan's eventual termination after the company's acquisition by Akumin Inc. in 2019.

Former Advanced Diagnostic employee Johana Colon said the company's CEO and Palm Beach Capital—a private finance firm that previously held a stake in the company—used the stock plan to "structure a lopsided deal that extracted the current value of the company for themselves" while also allowing them to claim the company's future value through interest payments and stock warrants.

Colon said certain defendants transferred 100% of the company's value to the stock plan and then worked against the plan's interests by diverting the company's business opportunities to themselves through separate entities.

Engstrom Lee LLC and Wenzel Fenton Cabassa PA represent the plan participants. The defendants are variously represented by Bryan Cave Leighton Paisner LLP, Kilpatrick Townsend & Stockton LLP, Hodkin Stage Ward PLLC, Jackson Lewis PC, and Holland & Knight LLP.

The case is Colon v. Johnson , M.D. Fla., No. 8:22-cv-00888, 12/17/24 .

Bioventus Investors Get $15 Million Med Rebate Deal Approved

B **bloomberglaw.com**/product/blaw/bloomberglawnews/securities-law/X2FC01RS000000

Ufonobong Umanah

Securities Law

- Pain medication company miscalculated money it owed insurer
- Deal requires Bioventus to pay significant amount of reserves

Bioventus' $15.25 million settlement over Exchange Act claims the pain medication company counted as revenue money that it'd have to return received final approval from a federal judge.

The settlement was fair in part because the amount insurance won't cover—$8.75 million—"is approximately 35% of the company's available cash" as of March 30, the US District Court for the Middle District of North Carolina said Wednesday. The settlement appeared to be "more than double the average recovery in §10(b) cases," the court said.

Investors said Bioventus used an arbitrary system to calculate osteoarthritis medication rebates. UnitedHealthcare claimed $12.4 million in rebates that Bioventus previously reported as revenue, according to the amended complaint.

Investors said the corrective disclosures between November 2022 and March 2023 caused Bioventus stock to drop more than 84%. The erroneous revenue report had painted a false impression of Bioventus' financial standing, they said.

Counsel for the lead plaintiff were awarded 33% of the settlement fund, over $5 million, after Judge Catherine C. Eagles said that attorneys' fee award was reasonable. Investors made 17,000 claims for shares acquired between Feb. 11, 2021, and Nov. 21, 2022

Bleichmar Fonti & Auld LLP and Tin Fulton Walker & Owen PLLC represented the lead plaintiff. Susan R. Podolsky, of Alexandra, Va., served as additional counsel.

Smith Anderson LLP and Latham & Watkins LLP represented Bioventus.

The case is Ciarciello v. Bioventus Inc , M.D.N.C., No. 1:23-cv-00032, 12/18/24 .

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Securities Law Prof Blog

Thursday, December 19, 2024

New Securities Law Articles in Print

The following law review articles relating to securities regulation are now available in paper format:

Todd Phillips & Beau J. Baumann, *The Major Questions Doctrine's Domain*, 89 Brook. L. Rev. 747 (2024).

Onnig H. Dombalagian, *Bond Trading at the Digital Frontier*, 49 J. Corp. L. 489 (2024).

Gary E. Kalbaugh, *Why Regulate Commodities?*, 57 Suffolk U. L. Rev. 43 (2024).

Charles W. Mooney Jr & Sandra M. Rocks, *Final Report on the Work of the Task Force on Securities Holding Infrastructure: Part Two*, 79 Bus. Law. 679 (2024).

Fernan Restrepo, *The Economic Consequences of Hedge Fund Regulation: An Analysis of the Effect of the Dodd–Frank Act*, 53 J. Legal Stud. 391 (2024).

Steven L. Schwarcz, *Regulating Financial Innovation: FinTech, Crypto-Assets, DeFi, and Beyond*, 79 Bus. Law. 615 (2024).

Benjamin A. Smith, Note, *Buying a Clean Conscience: Susceptibility from the Lack of Oversight in the Carbon Offset Market*, 47 Am. J. Trial Advoc. 151 (2023).

Emily Strauss, *Standing and Snitches*, 79 Bus. Law. 665 (2024).

LA County's opioid claims against Express Scripts, OptumRx to proceed

dailyjournal.com/articles/382569-la-county-s-opioid-claims-against-express-scripts-optumrx-to-proceed

Health Care & Hospital Law,

Civil Litigation

Dec. 19, 2024

The County of Los Angeles sued Express Scripts Inc. and OptumRx last year, claiming that they worked with drug manufacturers to place certain opioids on their formularies -- lists of approved drugs, giving them preferential status and declining to impose limits on their approvals in exchange for kickbacks.

Judge David S. Cunningham III

A Los Angeles judge has allowed claims to proceed against two pharmacy benefit managers accused of scheming with drugmakers to increase the use of opioids, fueling a drug overdose crisis that has claimed half a million lives.

The County of Los Angeles sued Express Scripts Inc. and OptumRx last year, claiming that they worked with drug manufacturers to place certain opioids on their formularies - lists of approved drugs, giving them preferential status and declining to impose limits on their approvals in exchange for kickbacks.

The second amended complaint claims public nuisance and common law public nuisance.

The defendants are represented by Quinn Emanuel Urquhart & Sullivan LLP, and Alston & Bird LLP. They asserted that five federal laws preempt plaintiff's causes of action: the Employee Retirement Income Security Act (ERISA); the Medicare Act; the Affordable Care Act (ACA); the Federal Employee Health Benefits Act (FEHBA); and the Defense Department's TRICARE program.

Brendan Austin of Motley Rice wrote in the complaint, "Defendants knew, or should have known, that their conduct would create or assist in the creation of the public nuisance - i.e., the opioid epidemic."

The defendants allegedly partnered with drugmakers in the marketing of opioids and ignored evidence that they were addictive and were being misused to the point of death, Austin wrote.

"Defendants' actions were, at the very least, a substantial factor in opioids becoming widely available and widely used and, therefore, widely misused and diverted," Austin continued. "Because of defendants' actions in using their unique position to increase the availability of opioids in the marketplace and inflate opioid sales, because of their collusion with manufacturers in the deceptive marketing of opioids, and because of defendants' special position within the closed system of opioid distribution, without defendants' actions, opioid use, misuse, abuse, and addiction would not have become so widespread, and the opioid epidemic that now exists would have been averted or much less severe."

Judge David S. Cunningham III on Tuesday overruled most of the defendants' demurrer except for their argument that the California safe harbor statute applied. He gave the county leave to amend the complaint to plead that regulators were deceived by the defendants' alleged actions. The *People of the State of California v. Express Scripts Inc., et al.*, 23STCV20886 (L.A. Super. Ct., filed Aug. 30, 2023).

The demurrer stated, "Plaintiff's claims target the PBM defendants' work for ERISA plans. The operative complaint alleges that PBMs 'administer prescription drug plans for entities that include insurers, self-insured employers, and state, county, and city agencies.

"Plaintiff's claims squarely seek to dictate ERISA plans' choices regarding coverage of prescription opioids. Plaintiff's principal theory is that the PBM defendants allegedly designed formulary offerings and UM tools in ways that increased opioid use and then declined to make alterations to abate the alleged nuisance," the demurrer continued.

Cunningham disagreed. He wrote that the county's claims did not focus on any particular plan. Rather, the plaintiff challenged defendants' conduct related to standard formulary offerings, some of which are not covered by ERISA. Cunningham pointed at the U.S. Supreme Court decision in *Rutledge v. Pharmaceutical Care Management Association*, in which it decided that an Arkansas law regulating PBM reimbursements to pharmacies "does not act immediately and exclusively upon ERISA plans because it applies to PBMs whether or not they manage an ERISA plan."

#382569

Feds accuse CVS of boosting profits by filling excessive opioid prescriptions

courthousenews.com/feds-accuse-cvs-of-boosting-profits-by-filling-excessive-opioid-prescriptions

Erik Uebelacker

A CVS Pharmacy sign is shown in Mount Lebanon, Pa., on Monday, May 3, 2021. (AP Photo/Gene J. Puskar)

(CN) — The U.S. Department of Justice has sued health pharmaceutical giant CVS, claiming that the chain "fed dependence and addiction" on potent opioids when it filled excessive and unlawful prescriptions, then asked federal health insurance programs to foot the bill.

According to a 97-page civil complaint, unsealed Wednesday but filed last week in Rhode Island federal court, CVS "knowingly filled prescriptions for controlled substances that lacked a legitimate medical purpose, were not valid, and/or were not issued in the usual course of professional practice."

The government claims that the scheme dates back over a decade, from Oct. 17 2013, to the present, and involved invalid prescription fills for "dangerous and excessive quantities" of opioids and early fills of the drugs.

Many of the illicit fills were done for prescribers who CVS knew to be engaged in so-called "pill mill practices," loosely prescribing controlled substance prescriptions without a sufficient purpose. The government claims CVS ignored explicit warnings from their own pharmacists who urged the company not to fill any more scripts from suspicious prescribers.

Internal medicine specialist Robert Ritchea, of Phenix City, Alabama, was one of those prescribers. The government says he was well-known in his community for doling out excessive amounts of narcotics to young, healthy patients.

"In early 2015, government investigators interviewed several CVS pharmacists regarding Ritchea's prescribing," the lawsuit says. "One pharmacist explained that their store had stopped filling Ritchea's prescriptions due to 'good faith issues.'"

Despite that single store taking action, the government says the other CVS pharmacies continued to fill Ritchea's prescriptions, despite the company's headquarters being well aware of the flags their pharmacists had raised.

The pharmacist told investigators that they saw as many as 10 to 20 patients per week with prescriptions from Ritchea. A majority of those patients sought large quantities of opioids, paid in cash and appeared to be addicted to the pills, the government says.

Some pharmacists even left notes in company databases to warn others about Ritchea.

“DO NOT FILL ANY RITCHEA SCRIPTS!!” one pharmacist wrote in August 2015.

The notes, according to the government, were available for CVS corporate to review. Still, the company filled 361 prescriptions from Ritchea after that note was sent.

“DR RITCHEA BEING INVESTIGATED … DO NOT FILL CONTROLS,” another 2015 note read. The company filled 845 Ritchea prescriptions after that note, per investigators who also found Ritchea was hardly an outlier.

“CAN NOT FILL OPIOID DERIVATIVES FROM DR. DIAMOND!!” an additional 2015 note read, referencing Texas family medicine physician Howard Diamond, who was known to prescribe “very high amounts of pain meds,” according to prosecutors.

CVS filled more than 8,000 prescriptions from Diamond after that note was sent. And the company continued filling hundreds of his prescriptions even as Diamond was investigated by the Drug Enforcement Administration less than two years later, the government says.

The company made the problem worse by understaffing, which “put profit over safety and caused its pharmacies to dispense controlled substances pursuant to invalid prescriptions," the government says.

“CVS knew that its pharmacists lacked the time to comply with their professional practice obligations, including their exercise of corresponding responsibility,” the government says in its lawsuit. “CVS also knew that its staffing policies and compensation and performance metrics emphasized speed over safety. As a result of these policies and practices, CVS caused its pharmacists to knowingly dispense controlled substances pursuant to invalid and dangerous prescriptions.”

The complaint includes details of 10 individual patients who fatally overdosed after supposedly filling prescriptions for opioids and other controlled substances at a CVS pharmacy.

The government claims the company’s filling of invalid prescriptions violates the Controlled Substances Act. And when it sought reimbursement from federal health care programs for some of those prescriptions, it ran afoul of the False Claims Act.

CVS denies any wrongdoing.

"We have cooperated with the DOJ's investigation for more than four years, and we strongly disagree with the allegations and false narrative within this complaint," the company said in a statement.

In 2022, CVS agreed to pay nearly $5 billion to settle thousands of similar claims made by state and local governments. The company did not admit to any misconduct under the deal.

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Categories / Health, National, Uncategorized

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US accuses CVS of filling, billing government for illegal opioid prescriptions

reuters.com/legal/us-accuses-cvs-filling-billing-government-illegal-opioid-prescriptions-2024-12-18

Brendan Pierson

A screen displays the logo and trading information for CVS Health on the floor at the New York Stock Exchange (NYSE) in New York City, U.S., December 6, 2023. REUTERS/Brendan McDermid/File photo Purchase Licensing Rights, opens new tab

- CVS accused of filling illegal opioid prescriptions since 2013
- Justice Department cites company-mandated metrics as cause for violations
- CVS settled similar claims for $5 billion without admitting wrongdoing

Dec 18 (Reuters) - The U.S. Department of Justice announced a lawsuit on Wednesday accusing pharmacy chain CVS (CVS.N), opens new tab of filling illegal opioid prescriptions and billing federal health insurance programs, contributing to a nationwide epidemic of opioid addiction and overdose.
The newly unsealed complaint, opens new tab in Providence, Rhode Island federal court alleges that, from October 2013 to the present, CVS violated the federal Controlled Substances Act by filling prescriptions for dangerous quantities of opioids and dangerous combinations of drugs.
It said the company regularly filled prescriptions from doctors running so-called pill mills, dispensing large quantities of opioids without legitimate medical reason.

The Justice Department said the violations were driven by company-mandated performance metrics that led to red flags being ignored, and that in some cases patients died of overdoses shortly after filling illegal prescriptions.

"We have cooperated with the DOJ's investigation for more than four years, and we strongly disagree with the allegations and false narrative within this complaint," CVS said in a statement.

CVS agreed in 2022 to pay close to $5 billion over 10 years to settle thousands of similar claims by state, local and Native American tribal governments. It did not admit wrongdoing under the deal, which was one of a series of nationwide settlements by pharmacies, drugmakers and distributors totaling about $46 billion.

The Justice Department's lawsuit unsealed on Wednesday began as a whistleblower complaint brought by a former CVS employee.

According to the lawsuit, CVS maintained inadequate staffing and pushed its pharmacists to fill prescriptions as quickly as possible without investigating whether they were legitimate, and ignored warnings from its own employees.

"Safety issues arise when one is dealing with medication and also being rushed to fulfill an order like McDonald's," one employee allegedly wrote. "CVS has concocted an assembly-line style of medication preparation and only cares about profits."

The company continued to fill hundreds of prescriptions for one Alabama doctor even after multiple internal notes warned in 2015 that he was under investigation, the complaint said. That doctor was arrested in 2016.

It filled thousands of prescriptions for a Pennsylvania doctor despite internal warnings and online patient reviews saying he "writes scripts without seeing the patient" and is "a pill pusher, and a drunk," the Justice Department said.

The complaint described 10 individual patients who died, allegedly after filling illegal prescriptions for opioids and other drugs at CVS.

More than 800,000 people in the United States died of opioid overdoses from 1999 through 2023, according to data from the U.S. Centers for Disease Control and Prevention. Preliminary data shows overdoses began to decrease last year.

Reporting By Brendan Pierson in New York; Editing by Chizu Nomiyama, Alexia Garamfalvi and Rod Nickel

Lawyers in NCAA athlete pay settlement ask for $515 mln legal fee award

reuters.com/legal/legalindustry/lawyers-ncaa-athlete-pay-settlement-ask-515-mln-legal-fee-award-2024-12-18

Mike Scarcella

Signage is seen outside of the legal offices of the Winston & Strawn law firm in Washington, D.C., U.S., May 10, 2021. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights, opens new tab

Dec 18 (Reuters) - Law firms that negotiated a landmark $2.8 billion settlement with the National Collegiate Athletic Association over compensation for student-athletes have asked a judge to award them more than $515 million in legal fees.

Law firms Winston & Strawn and Hagens Berman Sobol Shapiro filed their requests, opens new tab on Tuesday in federal court in Oakland, California.
The settlement resolves three lawsuits that claimed the NCAA violated U.S. antitrust law through its rules prohibiting schools from paying athletes. One case focused on compensation for the commercial use of athletes' names, images and likenesses, another lawsuit was about athletic service, and a third involved restrictions on payments tied to academic achievement.

The settlement allows schools to make payments directly to student athletes for the first time. They are expected to pay out some $20 billion over the next decade under the terms of the deal.

The ongoing student payments could lead to more than $200 million in additional fees to the plaintiffs' lawyers over 10 years, putting their total compensation at about $750 million, according to an expert's report, opens new tab in the case.
The settlement would be among the largest-ever recoveries in a class action. U.S. District Judge Claudia Wilken will weigh the fairness of the fee request and the settlement at a hearing in April.

The NCAA has denied any wrongdoing. It did not immediately respond to a request for comment.

In a statement, lead plaintiffs' attorneys Jeffrey Kessler of Winston and Steve Berman of Hagens Berman said they based their fee petition on the "transformative results we achieved for college players and the substantial investments our firms put at risk in pursuing these claims."

Kessler and Berman said their request was "significantly less" than the 25% benchmark that the 9th U.S. Circuit Court of Appeals, which hears cases from California, uses to assess fee awards in class action settlements.

The firms' requested fees are based on hourly rates ranging up to $1,980 an hour for Kessler. Winston, with more than 975 attorneys, said it invested more than 40,400 hours into the lawsuits.

Berman billed at $1,350 an hour, the filings showed. Other partners at the 80-lawyer Hagens Berman billed at between $800 to $975 an hour. The Seattle-founded firm said it devoted more than 35,900 hours to the lawsuits.

The case is In re: College Athlete NIL Litigation, U.S. District Court, Northern District of California, 4:20-cv-03919-CW.

Read more:

Lawyers in $2.7 bln NCAA settlement warn against outside groups courting students
Legal Fee Tracker: Lawyers play the long game in $2.7 billion NCAA settlement
NCAA's $2.7 bln student athlete settlement wins preliminary court approval
Reporting by Mike Scarcella

BT Emerges Victorious in First Full CAT Opt-Out Trial

law.com/international-edition/2024/12/19/bt-emerges-victorious-in-first-full-cat-opt-out-trial-

Jack Womack

Telecoms giant BT has successfully seen off a £1.3 billion class action against the company—the first full opt-out trial to take place before the Competition Appeal Tribunal.

The class representative Justin Le Patourel had sought £1.3 billion on behalf of approximately 3.7 million affected BT customers—accusing BT of abusing its “dominant position in a telecommunications market by imposing unfair prices”.

However, in its judgement, the CAT ruled: “Overall, we considered that, whether taken by itself or in comparison with other prices, BT’s prices were not unfair, and therefore there was no abuse of dominant position.”

In a statement following the ruling, BT commented: “We take our responsibilities to all of our customers very seriously and welcome today's ruling.”

Simmons & Simmons advised BT during the proceedings, while Mishcon de Reya advised the claimants, which were funded by Harbour Litigation Funding.

Patrick Boylan, Simmons’ lead partner on the case and the firm’s U.K. head of disputes, commented: “We are delighted by today’s judgment. The evidence we presented demonstrated to the Tribunal that BT’s products provided real and meaningful value to BT’s customers and BT charged a fair price for those products.”

In a statement, Le Patourel said: “While I am pleased that the Tribunal has recognised BT's dominant position in the market, and the significant and persistent nature of its excessive pricing, I am disappointed that it did not agree that these prices were unfair.”

They added: “This means we cannot now compensate many of BT’s most loyal but mistreated landline customers for the overcharging that took place. However, we are carefully considering the Tribunal's decision and whether the next step will be an appeal to the Court of Appeal to challenge this verdict."

The CAT’s decision had been widely anticipated, and has generated attention from many firms looking for signs of how the CAT may rule on similar class actions in the future.

Tim West, a partner at Ashurst, said of the CAT ruling: “The judgment was eagerly anticipated and will no doubt be disappointing news for the claimants. The disappointment may be felt more broadly by class representatives in other opt-out collective actions in the CAT and by the funders of those cases.”

He added: "While an appeal is likely (especially on the question of unfairness of BT's excessive pricing), it is unlikely that this will spell the end of the collective action regime. That said, it likely to have a dampening effect, at least in the short term, on the availability of capital to fund the more novel or unusual claims in the CAT moving forward."

However, others were more optimistic about the prospect of further cases, and pointed to the CAT's recent track record.

Mohsin Patel, director and co-founder of litigation finance broker Factor Risk Management, commented: "For many, it will be deeply regrettable that the first full opt-out trial to be heard in the CAT has failed. However, this should not detract from the fact that there has been a number of recent high-profile settlements in favour of consumers, which indicates that the CAT regime is creating a positive impact overall and affording redress where previously there was none."

BT Group Plc

BT fights off £1.3bn UK class-action lawsuit

Ruling is latest setback for claimants in new breed of collective legal action

BT fought off a claim that it overcharged about 3.7mn landline customers in the UK © A BT logo on a building

Alistair Gray in London 4 HOURS AGO

Telecoms operator BT has fought off a £1.3bn legal claim that it overcharged about 3.7mn landline customers in the UK, the latest setback for claimants bringing a new breed of class-action lawsuit.

In the first ruling of its kind, the Competition Appeal Tribunal on Thursday found in BT's favour after the former monopoly was accused of using a dominant market position in landlines to charge customers, many of them elderly, "unfair" prices.

The judgment comes two weeks after payments company Mastercard reached an agreement in principle worth about £200mn to settle a claim that it imposed unfairly high fees on card transactions — a fraction of the £10bn the claimants had been seeking.

The claims against BT and Mastercard were being closely watched as tests of a new regime of collective legal action in the UK. The BT case, financed by Harbour Litigation Funding and fronted by former Ofcom official Justin Le Patourel, was the first of its kind to go to trial earlier this year.

Legislation in 2015 allowed collective legal actions to be brought in the UK over alleged breaches of competition law on an "opt-out basis", under which consumers are automatically included unless they state they do not want to take part. However, while a plethora of claims have been brought against companies including Apple, Alphabet and Sony, cases have been held up by protracted legal arguments over process.

Antitrust lawyers — and the litigation funding industry that backs the cases — are scrutinising early judgments and settlements as they try to assess the prospects of success for other claims.

The CAT found that while BT's prices were "excessive", this did not amount to them being "unfair". The claim failed as there was "no abuse of dominant position".

Le Patourel said in a statement he was "pleased" the tribunal found "BT was a dominant operator which charged excessive prices to its loyal customers".

However, he added: "I am disappointed that the tribunal did not ultimately find in our favour on the question of whether BT's prices were unfair. We will now carefully consider the tribunal's reasoning and the prospects for an appeal."

Tim West, a dispute resolution partner at law firm Ashurst, who was not involved in the case, said: "The disappointment may be felt more broadly by class representatives in other opt-out collective actions in the CAT and by the funders of those cases."

He added: "It is unlikely that this will spell the end of the collective action regime. That said, it likely to have a dampening effect, at least in the short term, on the availability of capital to fund the more novel or unusual claims in the CAT."

The claim against BT followed a review by communications regulator Ofcom in 2017 that provisionally concluded the company held "significant market power" in the standalone landline market, and proposed price controls.

In response, BT voluntarily committed to cut landline prices by £7 per month from April 2018.

In the lawsuit, the claimants argued that the price reduction failed to compensate customers adequately.

However, the CAT on Thursday said it did not give “material weight” to Ofcom’s findings. The tribunal said it had been presented with “a very substantial body of expert evidence based on far more data” than had been available to the regulator.

BT did not accept that its pricing was anti-competitive, and said the claim related to a “technical” landline pricing issue that was “resolved by Ofcom in 2017”.

In a statement on Thursday the company said it welcomed the ruling, adding that it took “responsibilities to all of our customers very seriously”.

Casinos get green light for landmark antitrust arbitration class

reuters.com/legal/litigation/casinos-get-green-light-landmark-antitrust-arbitration-class-2024-12-18

Alison Frankel

Dec 18 (Reuters) - What is the best way for more than 100 casinos that signed similar arbitration contracts to litigate their antitrust claims against a company that sells automated card-shuffling machines?

Is it for each of the casinos to arbitrate individually against the company, Light & Wonder (LNW.O), opens new tab, in more than 100 separate proceedings before an array of arbitrators who might well reach contradictory conclusions about legal and evidentiary issues?
Or is it for all of the more than 100 casinos to move forward as a class in a single arbitration before one arbitrator who will decide the fate of their theory that Light & Wonder engaged in sham patent litigation to monopolize the market for its machines?

The obvious answer, according to American Arbitration Association arbitrator John Wilkinson, is for the casinos to proceed as a class. In a Dec. 9 ruling, opens new tab made public on Tuesday, Wilkinson certified the casinos as an arbitration class, rejecting Light & Wonder's arguments that their individual arbitration contracts are too dissimilar to allow the class to be certified.

"Class arbitration is by far the fairest and most efficient method for resolving the antitrust claims of proposed class members," Wilkinson wrote. The alternative of arbitrating 100 individual cases, he said, "would violate the AAA's basic rule of offering a cost-effective proceeding and would in no way be justified by 'individual issues' recited by [Light & Wonder], which could be easily addressed in a class action context."

The casinos are now members of what appears to be the first-ever certified antitrust arbitration class — a milestone that is all the more remarkable because it comes after the U.S. Supreme Court more or less obliterated classwide arbitration in its 2019 ruling, opens new tab in Lamps Plus, Inc. v. Varela.
In that decision, you may recall, the justices held that ambiguous arbitration contracts cannot be construed to allow classwide claims. But in the Light & Wonder case, Wilkinson concluded, opens new tab in 2022 that Lamps Plus did not preclude the Akwesasne Mohawk Casino Resort from arbitrating classwide claims because the casino's arbitration agreement was not ambiguous.

The contract did not specifically address classwide arbitration but contained what Wilkinson described as "exceedingly broad language" directing all disputes to arbitration. The AAA arbitrator, as I've previously reported, said the contract language was so broad that it encompassed classwide claims.

Light & Wonder, previously known as Scientific Games, tried to overturn Wilkinson's 2022 ruling in New York State Supreme Court, where it argued, opens new tab that the arbitrator had "manifestly disregarded" Lamps Plus precedent. New York state trial and appellate courts nonetheless sided with the Mohawk casino and confirmed Wilkinson's ruling.

After Wilkinson's 2022 decision, the company brought in Cravath, Swaine & Moore to argue that the arbitration class could not be certified under Lamps Plus precedent. Briefs at AAA are not public. But according to Wilkinson's ruling, Light & Wonder's primary contention was that the language in prospective class members' arbitration contracts varied, and Mohawk's lawyers at Cohen Milstein Sellers & Toll failed to show that every absent class member was entitled to classwide arbitration under the specific language of their arbitration contract.

Wilkinson roundly rejected that assertion. It was "based on nothing," the arbitrator said in the newly-public opinion. "No case law supports this argument, and L&W has not identified even one AAA class arbitration that applies Lamps Plus to the arbitration agreements of absent class members."

A Light & Wonder spokesperson said the company will appeal Wilkinson's holding. (That will presumably be another challenge in New York State Supreme Court.) He declined additional comment.

Mohawk counsel Michael Eisenkraft of Cohen Milstein said the decision means casinos will get a fair chance to arbitrate their extremely complex case, despite Light & Wonder's efforts to gum up that process.

"A lot of other countries look at our class system with envy because there's no other way to bring these cases," Eisenkraft said. "U.S. defendants keep trying to block class proceedings. What this ruling shows is that when someone doesn't build a dam, the water flows."

Light & Wonder is also battling class certification in federal district court in Chicago, where more than 1,000 casinos that did not sign arbitration agreements are litigating antitrust claims that parallel the allegations in the Mohawk arbitration.

In that case, which was actually filed before the Mohawk casino initiated arbitration, plaintiffs lawyers at Hausfeld and the Clifford Law Offices moved for class certification, opens new tab last February.

Defense lawyers at Cravath filed an opposition brief, opens new tab asserting much broader arguments than the company offered in the Mohawk arbitration. Members of the prospective class, the brief said, purchased all sorts of different card shuffling machines at different times. Figuring out if any of them was harmed, the company said, would require an individualized inquiry into each class member's purchases, which defeats the whole purpose of class certification.

U.S. District Judge John Kness, who denied, opens new tab Light & Wonder's motion to toss the case on timeliness grounds in 2022, has not yet ruled on class certification or on motions for partial summary judgment from both sides. Plaintiffs' lawyers from Hausfeld did not respond to my query on whether the certification of the arbitration class will impact their pending class certification motion.

At the moment, the class arbitration seems to be moving at a faster pace than the litigation before Kness — just like defendants have predicted in case after case urging courts to bless mandatory arbitration agreements.

Don't get me wrong: The Mohawk case is an outlier. Most companies have figured out by now, with help from the Supreme Court, how to write contracts that prohibit classwide arbitration. No matter how fairly and efficiently AAA's Wilkinson handles the Mohawk case, I doubt we'll see defendants suddenly reverse course and embrace class arbitration.

But it's also possible that the rise of mass arbitration will prompt companies to reconsider their longtime opposition to classwide arbitration. Keep an eye on the Mohawk case. Regardless of the outcome, the classwide arbitration will be a data point worth considering for defendants puzzling out the best way to minimize potential liability.

Read more:

Classwide arbitration is not dead yet, as casino antitrust decision shows

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

Alison Frankel has covered high-stakes commercial litigation as a columnist for Reuters since 2011. A Dartmouth college graduate, she has worked as a journalist in New York covering the legal industry and the law for more than three decades. Before joining Reuters, she was a writer and editor at The American Lawyer. Frankel is the author of Double Eagle: The Epic Story of the World's Most Valuable Coin.

Montana top court says youth have right to stable climate

reuters.com/legal/montana-top-court-says-youth-have-right-stable-climate-2024-12-18

Nate Raymond

U.S. flag and Judge gavel are seen in this illustration taken, August 6, 2024. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights, opens new tab

Dec 18 (Reuters) - Montana's top court ruled on Wednesday the state's constitution guarantees a right to a stable climate and invalidates laws barring regulators from considering the effects of greenhouse-gas emissions when permitting fossil-fuel projects.

The Montana Supreme Court upheld a landmark trial court decision in favor of 16 young people who said their health and futures were being jeopardized by climate change that the state aggravates through its permitting of energy projects.

The 6-1 decision, opens new tab, the first of its kind by a U.S. state supreme court, came in the first lawsuit to go to trial nationwide by young environmental activists challenging state and federal policies they say are exacerbating climate change.
Chase Scheuer, a spokesperson for Republican Montana Attorney General Austin Knudsen, in a statement called the ruling "disappointing, but not surprising."

"The majority of the state Supreme Court justices yet again ruled in favor of their ideologically aligned allies and ignored the fact that Montana has no power to impact the climate," Scheuer said.

Youth-led lawsuits nationally have taken aim at government policies at the state and federal levels that they say encourage or allow the extraction and burning of fossil fuels, and violate the rights of young people under U.S. or state constitutions.

While some of those cases have faltered, the youth activists scored a major victory in June when the state of Hawaii agreed as part of a first-in-the-nation settlement to take action to decarbonize its transportation system by 2045.

Wednesday's ruling rejected Republican-led Montana's bid to overturn District Court Judge Kathy Seeley's 2023 decision that said the young people had a right to a clean and healthful environment under a 1972 amendment to Montana's constitution that required the state to protect and improve the environment.
"Montana's right to a clean and healthful environment and environmental life support system includes a stable climate system," Chief Justice Mike McGrath wrote for the majority.

The state had argued the young people lacked legal standing to challenge the restrictions on agencies' ability to consider greenhouse gas emissions when issuing permits. But McGrath said they proved they had "a sufficient personal stake in their inalienable right to a clean and healthful environment."

He said the young people had shown that climate change was harming Montana's environmental life support system and "drastically" altering its water systems, air quality, glaciers and forests by increasing temperatures as well as leading to droughts, wildfires and extreme weather events.

McGrath said the constitutional provision's drafters intended it to be a strong environmental right and would not want to provide "a free pass to pollute the Montana environment just because the rest of the world insisted on doing so."

Nate Bellinger, a lawyer for the plaintiffs at the nonprofit Our Children's Trust, in a statement said the ruling "affirmed the constitutional rights of youth to a safe and livable climate, confirming that the future of our children cannot be sacrificed for fossil fuel interests."

Reporting by Nate Raymond in Boston; Editing by Rod Nickel, Alexia Garamfalvi and Diane Craft

Keller Postman says Tubi's lawyers should be DQ'd; Case says firm files frivolous claims

legalnewsline.com/stories/666968278-keller-postman-says-tubi-s-lawyers-should-be-dq-d-case-says-firm-files-frivolous-claims

December 19, 2024

Attorneys & Judges

Warren Postman | https://www.kellerpostman.com/

WASHINGTON (Legal Newsline) - The law firm Keller Postman, accused of filing frivolous arbitration claims against Fox Broadcasting's Tubi unit, has fired back with a demand that Tubi's lawyers at Jenner & Block be disqualified for contacting some its clients.

Jenner & Block partner Brandon Fox hired a former FBI agent to question people who had withdrawn their arbitration complaints against Tubi, Keller Postman says, a clear violation of California ethics rules. Keller Postman described the meetings as physical confrontations intended "to confuse, harass, intimidate and deceive" Keller Postman clients.

Jenner & Block was seeking evidence that Keller Postman hid fraudulent claims among thousands of arbitration demands in order to extort a $71 million settlement. Keller Postman used Instagram ads, YouTube videos and other advertising to recruit nearly 24,000 clients who filed arbitration demands against Tubi for offering targeted ads based on their age, sex and other demographic data, Tubi said.

Fox hired a former FBI agent named Stephanie Talamantez to call on Keller Postman clients at their homes and allegedly pressure them to sign sworn declarations that "described confidential communications and contradicted earlier declarations." Talamantez "refused to leave after being asked to and instead hounded them," Keller Postman said, and didn't always identify herself as working for Tubi.

This behavior violated California Rule of Professional Conduct 4.2, which prohibits lawyers from communicating with another attorney's clients, Keller Postman said. Fox responded he was only contacting people who had withdrawn their arbitration claims, but Keller Postman said the rule applies even after a case has been withdrawn.

"This flagrant abuse of represented lay parties by an adversary's attorney is sanctionable in any court in the country," the law firm said.

Other defense lawyers have reached out to Keller Postman to make sure they weren't about to contact clients who were still represented by the firm. "To Keller Postman's knowledge, after litigating dozens of mass arbitrations on behalf of hundreds of thousands of claimants, Jenner is the first law firm and Mr. Fox is the first lawyer to ever unilaterally contact withdrawn claimants," Keller Postman said.

Keller Postman has advised its thousands of clients to challenge the enforceability a 45-day delay it included in its arbitration clause. The sides are currently choosing an arbitrator who will decided whether its enforceable.

The firm's alleged business strategy is to swamp companies with mass arbitration so they will pay a quick settlement instead of $2,000 or more per claimant in arbitration fees – in Tubi's case, some $48 million.

Keller Postman boasts on its website that its clients "turn the arbitration game against the companies that harm them," using "the latest technology to pursue thousands of arbitration claims all at once."

Tubi accused Keller Postman of deliberately neglecting to collect basic information from its clients, however. A third of the claims have emails that don't correspond to any Tubi customers, the company said, 11% never received streaming ads and many others claim they received service in states where Tubi doesn't operate. Keller Postman said Tubi has since acknowledged in another case that it may have failed to identify some customers because they were in a different database.

Tubi also accused Keller Postman of violating ethics rules by advising its clients to ignore a contractual requirement to provide basic information before filing arbitration claims.

ORGANIZATIONS IN THIS STORY

U.S. District Court for the District of Columbia

Securities Law News

December 18, 2024, 10:16 AM PST; Updated: December 18, 2024, 4:05 PM PST

Ares Targets Litigation Finance in Deal With Omni Bridgeway (2)

By Emily R. Siegel

- Ares acquires fund for A$310 million
- Firm to hold 70% stake in new fund

Ares Management Corp. is making its first known entry into litigation finance through an agreement announced Wednesday with Omni Bridgeway.

Ares, an alternative asset manager that last week won National Football League owners' approval of a 10% stake in the Miami Dolphins, is acquiring a stake in Omni Bridgeway's ongoing investments, according to an Omni statement.

Omni Bridgeway is publicly listed on the Australian Stock Exchange and calls itself a global leader in litigation finance. The company invests in the upfront costs of lawsuits for a chance at returns should the litigation prove successful.

Under the agreement with Ares, a new fund is being created to include more than 150 Omni co-investments. Ares will acquire a 70% interest in the new fund for A$310 million. Omni will have a 30% interest in the fund, according to its statement.

The deal allows Omni to become completely debt free and gives it access to deep pools of capital, Raymond van Hulst, the company's managing director and CEO, said in an interview.

"This is probably the first time there's been a transaction of this scope," said van Hulst. "It's one step further for legal assets becoming a more regular and accepted asset class."

He said Ares spent about six months doing diligence for the transaction and secondaries and continuation funds are part of the industry maturing.

"What it exemplifies is the fact that the industry is becoming more varied, more sophisticated and attracting more categories of capital," said Rebecca Berrebi, a litigation finance broker and consultant. "Different structures are emerging for secondary pieces of portfolios and cases."

Funding transactions such as the one Omni announced with Ares have become a growing part of the litigation finance marketplace. Gerchen Capital Partners, which specializes in purchasing existing claims, closed on a deal in June 2022 with Omni Bridgeway for the purchase of a $38 million fund.

Last year, litigation funder Parabellum Capital sold partially-realized and unrealized assets from its first fund for nine figures to an undisclosed buyer. Woodsford Group Ltd., a UK litigation funder, also sought to sell its portfolio of passive US investments last year.

Omni Bridgeway will be an adviser on the new fund with Ares and it has the option to acquire up to a $35 million equity stake in the company through the issuance of warrants at an agreed strike price, according to the statement.

A representative for Ares declined to comment. Ares has approximately $464 billion of assets under management and offers investment solutions across credit, real estate, private equity and infrastructure asset classes.

(Add Omni Bridgeway comment in paragraphs five, six and seven.)

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FirstEnergy Says CEO Tierney to Add Role of Board Chair

B **bloomberglaw.com**/product/blaw/bloombergterminalnews/bloomberg-terminal-news/SOPKMFDWX2PS

Secondary Sources

News from Bloomberg Terminal
December 18, 2024, 1:23 PM PST

Bloomberg Editorial

By Jim Silver

(Bloomberg) --
Board elects CEO/President Brian Tierney as chair, effective Jan. 1.

- Succeeds John W. Somerhalder II, who will remain on the board
- Lisa Winston Hicks continues as lead independent director
- The Board is confident that combining the CEO and Chair roles will best position the company as it delivers more secure and reliable energy through the execution of its Energize365 capital investment program," Hicks said

To view the source of this information, click here

Effort to revive energy efficiency programs in Ohio dies in the Senate

cleveland.com/open/2024/12/effort-to-revive-energy-efficiency-programs-in-ohio-dies-in-the-senate.html

December 18, 2024

1. Ohio Politics

Published: Dec. 18, 2024, 5:24 p.m.

The Nest Learning Thermostat is on display following a news conference Wednesday, June 17, 2015, in San Francisco. Google's Nest Labs is releasing new versions of its surveillance video camera and talking smoke detector as part of its attempt to turn homes into yet another thing that can be controlled and tracked over the Internet. (AP Photo/Eric Risberg)AP

By
Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – The Ohio Senate killed legislation that would have allowed utility companies to run energy efficiency program designed to reduce their customers' net energy use.

Legislation at the center of a criminal bribery scandal at the statehouse from 2019 ended the programs in Ohio. A bipartisan coalition in the House narrowly passed House Bill 79 this summer, which would have revived them.

The legislation was scheduled for a last-minute vote in the Senate Energy committee Wednesday morning, the last scheduled lawmaking day of the year, though it was removed from the schedule Tuesday evening without explanation. Chairman Bill Reineke, a Tiffin Republican, declined comment when asked what happened.

Donovan O'Neil, state director of Americans for Prosperity, a free market advocacy group started by wealthy conservative donors, said his organization made the bill a major target.

"We made it clear in the Senate that this is something we have big concerns about," he said.

The bill also drew opposition from the Ohio Consumers' Counsel, a state agency that represents residential ratepayers' interests in regulatory and lobbying matters, which said the bill only forces more money from customers to power companies for a problem a free market can solve.

HB79 would have created an energy efficiency program less ambitious than its predecessor – a 0.5% electricity reduction year over year instead of 2% – but more specific in its guidance to utilities and with more oversight from regulators.

It passed the House by an unusually tight 50-46 vote in June, winning almost all Democrats and a good chunk of the Republican caucus. Senate President Matt Huffman, a Lima Republican, said “we’re going to start turning toward other solutions to provide energy and energy policy than taking money from ratepayers.”

Under the bill, utilities at their discretion would apply to the Public Utilities Commission of Ohio to create an efficiency program. Customers would pay a maximum of $1.50 extra per month and can opt out if they choose. year.

They accomplish this either by subsidizing customers' purchase of efficient appliances, or by deploying different forms of incentives or strategies for customers to reduce energy use at peak demand moments. The bill requires 15% of program spending go toward low-income customers with income below 200% of the federal poverty level ($51,640 a year for a family of three) who would struggle to afford the up front costs of a new dishwasher or other appliance.

In effect, the programs task utilities with the goal of decreasing Ohio’s net power demand, and then pays them for the money they lose to the new efficiencies.

The bills’ backers included two of Ohio’s biggest distribution utilities, along with interests they regularly tussle with: environmentalists and the Citizens Utility Board, a ratepayer advocacy nonprofit.

Supporters pointed to the results of the most recent wholesale electricity auction from PJM, which oversees the 13-state electrical grid that includes Ohio. Its power for next year sold 800% higher than it did in 2023, Reuters reported, driven in part by retiring coal facilities and a backlogged queue for new generation projects.

Efficiency programs, backers say, help individual customers cover the added purchase price of more efficient appliances that save money in the long run. And given the net reduction in demand, they say prices and maintenance costs will fall.

Brian Billing, director of customer experience for American Electric Power,estimated to state senators that the bill could save 500 megawatts – about the output of a small natural gas power plant – in one year. He said while a certified, energy efficient appliance saves money in the long run, customers need a nudge (the rebate) for the math to work on their timeline.

However, the Ohio Consumers Counsel, a state agency representing residential ratepayers' interests at the PUCO, testified against the bill. Director Maureen Willis said energy efficiency is a problem that the free market can solve – customers will buy the appliances that save them money over time, without utilities' involvement or new fees on their bills. She also questioned the wisdom of paying utilities for their "lost distribution revenue" – the revenue (from power sales) they lost to the more efficient appliances – which will limit any savings to customers.

John Seryak, a lobbyist representing the Ohio Manufacturers Association, testified against the bill, flagging to lawmakers language that requires utilities to include in their application a plan to exercise control over the "demand or impacts" of renewable energy sources like wind and solar. He said this could allow utilities to "shut down" companies that rely on rooftop-generated solar.

A throughline under much of the opposition: a deep mistrust of Ohio's utilities. The legislation that ended energy efficiency programs in Ohio, House Bill 6, sent its champion to prison for 20 years. He was accused of taking a bribe via a nonprofit he secretly controlled from FirstEnergy. The company's CEO and a senior vice president have been charged and await trial for bribing Householder along with the former PUCO chairman as well. American Electric Power, meanwhile, contributed $700,000 to Householder's nonprofit. The company has not been criminally charged, but the company told its investors it has set aside $19 million to settle a lawsuit brought against it in connection with HB6 by the U.S. Securities and Exchange Commission.

FirstEnergy didn't register to lobby on the bill. AEP and AES Ohio, two of its peers, support it.

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Securities Law News
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Matt Levine's Money Stuff: Insider Trading in Private Companies

By Matt Levine

Opinion

Pisces

Two approximately true things about the US stock market are:

1. Companies are required to publicly disclose everything about themselves that might be material to investors. This isn't exactly true, and it doesn't work seamlessly*:* Companies generally announce quarterly earnings shortly after the quarter ends, but there's some period of time when the company's executives pretty much know what the earnings release will say, but it hasn't been published yet. Or companies will often negotiate mergers without first announcing "hey we're in merger talks," which is something that investors would probably want to know. But for the most part investors expect that most material information about the company will be made public in a relatively timely way.
- 2. You are not allowed to insider trade: If you are an executive of a company, and you know something material that *hasn't* been disclosed — the company is negotiating a merger, it will announce bad earnings next week, etc. — then you are not allowed to trade the stock.

These two things are related. Investors are entitled to expect that, when they buy or sell a company's stock, they know more or less everything about the company. Cases where corporate insiders know important news that hasn't been disclosed are supposed to be relatively rare. But when they do have that sort of material nonpublic information, they can't trade, because public investors reasonably expect to be able to trade on a level playing field.

What about private companies?

1. The essential fact about private companies — the thing that makes them "private" — is that they don't have public-company disclosure requirements. There's no law that they have to publish quarterly financial

statements; there's not even a law that they have to send their shareholders annual financial statements. The relationship between private companies and their shareholders is a private matter to be negotiated among themselves, not, for the most part, a matter of securities regulation. In fact a lot of big private companies do share a lot of business and financial information with their shareholders, because the shareholders want that and the companies work for the shareholders. But that's not because the rules require it; it's because the shareholders do.

- 2. Are you allowed to insider trade?

I think the answer in the US is, mostly, no. (Not legal advice!) You can see, though, why it is hard. If a company *never* discloses its financial results, then an executive who knows the financial results just obviously has material nonpublic information that outside shareholders don't have. If the executive isn't allowed to insider trade, then she basically isn't allowed to trade at all.

Which, historically, was fine. The other essential fact about private companies was, for a long time, that their stock didn't trade. Public companies had publicly traded stock; private companies did not have traded stock. People who owned stock in private companies could not regularly sell it, so there wasn't too much reason to worry about insider trading.

Now, though, private markets are the new public markets, and secondary trading of private company shares is a big business. Bloomberg's Sarah McBride reports today:

Secondary transactions involving venture-backed startups are on track to hit a new high this year, as companies like OpenAI, SpaceX and Stripe Inc. organize tender offers to get employees paid, and investors look for ways to offload stakes outside of initial public offerings. …

This year, the larger secondary market got bigger than ever: 2024 is on track to top $140 billion in transaction value, according to investment bank Jefferies, up from the prior record of $132 billion in 2021. And a fast-growing portion of those transactions involve venture-backed startups, NewView says. Buyers include family offices, venture capitalists looking to snap up new shares and specialized secondary firms.

So the insider trading problem seems like it would come up more. It can be handled in two ways:

1. Disclosure. This seems like the main US approach. Private companies with active secondary markets for their shares *do* tend to give financial information to shareholders. You can get some information before investing in the private market. In particular, when a private company trades its own stock — when it offers stock to new investors, or does a tender offer to buy back employee shares — it will normally disclose all of its material information to the buyers or sellers, so that it cannot be accused of defrauding them or insider trading. And so you *could* have an expectation, in the private market, that the company will disclose most of the important information about itself. And so you could have an expectation that employees won't sell stock when they have material information that hasn't been disclosed yet.

- 2. "Big boy" letters: If you're buying stock from someone on the private market, you can sign an acknowledgment saying "I know that you might have information that I don't, and if it turns out you do, I promise not to sue you." This approach is common between sophisticated counterparties, but it is not clear how well it works.

It seems a bit messier than in the public markets. Without strict standardized disclosure expectations, there will usually be some information asymmetry; outside buyers will generally be less informed than they would be in public markets, which means that it is riskier for insider sellers to trade with them.

You could imagine a third approach: Just "ehh, private companies are not legally required to disclose much information, and therefore nobody should expect to know all the material facts about a private company or to be able to trade on a level playing field, and therefore there just shouldn't be any rules against insider trading in private companies."

That apparently will be the UK's approach. Yesterday the UK's Financial Conduct Authority published a consultation paper on its new Private Intermittent Securities Capital Exchange System (Pisces), a proposed market for shares of private companies. It includes this:

There will not be an insider dealing regime for PISCES. Some investors (such as employees) may have more information than others, notwithstanding the core disclosures we are requiring under PS 2 in Appendix 1. Unlike on public markets, those investors will not be prohibited from trading on such information on PISCES under a civil or criminal market abuse regime. …

There will be a higher risk than in public markets that some investors, such as company employees, could have access to information not available to all other investors. This may benefit some market participants over others. This risk is compounded by potential information-sharing occurring in the private market before a PISCES trading event. Our disclosure arrangements aim to reduce this risk by providing appropriate information to investors. However, as the civil or criminal insider dealing regimes will not apply, persons will not be prohibited from sharing and trading on confidential information. Accordingly, it is important that investors understand and accept these limitations before participating.

"Insider trading can be legal, FCA says," is the title of Bryce Elder's post at FT Alphaville.

It's kind of neat, no? Empirically, it seems clear that people are desperate to invest in hot private startups without getting any financial information about those startups, so it would be a little weird for them to complain about insider trading. (If you never see any earnings reports, and never expect to, you can't be mad that an employee sold you stock knowing the company would have bad earnings.)

And the rule against insider trading is not, like, a fundamental feature of human society. In financial markets, some sorts of bluffing and information asymmetry are fine and allowed and approved, and other sorts are bad and illegal, but these categories are mostly arbitrary conventions. I wrote recently:

There is no a priori way to know which is which. Basically if everyone in the market … [thinks] that some sort of bluffing or misdirection is okay, then it is. If everyone thinks it isn't, then it isn't.

For a long time, in the US *public* markets, insider trading was legal. Now it's quite illegal. Because it is quite illegal, you do not expect it, and if it happens you can be fairly aggrieved. But if you just made it legal, people would expect it, and wouldn't have much to complain about if it happened.

Also, I have written a few times recently about the idea of the Nice Market and the Fun Market:

The Nice Market has rules, and the rules aim to achieve fairness, informative asset prices and efficient capital formation. The Fun Market has fewer rules, and it aims to achieve fun. The Nice Market, like all financial markets, tolerates a certain amount of speculation, because speculation can be good for price efficiency and liquidity. The Fun Market mostly encourages gambling.

The point is that these are two plausible sets of conventions, and you could have different conventions for different purposes. US public equity markets are, for the most part, a Nice Market. But maybe you want the private markets to be a bit more fun than the public ones. Maybe a little insider trading would spice things up.

Elliott

Plausibly there are two ways for an investment manager to generate market-beating returns consistently at large scale:

1. Rigorously hire people who are exceptionally good at making market bets, meaning that their bets win, like, 53% of the time. And then have those people make hundreds of uncorrelated bets pretty frequently.
- 2. Make fewer bets, but create value yourself: Don't just buy stocks and hope they go up, but buy stocks and *make* them go up.

The first approach roughly describes most of the big multistrategy hedge funds like Citadel and Millennium, quant hedge funds like Renaissance Technologies, and proprietary trading firms like Jane Street. The second approach roughly describes private equity firms (which buy companies and try to improve their operations), activist hedge funds (which buy minority stakes in companies and try to improve their operations), distressed debt funds (which buy debt and fight to get it paid), etc.

There is an important and popular third approach, like "buy like 20 stocks, but the right stocks, and just hold them and watch them go up," which sounds very appealing, but I think a lot of people who do the first two approaches are skeptical that this one is real. If you make 100,000 bets a year and make money, you are probably good at betting; if you buy 20 companies and improve all of their operations, you are probably good at operating; if you make 20 bets a year and make money, that could be luck.

What if you generate market-beating returns consistently at large scale? Well, you'll get bigger, and you'll have to generate market-beating returns consistently at even larger scale. How do you do that? I think it depends on your approach:

1. In the first approach, you rigorously hire more people who are good at making bets, and you have them make more uncorrelated bets. If you have gotten rich with equity market-neutral strategies, maybe you branch out into commodities, or weather derivatives, or crypto. You go from making 100,000 bets a year to making 200,000.

- 2. In the second approach, you make bigger bets: You are putting a ton of capital and energy and resource into making changes at the companies you buy, so each bet needs to be meaningful to your overall portfolio, and as your portfolio gets bigger so do the bets.

This is not any sort of absolute or rigorous classification, but I think it is roughly helpful.

Paul Singer's Elliott Investment Management is a large and famous example of the second approach. It is a large hedge fund with multiple strategies, but not quite like Citadel or Millennium: Elliott is best known for activist equity and distressed debt investing, where it makes big bets and tries to engineer a favorable outcome. I have always liked this quote from Singer in Sheelah Kolhatkar's 2018 story about Elliott:

"What I came to feel relatively early on in my career is that manual effort—making something happen, getting on the committee, becoming part of the process, try to control your own destiny, not just riding up and down with the waves of the financial markets—was actually not only a driver, an important driver, of value and profitability but an important way to control risk, dig yourself out of holes when you slip into a ravine," he has said.

"Manual effort": This form of investing skill is not about picking the right stocks; it's about *making them* the right stocks.

Bloomberg's Swetha Gopinath, Nishant Kumar, Katherine Burton, Dinesh Nair and Eyk Henning have a story about succession planning at Elliott, and about tensions between the firm's London and New York offices, that highlights the differences in approaches. For instance:

Elliott is far smaller than other multistrat hedge funds, despite having more money than most, and in the past individuals would have been largely left alone as long as they delivered. As of June, it had $69.7 billion of assets and 578 staff, about a quarter in Europe. Citadel has $66 billion and about 3,000 employees; Millennium Management $72 billion and more than 6,000 workers.

It is plausibly easier to add more people to run more money if you are essentially in the frequent uncorrelated bets business. It seems harder to add more people to run more money if you are essentially in the "throwing the weight of your firm behind fight-to-the-death activist situations" business. Meanwhile:

As Elliott's assets under management have swelled, its thirst for comparatively smaller gambles has dried up, a reason for much of the frustration in Europe, people familiar say. London managers now have to pitch all deals to the US, they add, putting approval in the hands of people who don't know the local market. …

One deal that might have made up to $30 million in a few days, and which once would have been signed off by Gordon [Singer, Paul's son] in minutes, was nixed by the US for being too small and too risky to bother with. It's a common complaint.

A rush of investments this year in many of the marquee names listed in New York shows the direction of travel. Elliott's campaigns have targeted Texas Instruments Inc., Etsy Inc., Southwest Airlines Co. and a host of others. Europe's opportunities can be small fry by comparison, although a person familiar with the matter says it does still have appetite for supersized trades run from there, pointing to the $1 billion-plus positions taken in Anglo American Plc and Japan's SoftBank Group Corp.

There is one model of running a hedge fund in which you want to make as many trades as possible that can make $30 million in a few days. There is another model of hedge fund in which you can only make so many trades, and a $30 million trade for a $70 billion fund isn't worth bothering with.

Head of macro

So a couple of things here:

A new investment fund that plans to oppose corporate DEI hiring goals is taking aim at Nike Inc., Kraft Heinz Co. and Autodesk Inc.

Azoria Partners' fund says it will avoid S&P 500 companies with specific diversity, equity and inclusion hiring objectives when it opens in March. Nike, Kraft Heinz and Autodesk fall into this category, according to an internal memo from the fund seen by Bloomberg News.

Co-founder James Fishback said earlier this month during Azoria's launch at President-elect Donald Trump's Mar-a-Lago resort that he has already spoken with Starbucks Corp. about their DEI targets. …

Now, Fishback is joining the fray. He previously worked at Greenlight Capital Inc., the hedge fund run by David Einhorn. He left the firm last year and he's now in a legal dispute with Greenlight over various allegations.

Fishback's exchange-traded fund, Azoria 500 Meritocracy, will exclude three dozen companies from the S&P 500 that have gender and racial hiring targets. Fishback said those companies will be made public when the fund launches. He has previously mentioned Best Buy Co. as another company that he's targeting.

First: Fishback is the guy who is suing and being sued by Greenlight because he says he was the "head of macro" at Greenlight and they say he wasn't. I feel like 10 years ago that would not have been an auspicious way to launch a financial career, but now it might be the best possible way to launch a financial career. The key skill these days is trolling.

Second: This is a good pitch? "Anti-DEI," these days, is the new ESG: Five years ago, you could attract investors by launching a fund that was "the S&P 500, but with good environmental, social and governance characteristics"; today, you attract investors by launching a fund that is "the S&P 500, but without diversity, equity and inclusion." *In either case*, the sensible approach is:

1. To advertise your political/social/cultural goals, and
- 2. To track the S&P 500 pretty closely.

People want index funds, and they have political preferences, and you can give them both. Five years ago, as it happens, I proposed "the Money Stuff S&P ESG Fund, a mutual fund whose stated mission would be to invest in the 500 companies in the S&P 500 index with the best environmental, social and governance ratings judged by my proprietary rating system." That is: It would own exactly the same stocks as S&P 500, in the same proportions, but it would have "ESG" in the name. Azoria 500 Meritocracy isn't that — it will own, like, 464 of the S&P 500 companies? — but it's the right general idea. An index fund, for your head, with a sprinkling of culture war, for your heart.

Third: When I proposed my ESG fund, (1) I was kidding and (2) the rules around this stuff were a lot looser. Now, though, you can't be too loosey-goosey about this. Like here is an approach you could imagine taking with a fund like this:

1. You pick like a dozen companies to be mad at.
- 2. You do a press conference saying "Nike is too woke" or whatever.
- 3. You exclude those stocks from your fund.
- 4. You buy the rest of the index.

In this approach, you do not necessarily spend a lot of time researching the DEI policies of every company in the S&P 500 and setting rigorous criteria for what DEI policies you will or will not allow. The point is that you can get good publicity by taking on a dozen or so high-profile companies with DEI policies that you don't like; you don't need absolute rigor to get that publicity. Just a sprinkling of culture war.

But that doesn't work anymore. The US Securities and Exchange Commission, as part of its battle against ESG "greenwashing," now insists on rigor in excluding stuff that you say you exclude. If you advertise an investment fund by saying "we don't invest in companies that work with fossil fuels," and actually you own some shares in supermarket companies that also sell gas, the SEC will go after you. If you advertise by saying "we don't invest in companies that donate to gay rights charities," and actually you own some shares in some companies that have made some donations, the SEC will go after you. The SEC now wants to make sure that funds that advertise their social and cultural positions actually live up to those positions.

Of course in a month it will be a different SEC. I wrote last month that "Gary Gensler's SEC has a few months to bring its last greenwashing cases"; presumably the new regime will be less concerned about fossil fuels or, frankly, misleading securities disclosure. But it might be more concerned about DEI! If you say that you're not investing in companies "that have gender and racial hiring targets," you'd better be clear about what you mean, and you'd better be rigorous about excluding all of the companies with those targets.

Things happen

UniCredit lifts Commerzbank exposure to 28%. Wall Street Is Selling Custom-Made Portfolios to the Masses. BofA's Moynihan Hints That He's Just Getting Started 15 Years In. Grubhub to Pay $25 Million Over Inflated Delivery Costs, Deceptive Practices. Sam Altman-led nuclear start-up signs major AI power supply deal. U.S. Weighs Ban on Chinese-Made Router in Millions of American Homes. Lawsuit Reveals How Colleges Really Talk About Rich Applicants. India's Record Gold Import Said to Be Due to Calculation Error. How rich musicians billed American taxpayers for luxury hotels, shopping sprees, and million-dollar bonuses. Guinness shortage.

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- 1. In particular, it's not actually the case that they have to disclose everything material: There are specific disclosure requirements (quarterly financial statements, hacking stuff, etc.), and a general obligation not to be misleading. The combination of those things means in practice that companies try to disclose almost everything material, but that's not precisely what the law says, and I'm sure some lawyers are annoyed that I wrote it.
- 2. This is, I think, roughly the right legal intuition, and totally wrong factually: Every single day without exception, the chief executive officer of a big public company *obviously* knows important things about the company's business, plans, prospects, etc., that the public does not. But there is the polite fiction that the company has "open windows" where everything that is material has been disclosed so the CEO can trade freely.
- 3. Again this is only approximately true. In fact a lot of private companies offer stock to investors under exemptions from registration that do include disclosure requirements.
- 4. The key case is SEC v. Stiefel Laboratories Inc., from 2011. Stiefel was a private company whose shares did not trade. But current and former employees could sometimes sell stock back to Stiefel, at prices offered by Stiefel. The SEC claimed that it "did not disclose," to the shareholders, "material, nonpublic information that would greatly affect the value of Stiefel Labs' stock. For example, in late 2008 and early 2009 while purchasing shares for less than $16,500 a share, the Defendants did not inform them that Stiefl was in the midst of negotiating the sale of the Company for more than $68,000 per share." A law firm wrote at the time that "This case serves as a powerful reminder that … the insider trading laws apply to private companies as well as to public companies, and to transactions with employees and employee stock plans as well as with third-party shareholders. Moreover, this case emphasizes that the SEC will prosecute cases involving private companies and employee shareholders."
- 5. Or, in reverse, do activist short selling.
- 6. This seems right to me, and is supported by the Elliott story and also by the fact that, like, Blackstone Group isn't doing a ton of $100 million leveraged buyouts, but I am not sure I could argue for it rigorously. Why

can’t you just hire more people to do more activism? I think it is something like: If your bets have to be 80% right, rather than 53% right, you will be less inclined to delegate the betting and will want more central oversight over each bet, which is harder to scale.

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Securities Law News

December 18, 2024, 5:00 AM PST

Silicon Valley's Secondary Markets Are Bigger Than Ever

By Sarah McBride

Secondary transactions involving venture-backed startups are on track to hit a new high this year, as companies like OpenAI, SpaceX and Stripe Inc. organize tender offers to get employees paid, and investors look for ways to offload stakes outside of initial public offerings.

Tender offers give staffers, former employees and certain investors a way to sell their shares directly to other investors. It's a break from past years, when major startups looking for a payday for staff would go public — the traditional route to fame and fortune in the tech world.

But with IPOs scarce, tender offers and other types of secondary deals have surged. NewView Capital, a firm that specializes in secondary markets, expects startup transactions on those markets to hit $21 billion in 2024, more than double the previous high in 2023.

Financial technology company Carta administered 26 tender offers last quarter, the most since the pandemic boom. And companies including Fanatics Inc., Databricks Inc. and Rippling have all recently completed or been in talks for similar deals. Meanwhile, SoftBank Group Corp. has had talks with OpenAI about buying $1.5 billion in shares from employees via a tender offer — the AI company's second this year.

Cash Starved

On secondary markets, buyers and sellers trade existing shares in private companies. That's different than deals that issue new shares, which are what VCs generally buy in a funding round or what employees get access to as part of their compensation. A big part of the appeal is that such deals allow investors to offload stakes outside of IPO or acquisition, controlling the timing on when they get a payout.

This year, the larger secondary market got bigger than ever: 2024 is on track to top $140 billion in transaction value, according to investment bank Jefferies, up from the prior record of $132 billion in 2021. And a fast-growing portion of those transactions involve venture-backed startups, NewView says. Buyers include family offices, venture capitalists looking to snap up new shares and specialized secondary firms.

In the case of tenders, some companies coordinate the deals to get their employees get a cash windfall and help retain staff. Many startup employees might hold stock that makes them look rich on paper, but doesn't equal spending power.

"Net worth doesn't cover your needs," says Greg Martin, who founded and runs Archer Venture Capital, a firm specializing in secondary funds, alongside his Rainmaker Securities, a platform for trading secondary shares. With illiquid startup shares, "You can't buy a house, you can't pay school tuition, you can't take care of family health matters."

Some bigger and older startups arrange share sales on a regular cadence, typically a couple of times a year. For example, SpaceX and Stripe have organized multiple such deals. That structure can help alleviate pressure from employees to go public.

SpaceX is the world's most valuable startup, and has coordinated multiple tender offers.
Photographer: Jordan Vonderhaar/Bloomberg

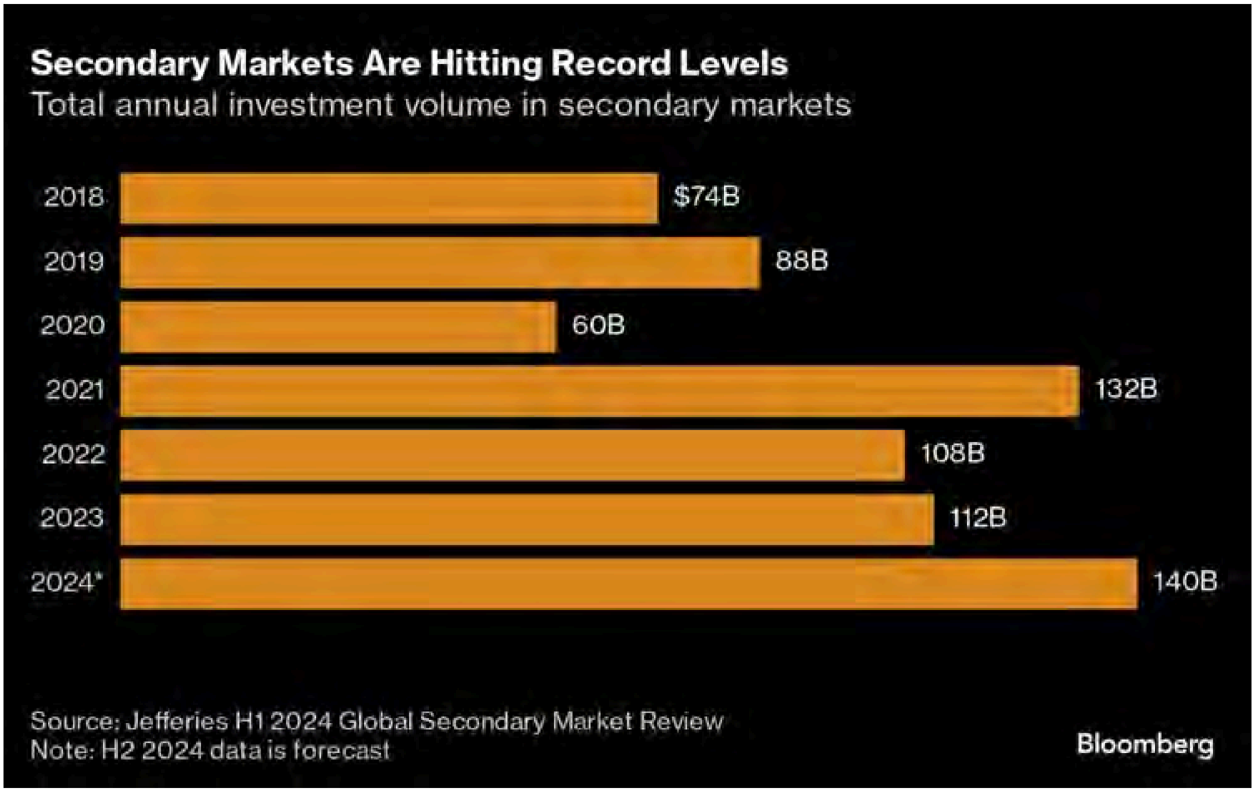
This system is a contrast to past years, when tender offers were rare, and those who wanted to sell their private-company shares sometimes did so quietly and on a fairly ad-hoc basis, perhaps using a platform that matched willing buyers and sellers.

"It was a bit taboo," says Larry Aschebrook, the founder and managing partner of G Squared Investment Management LP. "It was companies thinking, 'If somebody wants to sell my stock, I must be failing.'" That attitude has all but disappeared, Aschebrook says, largely because of the long wait for some big startup IPOs. The result has transformed his secondary-heavy investment business, from "a struggle" to "great."

Employees aren't the only ones selling stakes. Many VCs are also unloading shares on the secondary markets. Over the last 24 months, venture capitalists have seen far fewer money-making transactions — acquisitions, IPOs, or buyouts — than they're used to. Last quarter, such transactions barely topped $10 billion, according to PitchBook. Compare that to 2021, when each quarter saw at least $100 billion in returns. That's driven more urgency for investors to seek returns outside the primary markets.

Read More: VCs Look to Secondary Share Sales as The New Exit While M&A Falters

Institutional investors are involved, too. Earlier this year, the Los Angeles County Employees Retirement Association said it would reduce the percentage of assets it allocates to venture capital and growth equity to between 5% and 25% of its growth category, down from a target range of between 15% and 30% previously. At the same time, it said it would increase the target range of the group that includes secondary shares to as much as 35% of its growth category, compared with 30% previously.



Good Deals

Archer's Martin sees opportunity in these rough times. On the secondary markets, he likes to buy shares in venture-backed companies that will be acquired or go public relatively soon — ideally in three to four years. And he says he gets good prices.

"What's nice about the secondary market is it's a little less efficient," Martin says. "When you need liquidity," meaning cash, "you're less price sensitive." Startups shares still trade at a discount on the secondary markets compared to their latest official valuation on average. Some of the companies whose secondary shares Martin holds in his portfolio include improved-sleep business Hatch Baby Inc., AI computing company Lambda Inc. and writing assistant Grammarly Inc.

The market once had a reputation as a Wild West. Carta, for example, pulled out of the secondary business altogether earlier this year after attracting fury from founders for trying to get investors to sell their shares. But secondaries have gradually become more formalized, in part because of the growing popularity of tender offers.

While some VCs remain glum about the long, slow timetable to IPO, secondary specialists feel they’ve found a bring spot. “It’s exciting,” Aschebrook said.

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Hack Disclosures Surged in 2024 After SEC's Rule, Report Says

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- SEC’s disclosure rule triggered 60% increase in reported hacks
- Small share of reported breaches included evidence of harm

More corporate victims of cyberattacks disclosed their hacks during the first year of new federal reporting requirements, according to a Paul Hastings analysis of breach disclosures.

The law firm’s study, examining 75 disclosures from 48 public companies between Dec. 18, 2023 and Oct. 31, revealed a 60% increase in cyber incident disclosures since the US Securities and Exchange Commission’s new reporting requirements went into effect in December 2023. Of those, 78% were made within 8 days of discovery, according to the report released Wednesday.

Only 30 incidents were reported in the same time period in 2023.

The findings offer insights into how companies are adapting to the SEC’s new cybersecurity regime, which requires victims of hacks to disclose their compromises within four days of discovery. While the rules don’t set a strict deadline from incident discovery to disclosure, they require companies to disclose the impact of compromises, or materiality, “without unreasonable delay.”

Of the 75 disclosures, 75 percent disclosed that law enforcement had been notified of the breach. Financial services, healthcare and manufacturing were the most affected industries.

The SEC rule requires that a form 8-K must be filed when a cyber incident is determined to be material. Only 10% of disclosures detailed a material impact. That suggests the companies may be erring on the side of caution due to the SEC’s increased appetite for enforcement, Michelle Reed, co-chair of Paul Hasting’s Data Privacy & Cybersecurity practice and co-author of the report, wrote in an email.

The analysis shows companies taking varied approaches to materiality assessments. The SEC’s June 2024 guidance clarified that factors such as ransomware payments or cyber insurance coverage shouldn’t solely determine materiality. Instead, firms must evaluate both quantitative and qualitative factors, including operational impacts, customer relationships, and potential litigation risks.

The new rule is “forcing corporations to have unprecedented transparency on cyber practices, providing visibility that markets have not seen before,” said Reed.

However, over-disclosure can lead to risks including “litigation and reputational harm,” she noted.

Third-party breaches, such as the Snowflake breach that affected companies including Ticketmaster, had the widest impact for public reporting. One-in-four incidents analyzed by Paul Hastings stemmed from the breach of a third-party. As a result, “companies face the dilemma of whether to disclose third-party breaches, particularly where peers have disclosed, opening all involved parties up to potential enforcement risk,” the report’s authors noted.

The SEC in October announced enforcement settlements with four companies for allegedly misleading consumers about the impact of the SolarWinds breach on their businesses.

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The Self-Driving Computer in Brand New Teslas Is Failing

futurism.com/the-byte/computer-brand-new-tesla-failing

Frank Landymore

New and Unimproved

It seems that Tesla's self-driving efforts have hit another snag, because the computers built into its cars that run its semi-autonomous driving software are failing, *Electrek* reports, adding to the Elon Musk-owned automaker's track record of dodgy quality control.

The issue has been apparent for several weeks but has not received significant attention until now. According to complaints that *Electrek* says it's received from owners, it's brand new Teslas that are experiencing the hardware failures within just several hundred — and sometimes just several dozen — miles of driving.

When the computers malfunction, it disables not only the Autopilot and Full Self-Driving modes, but more commonly used features like the vehicle's extensive suite of cameras, its GPS, navigation features, and active safety features, the site found.

Quiet Coverup

Per *Electrek's* investigation, the issue is related to the newest version of Tesla's onboard self-driving chips, dubbed HW4, which are reportedly "short-circuiting."

An *Electrek* source speculated that the computer's built-in battery may be responsible for the apparent electrical error, and according to other sources inside the automaker, only Tesla models built within the past several months that are equipped with HW4 are experiencing the issue.

From the outside, the breadth of the issue is difficult to gauge. But two of the anonymous insiders said that Tesla is "currently receiving a high number of complaints about this issue," though the automaker is yet to release a service bulletin.

Another source alleges that Tesla service has been instructed to "play down any safety concerns related to this problem to avoid people believing their brand-new cars are not drivable." This is a serious claim to make, but the automaker has a history of misrepresenting its own capabilities and obfuscating crash reports that would be damaging to its image.

According to *Electrek*, Tesla should have reported the issue to the National Highway Traffic Safety Administration because a broken rear-view camera violates federal safety regulations, which would mandate the vehicles be recalled.

One Step Backward

Even by Tesla's ever-lowering standards, this sounds like an embarrassing blunder. Recall that CEO Elon Musk, not that long ago, made it sound like this new line of vaunted HW4 chips would finally provide a hardware platform powerful enough to enable cars to fully drive themselves.

The solution is as yet unclear. If a software update can fix the issue, it could soon fade into memory. But the main fix being discussed at the company is a total computer replacement, according to *Electrek*.

It's safe to say that in that case, the fallout will be costly, and the swamped status of Tesla service will likely mean that it could be months before owners could get their high-tech EVs repaired.

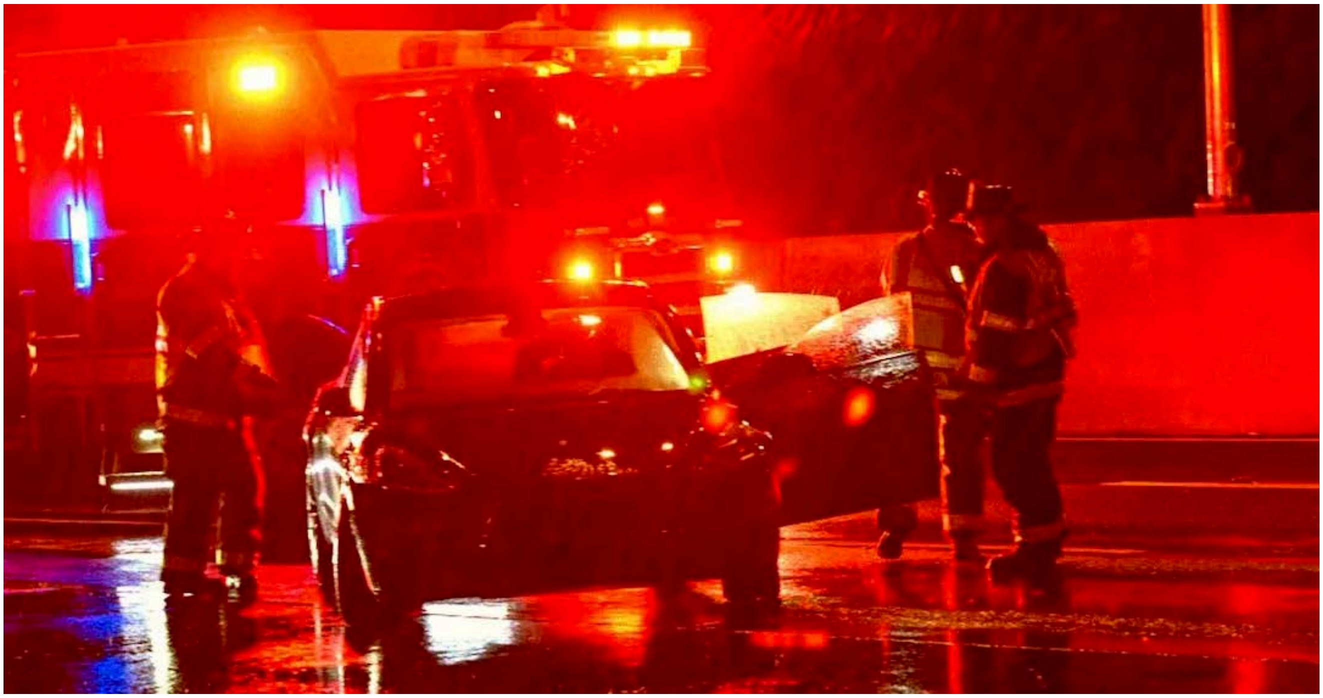
"I am owning such a car," wrote on *Electrek* commenter, who claims to own a Model 3 delivered this September. "Driving computer broken after 1 month [and] 1500km of use. Still not repaired due to missing spare part."

More on Tesla: *Trump Admin Planning to Drop Requirement for Tesla to Report Self-Driving Crashes*

Trump Admin Planning to Drop Requirement for Tesla to Report Self-Driving Crashes

futurism.com/the-byte/trump-admin-drop-requirement-tesla-report-self-driving-crashes

Victor Tangermann



Non Disclose, Sir

President-elect Donald Trump doesn't want his newfound son and Tesla CEO Elon Musk to be caught up in pesky regulations and government scrutiny.

According to documents obtained by *Reuters*, the Trump transition team is looking to drop a federal car-cash reporting requirement — which could greatly undermine the government's efforts to investigate Tesla's infamous driver-assistance software.

Tesla's Autopilot software, particularly the misleadingly-named Full Self-Driving add-on, has been under heavy government scrutiny after being linked to hundreds of crashes and dozens of deaths.

So far, Tesla has reported more than 1,5000 crash reports to federal safety regulators, per *Reuters*.

But now that Trump, who has grown extremely close with Musk, is set to return to the White House in January, the rules requiring Tesla to be upfront about crashes involving its vehicles could soon vaporize.

Dismantling Rules

It's an especially pertinent topic now that Musk has bet the company's fate on the development of an autonomous ridehailing service. The company showed off a prototype "Cybercab" at an event earlier this year, with Musk promising to pump out countless robotaxis as soon as next year.

According to *Reuters*, Trump's transition team was tasked with devising a 100-day strategy for automotive policy, and identified the crash-reporting rule as "excessive" data collection.

It remains unclear whether Musk or Tesla played a direct role in coming up with these recommendations, but given the close relationship between the mercurial CEO and the president-elect, it's not exactly a stretch.

Meanwhile, the National Highway Traffic Safety Administration (NHTSA), which has long been investigating crashes involving the car company's driver assistance software, told *Reuters* that the collected data was crucial to determine the tech's safety. Two former NHTSA staffers also argued that the requirement was pivotal in the regulator's investigations.

And it's not just Tesla. The NHTSA has collected data on more than 2,700 crashes through the requirement, involving six companies, four of which were involved in nine safety recalls.

During Tesla's third-quarter earnings call in October, Musk called for simpler federal rules governing the development of autonomous vehicles instead of relying on a patchwork of state laws.

Since then, Musk has been put in charge of a so-called Department of Government Efficiency (DOGE) to slash federal spending, which could put him in a conflicted position to call for the dismantling of rules that inconvenience his own business interests.

Whether those actions will prove popular with lawmakers on Capitol Hill, however, remains to be seen — as the regulation of autonomous vehicles has historically been a bipartisan issue, and individual states will likely want a say in the matter as well.

More on Tesla: *Elon Musk's "Charity" Is Hoarding Money Instead of Giving It to the Needy*

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Justices Rightly Corrected Course In Nvidia And Facebook

By **Laura Posner** (December 18, 2024, 5:52 PM EST)

Laura Posner

In the past two weeks, the U.S. Supreme Court dismissed as "improvidently granted" — an order colloquially called a DIG — two securities class actions, Nvidia Corp. v. Investors, and Facebook Inc. v. Amalgamated Bank. DIGs are rare and are issued only when the Supreme Court realizes it shouldn't have taken a case at the outset.

Dismissing two securities cases in such close succession, both of which presented significant risks to investor protections, is not only a procedural anomaly — it's a necessary course correction.

The petitioners' questions presented in both the **Facebook** and **Nvidia** cases were flawed — mischaracterizing existing law, purported circuit splits, the facts of the cases and the lower courts' decisions.

The Supreme Court's decisions to dismiss these cases maintain securities law pleading standards, preventing them from being unfairly tilted in favor of corporate defendants. The stakes in both cases were immense: The petitioners — Nvidia and Meta — in both cases sought rulings that would have significantly weakened securities laws and undermined investors' ability to hold corporations accountable for fraud.

In Facebook, the company argued it wasn't obligated to disclose that Cambridge Analytica accessed and misused Facebook user data without users' consent — a data breach that caused a multibillion-dollar loss in Facebook's market value and hundreds of millions in regulatory fines — because the events were historical and purportedly immaterial in nature to investors.

If the Supreme Court had endorsed this argument and ruled in Facebook's favor, corporations would have been able to conceal material information simply by arguing it happened in the past, limiting any recourse in cases brought by shareholders, and undermining the trust that underpins financial markets.

The court's refusal to take up Facebook's argument leaves intact the principle that material information, regardless of its timing, must be disclosed to investors when a company speaks on the topic. Shareholders rely on full transparency to make informed decisions, and the law requires this from companies.

In Nvidia, the stakes for investor protection were even higher. In their complaint, the plaintiffs cited an overwhelming body of evidence, including knowledge by former employees of internal documents reviewed by the company's CEO and expert analysis, that clearly supported their allegations of fraud.

This evidence was far more information in breadth and detail than most plaintiffs can obtain before the discovery stage of litigation. Yet, Nvidia sought to impose an impossibly high pleading standard for securities fraud claims.

The question Nvidia posed to the court would have required plaintiffs to detail and quote from internal company documents in their initial complaints, despite the fact they can't realistically access these documents without discovery in the vast majority of cases.

In securities class actions, discovery only occurs after a judge assesses that a case has met the standard to continue past a motion to dismiss. If the court moved forward with the case, they could have effectively immunized corporations from investor claims of securities fraud or lesser securities violations.

Nvidia also sought to undermine investors' ability to use an expert at the pleading stage. Disallowing such testimony in securities fraud cases would have further harmed investors' ability to hold wrongdoers accountable, and made it more difficult for courts to weigh and understand scientific, or particularly complex, information pled in complaints.

These DIGs protect more than legal principles; they safeguard the broader ecosystem of trust and accountability in the financial markets and the courts. If the Supreme Court had issued rulings based on the petitioners' misleading characterizations of the facts and law, the consequences for investors and markets could have been severe. By declining to rewrite securities law in ways that favor corporations at the expense of transparency, the Supreme Court has reinforced the laws that protect investors from corporate misconduct.

While DIGs often fly under the radar, don't underestimate their implications.

For securities lawyers, the Nvidia and Facebook cases represent real and dangerous efforts to distort the law under the guise of Supreme Court review.

For investors, these decisions underscore the continued importance of robust securities laws and the courts in protecting their interests. Corporations could evade accountability without these protections, jeopardizing market fairness and stability.

By issuing DIGs in both Facebook and Nvidia, the Supreme Court has sent a clear message: It will not be a party to undermining the integrity of securities litigation. These decisions are not just procedural footnotes; they reaffirm the principles that ensure corporate accountability, protect investors and uphold the rule of law.

Laura H. Posner is a partner at Cohen Milstein Sellers & Toll PLLC. Prior to joining the firm in 2017, she was the bureau chief for the New Jersey Bureau of Securities.

Disclosure: Posner organized the amicus strategy for both cases and authored one in Nvidia.

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Vaxart Investors Win Class Cert. Over COVID Shot On 2nd Try

By **Lauren Berg**

Law360 (December 18, 2024, 9:51 PM EST) -- A California federal judge has certified a class of Vaxart investors accusing the biotechnology company's onetime controlling shareholder of dumping stock at inflated prices following deceptive headlines about a COVID-19 vaccine, saying the investors' revised motion fixes issues of predominance and the damages model.

After denying the investors' first attempt, U.S. District Judge Vince Chhabria in a **five-page order** Tuesday granted the **renewed motion for class certification** brought by lead plaintiffs Wei Huang, Langdon Elliott and Ani Hovhannisyan, finding the revised version explains how price impact, loss causation and other factors can be determined as to all class members, regardless of when they purchased or sold Vaxart stock during the class period.

In addition, the renewed motion now presents a damages model that can account for the degree to which artificial stock price inflation might have varied over the class period, and it accounts for different findings regarding the amount of inflation at any point in the period, the order states.

"In other words, the plaintiffs have shown that, whether the jury finds no liability, finds that the truth leaked out gradually, or finds that the truth was revealed in a series of discrete corrective disclosures, liability can be resolved and damages apportioned on a class-wide basis," Judge Chhabria said.

The underlying suit accuses Vaxart, its current and former executives and Armistice Capital LLC — which owned a majority of Vaxart's publicly traded common stock — of falsely claiming to receive support from Operation Warp Speed, the federal COVID-19 vaccine development effort, to pump the company's stock price.

Last year, the investors finalized a **$12 million settlement** with Vaxart and its executives. However, Armistice and two of its senior officials — founder Steven Boyd and Keith Maher, who also both served on Vaxart's board of directors — remain in the suit.

The investors moved for class certification last December, court records show, but Judge Chhabria denied the bid in July. However, he gave the investors 28 days to file a renewed motion that addressed his concerns about the predominance issues and damages model.

On July 30, the investors filed their **renewed motion**, pointing to their damages expert's loss causation analysis showing the inflated stock prices "dissipated at different rates and on different days" as various corrective disclosures were made.

They also reaffirmed that common questions of law and fact predominate, arguing that even though the level of inflation was not constant, all class members were similarly damaged by the defendants' conduct, according to the motion.

In his order Tuesday, Judge Chhabria accepted the investors' damages model and rejected the defendants' arguments that it's inadequate and inconsistent with the investors' theory of liability in its treatment of artificial inflation of Vaxart's stock and its treatment of loss causation.

Specifically, the defendants argued the damages model incorrectly attributes all of the stock price increases to the alleged misrepresentations in the company's press releases and that it attributes every decline in stock price to the disclosure of the alleged fraud, according to the order.

"Even if the defendants are right that some portion of the increase in Vaxart's share price on those two days is attributable to the true portions of the press releases, that is a merits issue that doesn't defeat class treatment — the jury's findings regarding the degree to which Vaxart's price increased because of the press releases' true portions can simply be factored into the damages calculation," Judge Chhabria said.

Likewise, the judge found the defendants' argument related to price declines "amounts to an argument that the plaintiffs have failed to establish loss causation," which they don't need to do at the class certification state.

Judge Chhabria certified the proposed class of people who bought Vaxart stock, or bought call options or sold put options, between June 25, 2020, and July 24, 2020, and were damaged, according to the order.

He also certified the proposed subclass of people who bought Vaxart stock contemporaneously with the June 26 and June 29, 2020, sales of Vaxart stock by the Armistice defendants and were damaged.

The judge then appointed Huang, Elliott and Hovhannisyan as class representatives and their counsel at Hagens Berman Sobol Shapiro LLP and Scott + Scott Attorneys At Law LLP as class counsel, the order states.

Reed R. Kathrein of Hagens Berman told Law360 on Wednesday they are "very pleased" with the order and that "it took a lot of good team work to get there."

Counsel for the defendants did not respond to a request for comment Wednesday.

The investors are represented by Reed R. Kathrein, Lucas E. Gilmore, Steve W. Berman and Raffi Melanson of Hagens Berman Sobol Shapiro LLP, John T. Jasnoch, William C. Fredericks and Jeffrey P. Jacobson of Scott + Scott Attorneys At Law LLP, and Brian J. Schall of the Schall Law Firm.

The Armistice Capital defendants are represented by Miranda Kane, Warren Metlitzky and Nathan D. Theobald of Conrad Metlitzky Kane LLP, and Neal R. Marder, Joshua A. Rubin, Sina S. Safvati and Lillian J. Rand of Akin Gump Strauss Hauer & Feld LLP.

The case is In re Vaxart Inc. Securities Litigation, case number 3:20-cv-05949, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sarah Jarvis and Bonnie Eslinger. Editing by Lakshna Mehta.

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EY Accused Of Aiding Energy Firm's SPAC Fraud

By **Emilie Ruscoe**

Law360 (December 18, 2024, 7:49 PM EST) -- Big Four accounting firm EY faces a suit alleging that its "unqualified" audit opinions for a United Arab Emirates-based oil storage leasing company enabled the company to defraud investors in its $1 billion 2019 merger with a special purpose acquisition company.

The complaint, filed Tuesday in Manhattan federal court, says EY's investors lost money when the announcement of a regulatory probe and associated $5 million settlement agreement hurt trading prices for the leasing company's shares.

Plaintiffs Anvil Trust, Stephen Cannon, Bryant Edwards and Neil Richardson claim that when they decided to invest in the SPAC, they had been reassured by the relationship between "the supposedly reputable Ernst & Young," which EY was formerly known as, and SPAC acquisition target Brooge Petroleum and Gas Investment Co. FZE.

The plaintiffs say they were among a group of investors introduced to Brooge in 2018 who executed a merger agreement in advance of the planned merger.

But, the investors claimed, "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."

According to the investors, Brooge faked its revenues by making fraudulent invoices for customers it didn't do business with. To keep the scheme from being discovered, the investors claimed, Brooge received checks for its listed amounts from an affiliate — but then sent that money back to the affiliate.

"It goes without saying that none of this was disclosed to investors, including plaintiffs," the suit claims.

The investors say Brooge couldn't have pulled off its scheme without support from its auditor, specifically EY's Middle East unit and its Abu Dhabi branch, which are named alongside their parent company in the action.

"All of the EY defendants aided Brooge in devising a plan in which the affiliated entity would be inserted as an intermediary between Brooge and its supposed (but fake) customers, with both Brooge and its counsel, K&L Gates, falsely stating to plaintiffs that this structure was necessary to protect Brooge's confidential customer information," the investors claimed.

According to the suit, the EY defendants also claimed that the company "blessed" the scheme with audit opinions, stating that the company's financial statements fairly presented its financial position ahead of the merger.

The scheme allowed Brooge "to report tens of millions of dollars in fake revenue" to investors and the U.S. Securities and Exchange Commission, the investors claimed, and its SPAC merger secured a valuation of over $1 billion.

In connection with the scheme, the investors said, Brooge became the target of a lengthy SEC investigation. When the probe's findings were announced, along with a $5 million fine, that news precipitated a falloff in trading prices for Brooge shares.

As a result, the plaintiffs claimed, they "lost virtually the entire value of their investment."

Brooge also faces an ongoing proposed investor class action pointing to the SEC findings.

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

The plaintiffs are represented by Serine Consolino and Alison Van Horn of Aegis Law Group LLP.

Counsel information for the defendants was not immediately available Wednesday.

The case is Anvil Trust et al. v. Ernst & Young et al., case number 1:24-cv-09731, in the U.S. District Court for the Southern District of New York.

--Editing by Karin Roberts.

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CVS Fueled Opioid Epidemic In Rush For Profits, Feds Say

By **Brian Dowling**

Law360 (December 18, 2024, 6:31 PM EST) -- The U.S. Department of Justice unveiled a suit Wednesday accusing CVS, the nation's largest pharmacy chain, of knowingly filling invalid prescriptions for powerful opioids and ignoring internal pleas from its pharmacists as it allegedly put profits over safety.

The Justice Department on Wednesday filed a civil suit alleging CVS knowingly filled invalid opioid prescriptions over pharmacists' objections. (AP Photo/Gene J. Puskar)

In a civil lawsuit unsealed in Rhode Island, the government said CVS routinely dispensed opioids based on prescriptions its staff knew were invalid, including in extremely high doses and excessive quantities.

The company, headquartered in Woonsocket, Rhode Island, frustrated pharmacists' responsibility to deny "red flag" prescriptions that are more likely to be abused or diverted, pushing the staff to fill the drug requests regardless of prior warnings, according to the suit.

"CVS has concocted an assembly-line style of medication preparation and only cares about profits," one CVS pharmacy staff member said, according to the complaint.

Pharmacists were routinely filling prescribers' medication requests despite red flags, the government said. Prescriptions were filled for a dead patient and, in another case, pushed through for a prescriber who had been marked by CVS pharmacists as a "pill mill," according to the complaint.

The government's civil prosecutors said CVS is one of the largest dispensers of opioids in the United States. With more than 9,000 locations, the company sold over 12 billion doses of the powerful pain medication from 2015 to 2020, according to prosecutors.

"This lawsuit alleges that CVS failed to exercise its critical role as gatekeeper of dangerous prescription opioids and, instead, facilitated the illegal distribution of these highly addictive drugs, including by pill mill prescribers," U.S. Attorney Zachary A. Cunha of Rhode Island said in a statement. "When corporations such as CVS prize profits over patient safety and overburden their pharmacy staff so that they cannot carry out the basic responsibility of ensuring that prescriptions are legitimate, we will use every tool at our disposal to see that they answer for it."

The lawsuit alleges violations of the Controlled Substances Act and the False Claims Act against CVS Pharmacy Inc. and dozens of its subsidiaries across the United States.

The allegations about the company's practices were first detailed in an October 2019 complaint filed by former CVS pharmacy manager Hillary Estright, who sued on the government's behalf. The federal government elected to intervene in the case earlier this week.

In a statement, CVS representative Kara Page said the complaint is "misguided" and sets out a false narrative. The company said it has cooperated with the DOJ's investigation for more than four years.

"The government's lawsuit seeks to impose a shifting standard for pharmacy practice," Page said. "Many of the litigation theories laid out in the complaint are not found in any statute or regulation, and relate to topics on which the government has declined to provide guidance."

CVS added that the lawsuit "intensifies a serious dilemma for pharmacists, who are simultaneously second-guessed for dispensing too many opioids, and too few."

In the complaint, the government claims CVS knew that its pharmacists lacked the time to comply with their professional obligations to dispense only valid prescriptions, because the company's staffing policies "emphasized speed over safety."

The corporate budgeting at CVS allegedly sought to reduce labor costs by cutting pharmacist and technician hours, but without reducing the number of drugs dispensed. CVS also incentivized speed and volume of prescription output with higher bonuses, according to prosecutors.

CVS allegedly ignored official warnings about its staffing from professional pharmacy boards in Oklahoma, Virginia and Ohio, as well as concerns from store managers and complaints from an internal ethics hotline warning of major public safety risks.

The complaint states that some prescriptions covered by taxpayer-funded programs like Medicare, Medicaid and Tricare were not legitimate claims, and CVS should be held responsible for damages under the False Claims Act.

The whistleblower's counsel, Scott Simmer of Baron & Budd PC, said he's pleased the federal government has decided to intervene in the case to seek to hold CVS liable for "blatant violations of their duty to responsibly dispense controlled substances."

"The greed of pharmacies has resulted in the largest public health crisis our country has seen with nearly every American touched in some way by the opioid epidemic," Simmer said in a statement.

His firm also filed an FCA suit regarding Rite Aid's dispensing of opioids. The Philadelphia company in July agreed to a **nearly $410 million** settlement to resolve the lawsuit.

Federal prosecutors are also pursuing claims in a separate case that Walmart helped fuel the opioid crisis through illegitimate prescriptions.

The government is represented by Bethany N. Wong, Kevin Love Hubbard, Rachna Vyas and Sara Miron Bloom of the U.S. Attorney's Office for the District of Rhode Island.

Estright is represented by Jerry E. Martin and Seth Marcus Hyatt of Barrett Johnston Martin & Garrison LLC, Louise A. Herman of Herman Law Group, as well as W. Scott Simmer and Will Powers of Baron &

Budd PC.

CVS is represented by Eric R. Delinsky and Alexandra W. Miller of Zuckerman Spaeder LLP.

The case is United States of America et al. v. CVS Health Corp. et al., case number 1:22-cv-00222, in the U.S. District Court for the District of Rhode Island.

--Editing by Alanna Weissman.

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Class Counsel In NCAA-NIL Suits Seek $500M-Plus In Fees

By **David Steele**

Law360 (December 18, 2024, 3:36 PM EST) -- The attorneys who represent the athletes in two name, image and likeness class actions that were settled with the NCAA have requested more than half a billion dollars total in fees and costs, citing the "substantial risks and complex issues" involved.

Steve Berman of Hagens Berman Sobol Shapiro LLP and Jeffrey Kessler of Winston & Strawn LLP, co-lead counsel for the classes, led by former swimmer Grant House and former football player Chuba Hubbard, submitted their requests Tuesday in California federal court. Berman and Kessler asked for attorney fees, reimbursement of expenses and service awards for House, Hubbard and the other class representatives. The requests in the House settlement totaled more than $484 million, and for Hubbard more than $40 million, for nearly $525 million combined.

The **settlement** between the NCAA and the House class is for $2.78 billion, and between the NCAA and Hubbard for $200 million. The House class includes a consolidated class action led by former football player DeWayne Carter. House, Carter and other class representatives submitted declarations supporting the fee requests along with the attorneys' claims.

The request in the House settlement included the right to apply for an additional award of a portion, as high as 1.25%, of future total revenues spent by institutions on compensation to the athletes for each academic year, also over the next 10 years.

The class representatives were entitled to the service awards, the attorneys said — including $125,000 each for House, former basketball player Sedona Prince and football player Tymir Oliver — for "the risks they took suing the NCAA and major conferences in such a high-profile litigation, which for most of them occurred during their collegiate careers.'' The attorneys also requested awards of $50,000 for the co-lead plaintiffs in the Hubbard suit, including former track athlete Keira McCarrell.

The hearing on final approval of the settlement before U.S. District Judge Claudia Wilken is scheduled for April 7.

The attorneys requested that the fees and cost be paid over 10 years, the same length of time that NIL money and shared revenues are to be paid out by NCAA institutions to athletes going forward, in the revolutionary compensation plan negotiated in the settlement. They also pointed out that their request of 20% of the settlement funds in the House and Hubbard cases was not only reasonable based on the work put into them, but was below the generally accepted market rate of 25%.

Just as important, Berman and Kessler told the court, the co-counsel "has achieved exceptional results'' for the athletes, and did so "despite the case's risks, challenges, and complexities,'' further justifying the fees request. Their argument for the fees and costs in the Hubbard case was similar — they had "achieved an outstanding outcome'' for the athletes that was "far beyond many other approved recoveries in antitrust class actions,'' they said in their request.

Representatives for the athletes and for the NCAA did not immediately reply to requests for comment Wednesday.

The athletes are represented by Steve W. Berman, Emilee N. Sisco, Stephanie Verdoia, Meredith Simons and Benjamin J. Siegel of Hagens Berman Sobol Shapiro LLP, Jeffrey L. Kessler, David G. Feher, David L. Greenspan, Adam I. Dale, Neha Vyas and Jeanifer E. Parsigian of Winston & Strawn

LLP, and Jeffrey L. Kodroff and Eugene A. Spector of Spector Roseman & Kodroff PC.

The NCAA is represented by Rakesh N. Kilaru, Beth A. Wilkinson, Kieran Gostin, Calanthe Arat, Tamarra Matthews Johnson and Matthew R. Skanchy of Wilkinson Stekloff LLP and Jacob K. Danziger of ArentFox Schiff LLP.

The cases are In re: College Athlete NIL Litigation, case number 4:20-cv-03919, in the U.S. District Court for the Northern District of California, and Chuba Hubbard et al. v. NCAA et al., case number 4:23-cv-01593, in the U.S. District Court for the Northern District of California.

--Editing by Linda Voorhis.

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NYC Agrees To Pay Immigrants $92.5M In Overdetention Suit

By **Rae Ann Varona**

Law360 (December 18, 2024, 10:50 PM EST) -- A New York state court Wednesday gave the initial OK to New York City's agreement to pay a class of over 20,000 individuals up to $92.5 million to resolve decadelong allegations the city unlawfully detained immigrants for days or weeks longer than allowed under U.S. Immigration and Customs Enforcement detainers.

In announcing the preliminary approval of the multimillion-dollar deal, attorneys at Emery Celli Brinckerhoff Abady Ward & Maazel LLP and Benno & Associates PC said class members — individuals held by NYC's Department of Correction on an ICE detainer between April 1997 and Dec. 21, 2012 — may receive up to tens of thousands of dollars.

How much each individual gets will be determined by the date and length of time they were overdetained, the attorneys said.

"We are proud to bring a measure of justice to the individuals who experienced a loss of liberty and a disruption of their lives due to this unwarranted and excessive detention," Debbie Greenberger, a partner at Emery Celli, said in a statement. "This settlement should be a reminder that all individuals are entitled to due process of law."

The settlement comes nearly 15 years after lead plaintiff Oscar Onadia in February 2010 hauled the city into New York state court, accusing it of holding him and others past a 48-hour limit allowed for ICE "detainers," or requests the immigration agency issues to state and local law enforcement agencies to hold an individual beyond their scheduled release.

According to ICE, the detainers give the agency time to take custody of individuals in accordance with federal immigration law.

But, according to Onadia, he remained in jail for 41 days after he had already completed a five-day sentence for unlicensed driving.

New York Supreme Court Judge Mitchell J. Danziger granted **class certification** in January 2017, finding Onadia sufficiently showed there were at least 9,000 people who had been held in custody after their scheduled release and after the NYC Department of Correction received a detainer.

According to the settlement agreement, the city, which has denied all liability, has agreed to pay Onadia $25,000 for any "inconvenience, pain, suffering, and other non-pecuniary loss experienced as a result of having been a named plaintiff in this action."

The service award is in addition to any payment he would get as a class member, the settlement stated.

The settlement also stated that settlement costs should not exceed 30% of the $92.5 million class fund.

In announcing the deal, the attorneys said some of the class members are now living outside the United States, including in Mexico, the Dominican Republic, Haiti, Jamaica, Ecuador, Cuba, Colombia, Trinidad and Tobago, Honduras, and Guyana. Class members were detained "more than 166,000 days beyond their scheduled release dates," the attorneys added.

New York City has largely stopped honoring ICE detainer requests, the attorneys noted. But those who were affected, including Bronx resident Frank Barker, know "all too well how devastating illegal ICE detainers can be," they said.

Barker, according to the attorneys, was brought to the United States as a legal resident from Barbados when he was 9 years old. They said that after struggling with drug addiction and getting arrested in 2008, the now 58-year-old served an eight-month sentence at Rikers before being picked up by ICE and held for a year at an ICE detention center.

In a statement, Barker said that the United States has been his home "for as long as I can remember."

"It's where I've raised my family and built a career, and I do everything I can to give back to this community," Barker said. "As someone who has lived in fear of ICE and who lost a year of his life to being detained, I applaud this lawsuit and encourage anyone who has experienced similar treatment or who has a family member or friend who has been impacted by this, to take action to be included in this class."

A spokesman for the New York City Law Department told Law360 on Wednesday that resolving the longstanding case "was in the best interest of all parties.

"During the period this case covers from 1997 to 2012, New York City — and localities across the country — operated with the assumption that compliance with ICE detainers was mandated under federal law," the spokesman said. "Court rulings eventually clarified that localities could not hold a detainee beyond their release date based solely on the contents of a federal detainer and that a court order is needed."

He said the city changed its policies in 2012 to conform with the court rulings.

The class is represented by Matthew D. Brinckerhoff, Debra Greenberger and Vasudha Talla of Emery Celli Brinckerhoff Abady Ward & Maazel LLP, and Ameer Benno of Benno & Associates PC.

New York City is represented by Chlarens Orsland of the Corporation Counsel of the City of New York.

The case is Oscar Onadia v. City of New York et al., case number 300940/2010, in the Supreme Court of the State of New York, County of Bronx.

--Editing by Kristen Becker.

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Hagens Berman Says Apple, Amazon Doc Demand Is Off Base

By **Ryan Boysen**

Law360 (December 18, 2024, 4:20 PM EST) -- Hagens Berman Sobol Shapiro LLP is firing back against Apple and Amazon's bid to force the turnover of texts and emails with a client who disappeared from a putative class action against the tech giants, calling the spat an opportunistic attack "based on a fiction."

In an opposition motion filed Tuesday, Hagens Berman said Apple Inc. and Amazon.com Inc. are dead wrong to claim that the privileged client communications are "vital" to their defense or that Hagens Berman put them in the spotlight.

"This latest (and very late) effort to relitigate [an earlier] motion to amend should be denied," Hagens Berman wrote.

That **amended complaint**, filed in May, replaced former lead plaintiff Steven Floyd with two other lead plaintiffs. Hagens Berman made the substitution because Floyd had stopped responding to his attorneys.

Apple and Amazon **now claim** Hagens Berman may never have gotten Floyd's permission to file the amended complaint, which they say could invalidate the entire case.

The two defendants are asking U.S. District Judge Kymberly K. Evanston to force Hagens Berman to turn over communications with Floyd that preceded his going silent in January.

In Tuesday's filing, Hagens Berman played down those assertions, noting that the motion to amend hinged on the firm's responsibility to a proposed class of electronics purchasers, not on permission from Floyd.

"The only parties to put Floyd's implied authority and communications 'at issue' are defendants, and defendants cannot bootstrap a privilege waiver by doing so," Hagens Berman said.

The filing is the latest twist in the nearly yearlong dispute over Floyd, who was formerly the lead plaintiff in the case until he **disappeared** at the beginning of the year. The case was filed in 2022.

Since then his attorneys have tried to contact him "by U.S. mail, phone, text and personal service," all to no avail, according to court documents.

In the meantime, Floyd has blown past several deadlines to provide information about whether he bought Apple devices directly from the phone carrier Verizon Communications Inc.

That information could prove critical in determining whether he's an adequate class representative in a case that challenges a 2018 deal under which Amazon only allows Apple-approved third-party vendors to sell iPhones and iPads on its online marketplace.

The putative antitrust class action claims the agreement **restricted competition** and artificially inflated prices. Apple and Amazon, meanwhile, claim the deal protects consumers from counterfeit electronics sellers.

Hagens Berman filed a motion to withdraw from representing Floyd on Oct. 4. Apple and Amazon responded with a motion for **discovery sanctions** just hours later.

In response, Hagens Berman said it **wouldn't oppose** efforts to sanction Floyd, and it **produced** a log of privileged communications between the firm and Floyd before he stopped responding.

Apple and Amazon say the privileged log shows a "flurry of communications" with Floyd around that time, which the defendants say might mean he had attempted to withdraw from the case entirely. If he had, that could invalidate the subsequent motion to amend, according to Apple and Amazon.

In Tuesday's opposition brief, however, Hagens Berman said the defendants were making the exact same arguments at the time, and the court OK'd the motion to amend based on the interests of the proposed class.

"In granting leave to amend, the court … did not suggest that counsel had asserted implied authority from Floyd," Hagens Berman said.

Neither party responded to requests for comment.

Amazon is represented by John Goldmark and MaryAnn Almeida of Davis Wright Tremaine LLP; Jonathan E. Nuechterlein and Benjamin M. Mundel of Sidley Austin LLP; and William C. Lavery of Clifford Chance LLP.

Apple is represented by Mark S. Parris of Orrick Herrington & Sutcliffe LLP; Mark A. Perry, Eric S. Hochstadt, Brian G. Liegel and Morgan MacBride of Weil Gotshal & Manges LLP; and Jeremy Roller of Arete Law Group PLLC.

The case is Floyd et al. v. Amazon.com Inc. et al., case number 2:22-cv-01599, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Emily Sawicki, Rachel Scharf and Bryan Koenig. Editing by Andrew Cohen.

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Talc Law Firm Seeks Judge's DQ In Beasley Allen Suit

By **James Boyle**

Law360 (December 18, 2024, 4:28 PM EST) -- An Alabama federal judge's prior representation of Montgomery-based Beasley Allen Law Firm is grounds for The Smith Law Firm PLLC's motion filed Wednesday calling for the judge's recusal from Beasley Allen's breach of contract suit against the Smith firm regarding alleged owed expenses from a joint venture the two firms shared.

U.S. District Judge R. Austin Huffaker disclosed during a Dec. 10 status conference that he had previously represented Beasley Allen while he practiced at Rushton Stakely Johnston & Garrett PA. He ordered the parties to file a motion to recuse by Dec. 20, according to court documents.

The Smith Law Firm said in its Wednesday **motion** it is aware that Judge Huffaker managed several matters as Beasley Allen's attorney during the time he practiced at Rushton Stakely, but the defendant is not aware of the nature of each matter. Judge Huffaker ended his business relationship with Beasley Allen when former President Donald Trump nominated him for the federal bench in 2019 and the Senate approved the selection.

Beasley Allen filed a **breach of contract** suit against The Smith Law Firm in September, saying the defendant owes the firm more than $1 million in owed expenses from a joint venture the two parties formed to represent thousands in talcum powder litigation against Johnson & Johnson. The suit also claimed that the Smith firm has been unilaterally negotiating with the pharmaceutical giant to the detriment of clients.

The Smith Law Firm entered into the joint venture with Beasley Allen and another firm, Porter Malouf PA, in 2014. The joint venture has handled more than 11,000 clients pursuing claims that Johnson & Johnson's talc-based baby powder products caused ovarian cancer, according to the complaint.

Beasley Allen claimed that The Smith Law Firm and principal member Allen Smith failed to reveal that it bought out Porter Malouf's interest in the joint venture agreement, which Beasley Allen discovered last year during talks with lenders that the Smith firm had turned to because of financial troubles. Porter Malouf is also a defendant in the case.

The complaint also said the parties in the joint venture were to share expenses based on their proportion of fees from the talc cases, with Beasley Allen shouldering 50% of those costs and the Smith firm and Porter Malouf splitting the other half.

Beasley Allen said it has mostly fronted those expenses while the other firms reimbursed it on a quarterly basis. While those payments have totaled more than $15 million since 2014, the Smith firm has since fallen behind, according to the complaint. The firm and Porter Malouf owe Beasley Allen $1.2 million, even as the Smith firm has failed to handle its share of the work on the joint venture's cases, the complaint said.

Meanwhile, The Smith Law Firm has kept a "substantial" number of talc clients secret from Beasley Allen and persisted in "actively undercutting" the firm in settlement talks with Johnson & Johnson, according to the complaint.

Attorneys representing the parties were not immediately available for comment Wednesday.

Beasley Allen is represented by Robert D. Segall and J. David Martin of Copeland Franco Screws & Gill PA.

The Smith Law Firm is represented by Joel D. Connally of Strength & Connally LLC and Thomas G. Bufkin of Carroll Bufkin PLLC.

Porter Malouf is represented by Bruce F. Rogers and Elizabeth N. Terenzi of Bainbridge Mims Rogers & Smith LLP.

The case is Beasley Allen Crow Methvin Portis & Miles PC v. The Smith Law Firm PLLC et al., case number 2:24-cv-00582 in the U.S. District Court for the Middle District of Alabama.

--Editing by Rich Mills.

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Pilgrim's Pride Gets Chicken Exit OK Under Contested Deal

By **Bryan Koenig**

Law360 (December 18, 2024, 9:06 PM EST) -- Pilgrim's Pride is able to formally duck Sysco chicken price-fixing claims picked up by a Burford Capital LLC unit after an Illinois federal judge once again ruled that the companies are bound by a settlement between Pilgrim's Pride and Sysco that the litigation funding giant contested as too small.

U.S. District Judge Thomas M. Durkin's Monday ruling is the latest, most decisive blow yet to Carina Ventures LLC's bid to continue pursuing price-fixing claims against Pilgrim's Pride, which entered a global settlement with Sysco to resolve chicken price-fixing claims in Illinois, and pork and beef price-fixing claims in Minnesota.

"The court having found that Sysco agreed that the claims should be released upon payment of the agreed upon sum, and Pilgrim's having made the payment, the court sees no reason why judgment should not be entered against Carina's continuing prosecution the claims against Pilgrim's in this case," Judge Durkin said. "Carina's claims against Pilgrim's in the District of Minnesota are not the subject of this motion for summary judgment, and the court need not address them further."

Judge Durkin in June **refused to block the settlement**, holding Carina to an email-based deal that the judge found sufficient to end the Burford unit's price-fixing claims against Pilgrim's Pride in **broader litigation** in the chicken industry. The back-and-forth is the latest twist in the saga of Burford's $140 million investment to foot Sysco's legal bills as a plaintiff in price-fixing litigation targeting major producers of chicken, pork and beef.

Instead of being bound by deals it contends were never properly formalized, Carina wants to continue litigating against Pilgrim's Pride in the chicken case and against JBS USA Food in the beef and pork cases currently proceeding in parallel in multidistrict litigation in Minnesota federal court.

Burford's **dissatisfaction with the deals** Sysco was inking resulted in a two-way legal feud that ultimately ended with Sysco **signing over** its rights to sue the protein giants to the litigation funder. But the judges in the chicken case in Illinois, and the pork and beef cases in Minnesota, have so far come out on opposite sides of the question of whether Carina should be able to tap in for Sysco.

In June, U.S. District Judge John R. Tunheim of the District of Minnesota **refused** to let Carina substitute for Sysco in the pork and beef cases.

In the chicken case in Illinois, Judge Durkin **allowed the swap** in March, over the objection of major chicken producer defendants. Another Burford unit has also been allowed to tag in for a different plaintiff **against turkey producers**. But in June, Judge Durkin said that Carina must remain bound to the unspecified settlement that Pilgrim's Pride and Sysco memorialized through email but never signed on paper.

Carina appealed that order to the Seventh Circuit, resulting in an Aug. 14 decision rejecting the case for lack of jurisdiction. The appellate panel concluded in the unsigned order that there was no order from Judge Durkin to be appealed because he never spelled out exactly what it was he was ordering, having "merely found that the parties had reached a settlement" and awarding "no specific relief to either party."

When Carina took that order **back to Judge Durkin**, he held in October that the Seventh Circuit's dismissal never addressed the substance of his enforcement order. Carina also hasn't pointed to any error warranting vacating the order, he said at the time.

Carina asked for permission to **appeal the October decision**, only for Judge Durkin to refuse, noting Pilgrim's Pride's pending summary judgment bid, which would result in a ruling he anticipated "will be an appealable order (by either party)."

"Should Carina appeal the anticipated order on Pilgrim's motion for summary judgment, Carina will also be able to appeal any previous interlocutory order," Judge Durkin said in a November minute order.

Judge Durkin on Monday granted Pilgrim's Pride's summary judgment and allowed it to nix the Sysco-based claims, standing by his findings that the underlying settlement is valid and rejecting arguments that Sysco's representatives had disavowed a deal in an August 2022 phone call.

"The problem with this argument is that the court already considered it on Pilgrim's initial motion to enforce the agreement. The court found sufficient evidence of agreement based on an email exchange that took place after the August phone call Carina relies on in opposition to this motion," the judge said.

Judge Durkin rejected arguments that the existence of a valid agreement is a contested factual dispute best left to a jury, noting that his findings "that the evidence shows that such an agreement exists, and that no reasonable fact finder could find otherwise."

Counsel for Carina and Pilgrim's Pride did not immediately respond to requests for comment Wednesday.

Carina is represented by Derek Ho, Travis Edwards, Christopher Goodnow, Mary Charlotte Carroll and Dustin G. Graber of Kellogg Hansen Todd Figel & Frederick PLLC and Christopher Seeger and Jennifer Scullion of Seeger Weiss LLP.

Pilgrim's Pride is represented by Michael Bonanno, William Burck, Christopher Michel, Kathleen Lanigan, Debra Bernstein and Michelle Schmit of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Broiler Chicken Antitrust Litigation, case number 1:16-cv-08637, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Lauraann Wood. Editing by Dave Trumbore.

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Schools Fighting Price-Fixing Suit Face $685M Damages Claim

By **Lauraann Wood**

Law360 (December 18, 2024, 9:21 PM EST) -- Students looking to hold a group of elite universities and colleges liable for an allegedly anticompetitive financial aid fixing scheme say they should be allowed to proceed as a class because they'll use common evidence to prove they suffered about $685 million in damages.

The students argued Monday that U.S. District Judge Matthew Kennelly should certify a class in the antitrust case pending still against seven of the 17 elite schools they initially targeted because they have "a wealth" of both qualitative and quantitative evidence showing their claims can be resolved by answering the questions common among them, such as whether a conspiracy existed, which schools were involved and the resulting impact.

"Abundant" evidence exists proving the schools conspired to fix their financial aid offerings and avoid competing for students, and that each school participated in the scheme, the students told Judge Kennelly. Enough common evidence also exists to prove the scheme was per se illegal, or that the schools command enough market power together that their agreement led to anticompetitive effects provable by common evidence, they said.

The students argued they'll also use the same evidence to prove they paid artificially high tuition prices, and that nearly all class members experienced that inflation. Certification is appropriate because the parties' dispute on the issue of common impact is "fundamentally classwide in nature," since the jury will find the students either demonstrated that element or they haven't, the motion argued.

The class also said their main economic expert will provide their classwide evidence that the schools at issue – University of Pennsylvania, Georgetown University, Cornell University, the University of Notre Dame, the Massachusetts Institute of Technology, the California Institute of Technology and Johns Hopkins University – caused them $685 million in damages through the scheme they coordinated in their so-called 568 Group.

"In fact, classwide evidence, including incriminating contemporaneous documents from defendants' own files, makes clear that the 568 Group was founded and maintained to prevent 'bidding wars' over aid for admitted students — a natural aspect of unfettered competition," they told Judge Kennelly.

The case's common evidence also shows the seven schools were relying on a statutory price-fixing liability exemption that didn't apply to their conduct, the students argued. The exemption applies to colleges that admitted students without considering their financial circumstances, but that's precisely what the defendants considered as they carried out their scheme, they argued.

"There were always defendants, for example, that favored children and grandchildren of wealthy donors in admissions," the students told the court. "This means that no defendant can claim the 568 exemption."

Representatives for the parties didn't immediately respond Wednesday to requests for comment.

Students launched the suit in 2022, alleging a group of 17 universities violated antitrust laws by agreeing to limit student aid they provided, adding that this affected the attendance price for around 170,000 students over 20 years. All 17 universities participated in the so-called 568 Presidents

Group, a group of colleges formed to collaborate on financial aid formulas.

The schools cited the 568 exemption in their early bid to toss the suit, but the students argued then as well that it didn't apply, since the defendants evaluated the financial situations of students and their families while making admissions decisions for wait-listed and transfer students.

Judge Kennelly sided with the students on that issue, finding they had adequately alleged the schools considered their financial standing during the admissions process. That ruling prompted the case's discovery process, sparking several evidentiary fights and a string of back-to-back individually negotiated settlements that **received final approval** in July.

The plaintiffs are represented by Devin "Vel" Freedman, Edward J. Normand, Ivy Ngo, Joseph Delich, Peter Bach-y-Rita and Richard Cipolla of Freedman Normand Friedland LLP, Robert D. Gilbert, Elpidio Villarreal, Robert S. Raymar, David Copeland and Natasha Zaslove of Gilbert Litigators & Counselors PC, and Eric L. Cramer, Ellen T. Noteware, David Langer, Jeremy Gradwohl, Daniel J. Walker, Robert E. Litan, Hope Brinn and Richard D. Schwartz of Berger Montague.

California Institute of Technology is represented by Cooley LLP.

Cornell is represented by Kirkland & Ellis LLP.

MIT is represented by Freshfields US LLP and Goldman Ismail Tomaselli Brennan & Baum LLP.

Notre Dame is represented by Williams & Connolly LLP and Michael Best & Friedrich LLP.

The University of Pennsylvania is represented by WilmerHale and Miller Shakman Levine & Feldman LLP.

Georgetown is represented by Mayer Brown LLP.

Johns Hopkins is represented by Ropes & Gray LLP.

The case is Henry et al. v. Brown University et al., case number 1:22-cv-00125, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Celeste Bott. Edting by Linda Voorhis.