

Wells Fargo earned 'billions' on fees before refunds, lawsuit says

DJ [dailyjournal.com/articles/382583-wells-fargo-earned-billions-on-fees-before-refunds-lawsuit-says](https://www.dailyjournal.com/articles/382583-wells-fargo-earned-billions-on-fees-before-refunds-lawsuit-says)

Contracts

Dec. 20, 2024

A federal judge allowed to proceed a putative class action against Wells Fargo that claims it earned "billions" in profits from interest on wrongly collected mortgage fees.



A federal judge in Oakland declined to dismiss all the claims from a putative class action against Wells Fargo & Co. by borrowers who say they are seeking the return of "billions" of dollars in allegedly improper fees they paid with their mortgages. They also argued that even in cases where the fees were refunded, the bank earned profits on the amounts for years.

In his order, published Wednesday, U.S. District Judge Haywood Gilliam Jr. dismissed only the lead plaintiff's claims for "money had and received" where he sought to recover the profits Wells Fargo allegedly gained from the improper collection of the fees. Gilliam denied the defendant's argument that the lead plaintiff's claims were time-barred because the mortgage at issue was signed in 2005.

Gilliam denied Wells Fargo's motion to dismiss the rest of the plaintiffs' claims and preserved the causes of action for conversion and quasi-contract for restitution.

Wells Fargo's press office declined to comment on Thursday. The company's legal team from Winston and Strawn LLP wrote in its latest motion to dismiss, "Plaintiff's claims are time-barred on their face and his tolling allegations are superfluous."

Christopher Ayers of Seeger Weiss LLP in New Jersey, one of the lead attorneys for the putative class, said he was pleased with Gilliam's decision in an email statement Thursday.

"Wells Fargo systematically and illegally charged customers Rate Lock Extension Fees by falsely blaming them for delays in the loan process," Ayers said. "We are pleased that Judge Gilliam's ruling allows our case to move forward as we seek full restitution to class members

of the billions in profits Wells Fargo made from these improper charges."

Shawn A. Williams, of Robbins Geller Rudman & Dowd LLP in San Francisco, Jacob Maiman-Stadtmauer of Selendy Gay PLLC in New York and several attorneys from their respective firms serve as Ayers' co-counsel in the case.

Gilliam's decision comes 10 months after he dismissed the initial complaint on Feb. 26, with leave to amend, on the grounds that "plaintiff's allegations, as to the exact nature of the defendants' misconduct, were too vague and conclusory to state a legally cognizable theory."

At the heart of the dispute is the lead plaintiff's claim that that Wells Fargo "improperly charged him a fee to extend the interest rate lock period on his August 2005 mortgage loan" known as a rate lock extension fee, or "RLEF." *Morris v. Wells Fargo & Company et al.*, 4:23-cv-03277 (N.D. Cal. filed June 30, 2023).

The plaintiff's legal team claimed that Wells Fargo "admitted that it wrongfully charged the borrowers at issue" and argued that the attempts to return the money were futile because the company had already benefited "billions" from the investment over the last two decades.

"The amounts distributed do not properly compensate borrowers for Wells Fargo's misappropriation and use of these funds for up to 18 years," the attorneys wrote. "In reality, Wells Fargo enjoyed a return of investment on these funds over the time period at issue vastly in excess of the amounts returned to borrowers. It is reasonably believed that Wells Fargo's actual return on its investment of these funds above the nominal amounts returned will be determined to be in the billions of dollars. Thus, Wells Fargo's minimal payments to borrowers, including Plaintiff, are wholly inadequate, inequitable, and in reality, do nothing but try to cover up the enormous profits that Wells Fargo obtained from its nearly two-decades-long practice of wrongfully charging, withholding, and reinvesting the RLEFs at issue."

Wells Fargo's legal team argued in their motion that the claims contradict the actual terms of the lead plaintiff's loan, and that the plaintiff cannot recover the alleged profits made from the improper fee charges because the amount is not identified in the complaint.

"The conversion claim must be dismissed because plaintiff does not seek a definite sum and because plaintiff had no ownership of or right to the 'profits' he seeks or in the 'investment opportunities' he now claims," Wells Fargo's attorneys wrote. "Moreover, it is well-settled that an alleged overcharge cannot form the basis for such a claim, nor can a payment that was voluntarily made. Plaintiff's claims lack legal merit, and the Amended Complaint should be dismissed with prejudice."

The following attorneys from Winston and Strawn LLP represent the company in the matter and could not be reached for comment Thursday: Amanda L. Groves in Los Angeles, Kobi Kennedy Brinson and Stacie Corbett Knight in Charlotte.

Despite dismissing the plaintiff's claim for money had and received without leave to amend, Gilliam addressed the plaintiff's ability to recover Wells Fargo's alleged profits from allegedly improper fees in his order.

"A different theory of liability might allow plaintiff to recover the profits defendants earned on the money he alleges that they unlawfully acquired from him, but it is not available as a remedy for a claim for money had or received," the judge wrote.

Wells Fargo was recently hit with a separate putative class action in the Northern District of California by a group of mortgage borrowers on Aug. 13.

The lawsuit claims that the company sent "vague" letters and cashier's checks to "buy off" mortgage customers whose accounts allegedly were subject to an "error" that the company would not identify. *Prado v. Wells Fargo & Company et al.*, 3:24-cv-05105 (N.D. Cal. filed Aug. 13, 2024).

#382583

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DCVC Denied Final Judgments in Zymergen Securities Fraud Case

By Bernie Pazanowski

- Part of claim over who controlled Zymergen wasn't dismissed
- Granting final judgment on other claim won't streamline suit

DCVC Management Co.'s motion for a partial final judgment in a securities fraud case against it was dismissed by a federal court.

Investors alleged that DCVC and two other venture capital groups violated Sections 11 and 15 of the Securities Act by controlling Zymergen Inc. and a member of its board, Matthew Ocko, in the lead-up to Zymergen's initial public offering. The IPO was valued at \$1.2 trillion, but the company allegedly had pipeline issues after the IPO and was ultimately purchased for less than a tenth of its IPO valuation in 2023.

Zymergen investors, lead by Biao Wang, sued in the US District Court for the Northern District of California. The investors said that DCVC was vicariously liable for their losses under Section 15 because it had control over Ocko, who partially owned DCVC, and under Section 11 through the theory of respondeat superior for the false statements in the IPO.

Judge P. Casey Pitts dismissed the Section 15 claim as far as it was based on DCVC's alleged control of Ocko, but not to the extent it was based on DCVC's control of Zymergen. He also dismissed the Section 11 claim in its entirety. DCVC then moved for a partial final judgment on the dismissed claims.

DCVC isn't entitled to a final judgment on the Section 15 claim because part of it is still active, Pitts said Wednesday. DCVC is still a defendant on part of the claim and dismissal of part of the claim wasn't a judgment that ended the litigation on its merits, he said.

Though Pitts' dismissal of the Section 11 claim ended DCVC's potential liability for the claim, final judgment was still inappropriate, Pitts said. Resolving the Section 11 claims wouldn't streamline the litigation because the parties would be litigating the appeal and the possible trial simultaneously, he said.

Wang's Section 11 claims against Ocko are also still part of the case, Pitts said. A ruling in Ocko's favor on those claims "would render moot any appeal of the Section 11 claim against DCVC," he said.

Robbins Geller Rudman & Dowd LLP represents Wang. Wilmer Cutler Pickering Hale and Dorr LLP represents Zymergen. Gibson, Dunn & Crutcher LLP represents DCVC.

The case is Wang v. Zmyergen Inc. , 2024 BL 463197, N.D. Cal., No. 21-CV-06028-PCP, 12/18/24 .

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Dental Maker Sued After Teeth Aligner News Spurs Stock Plummet

By Gillian R. Brassil

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** [No. 1:24-cv-09764](#) (Bloomberg Law subscription)

Dentsply Sirona Inc. allegedly lured low-income customers into getting invisible teeth straighteners they didn't medically need, causing the stock's largest single-day free fall after suspending sales, a proposed class action said.

Dentsply and current and former executives touted rising demand for its Byte aligners, especially among low-income people, after its 2020 acquisition of Byte, said the suit filed in the US District Court for the Southern District of New York on Wednesday. But the products were causing severe injuries, plaintiff Richard Calvin said, as Dentsply sold them to underserved individuals who couldn't afford good dental care and didn't know they had underlying issues that made them ineligible for treatment.

Dentsply purportedly didn't have a system to block these sales, patient injuries accumulated, and the company didn't properly report them to the US Food and Drug Administration, the investor said. This made executives' positive statements materially false and/or misleading and allegedly liable under securities law, the investor said.

Calvin's is the second proposed class action filed in the SDNY alleging similar securities violations against Dentsply in the past several weeks. These lawsuits come amid another SDNY investor suit concerning the company's financial health during the Covid-19 pandemic.

Byte aligners, being direct-to-consumer, were subject to various US state laws. Since early 2022, executives said in multiple forums that Byte and its other clear aligner products were a key asset. Their optimism continued despite some headwinds in 2023 onward, including when it cut its 2024 Byte growth target from 20% to 15%, citing state law changes it needed to comply with, Calvin said.

That was until Oct. 24, when Dentsply said it voluntarily suspended Byte aligner sales while it reviewed regulatory requirements after consulting with the FDA, Calvin said. In a Securities and Exchange Commission filing, Dentsply reported it expected “to record non-cash charges for the impairment of goodwill” among other points. The next day, CEO Simon Campion said that Dentsply’s patient onboarding might not have offered enough protections against individuals who shouldn’t have gotten aligners from getting treatment, the complaint said. The stock price tumbled more than 4%.

The stock’s largest plummet came Nov. 7 after Dentsply reported its third quarter financial results, including that it had \$495 million non-cash, goodwill impairment expense “net of tax within the Orthodontic and Implant Solutions segment” and a depressed 2024 outlook. Campion said the company was “thoroughly evaluating strategic options, which may include a discontinuation of some or all of this business” regarding Byte, Calvin said.

That day, Dentsply stock collapsed more than 28%, closing at \$17.26 per share—its largest drop ever, according to data compiled by Bloomberg.

The proposed class includes people who invested in Dentsply from Feb. 28, 2022, through Nov. 6, 2024. The plaintiff estimated hundreds to thousands of members.

Scott+Scott Attorneys at Law LLP and Schall Law Firm represent Calvin.

Dentsply didn’t respond to an email seeking comment. Neither did Calvin’s attorneys.

The case is Calvin v. Dentsply Sirona Inc. et al , S.D.N.Y., No. 1:24-cv-09764, complaint filed 12/18/24 .

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Kaspi-Led Fintech Investor Says It Misled on Russia Crime Ties

By Gillian R. Brassil 2024-12-20T10:39:43000-05:00

- **COURT:** C.D. Cal.
- **TRACK DOCKET:** [No. 2:24-cv-10926](#) (Bloomberg Law subscription)

[Joint Stock Company Kaspi.kz](#) hid ties to Russian businesses and mobsters and downplayed money laundering happening on its services, causing its stock to sink the most since its New York listing when a report exposed the issues, a [proposed class action](#) says.

The Kazakhstan-based lender said in 2024 public filings that while its business, by nature, was susceptible to illegal uses and the risk of violating sanctions, it had currently complied with US, EU, and UK policies, and did “not have any exposure to Russia or Russian businesses,” according to the complaint filed in the US District Court for the Central District of California on Thursday.

That was false, plaintiff Dmitry Krivenok says. The platform was being used for illegal purposes, “including assisting Russians with evading sanctions in the wake of the 2022 Russian invasion of Ukraine” by giving citizens financial services and letting them sell goods on its marketplace, he says. The company worked with Russian businesses and alleged criminals, the complaint says.

Connections came to light when Culper Research said on Sept. 19 that Russian partners were allegedly entangled with Kaspi and contributed to its growth, according to the complaint. Kaspi was working with the Russian arm of an Austrian bank that was facing at least two investigations into money laundering, the report alleged. And the company had purportedly relied on a Russian public relations agency of which every disclosed client was “a Russian company or Russian state-owned asset, with the exception of Kaspi.” Said the report, “while other Kazakh banks sought to limit Russian inflows, Kaspi welcomed them” after the 2022 invasion of Ukraine.

Kaspi understated the extent of money laundering occurring through its services, said Krivenok, “considering that the nephew of Nursultan Nazarbayev, the autocratic President of Kazakhstan from 1991 to 2019, and a former 30% shareholder of the Company, had pled guilty to laundering money through Kaspi.kz bank accounts, and then used the laundered funds to purchase properties in Russia” in 2024.

Kaspi said a Ukrainian payments platform it acquired in 2021 was a small portion of its company and offered limited legal exposure, the complaint said. This was misleading, per the plaintiff—Kaspi was exposed and the Ukrainian platform’s administrator had links to “Russian organized crime figures and sanctioned oligarchs, including an oligarch wanted by the FBI for ‘weapons trafficking, contract murders, extortion, drug trafficking, and prostitution on an international scale,’” he said, citing the Culper report.

After the report came out, Kaspi’s American Depository Share price fell 16% on Sept. 19, the plaintiff said. It was the stock’s biggest selloff since its US initial public offering in January, according to data compiled by Bloomberg.

The suit names the company and its CEO and CFO as defendants.

The proposed class includes investors from Jan. 19, 2024 through Sept. 19.

Rosen Law Firm, P.A. represents Krivenok, who seeks damages. His attorney didn’t respond to an email seeking comment. Neither did Kaspi.

The case is [Krivenok et al v. Joint Stock Co. Kaspi.kz et al](#) , C.D. Cal., No. 2:24-cv-10926, complaint filed 12/19/24 .

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Hawk Tuah Memecoin Investors Sue Promoters Over Registration (1)

By Gillian R. Brassil

- **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 first 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.

“We have been extremely transparent about the limited scope and extent of our involvement in the Hawk Tuah token project. We are confident that we have done nothing wrong,” a spokesperson for overHere said in an email. “As for any litigation, we will let the process play out in court.”

Welch has withdrawn from the public eye since the crypto crash, neither posting on social media nor releasing her podcast in two weeks.

Wolf Popper LLP and Burwick Law PLLC represent the investors.

Attorneys at each firm, 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 .

(Adds comment from overHere in the eighth paragraph and adds reporting in the ninth paragraph.)

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Ernst & Young Hid Client's Inflated Revenues, Investors Claim

[law.com/newyorklawjournal/2024/12/19/ernst--young-hid-clients-inflated-revenues-investors-claim](https://www.law.com/newyorklawjournal/2024/12/19/ernst--young-hid-clients-inflated-revenues-investors-claim/)

Alyssa Aquino

Ernst & Young is accused of helping oil storage company Brooge inflate its finances to get investors in an \$180 million special purpose acquisition company deal on board with a merger, according to a lawsuit filed in Manhattan federal court.

The “Big Four” accounting firm and its Middle Eastern business and managing partner Anthony O’Sullivan were accused of violating §10(b) of the Securities Exchange Act of 1934 by a handful of investors in Twelve Seas Investment Co., the SPAC vehicle that merged with Brooge Petroleum and Gas Investment Company FZE in 2019.

Represented by Aegis Law Group, the Twelve Seas investors say they went through with the merger based on revenue reports that were inflated by tens of millions of dollars between 2018 and 2020. Brooge was able to cover up the false revenue, with Ernst & Young’s “critical” support, the investors claim.

Ernst & Young “blessed the scheme by issuing unqualified audit opinions which falsely stated, inter alia, that ‘[Brooge’s] financial statements present fairly, in all material respects, the financial position of the company at 31 December 2018 and 2017,’” according to a complaint filed Tuesday.

Based in the United Arab Emirates, Brooge operates a terminal in the Port of Fujairah that is capable of storing nearly 1 million square meters of oil. Brooge claimed to have fully leased out this storage capacity to two companies through lucrative, multiyear contracts that included both a monthly fee and ancillary charges, according to the complaint.

But the investors say that Brooge fabricated both contracts and never received payments from either alleged lessee. Instead, Brooge received payments from an entity under its control, which Brooge ultimately remitted back, but logged as payments from the two customers, the investors said.

In their suit, the investors referenced the findings of a U.S. Securities and Exchange Commission investigation against Brooge, which resulted in charges against the company in December 2023.

The investors claim that Ernst & Young should have known about the fraudulent transactions, as the firm had audited Brooge’s financial statements in preparation for both the SPAC transaction in the U.S., as well as an earlier, failed initial public offering on the

London Stock Exchange. However, the investors go further and allege that Ernst & Young helped structure the fraudulent invoicing scheme to withstand scrutiny from U.S. financial watchdogs and potential investors.

“Brooge was thus able to report tens of millions of dollars in fake revenue to potential SPAC investors in advance of the merger and in its filings with the SEC,” according to the complaint. “Based on these inflated revenue numbers, Brooge was able to persuade the SPAC investors to exchange their securities for Brooge’s securities in a December 19, 2019 U.S. SPAC transaction registered with the SEC at a valuation of over \$1 billion.”

The suit was brought by Anvil Trust, Stephen Cannon and Neil Richardson, all of whom owned securities in Twelve Seas. Bryan Edwards, one of two management members of the SPAC’s sponsoring company, also joined the lawsuit.

Representatives for Twelve Seas and Ernst & Young didn’t respond Thursday to requests for comment.

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Car Software Maker Cerence Gets Investor Settlement Finalized

By Martina Barash

Cerence Inc.'s \$30 million settlement of investor securities fraud claims over the vehicle software company's revenue is reasonable, a federal court said in granting final approval to the class deal.

Judge Allison D. Burroughs gave a green light to an attorneys' fee award of 25% of the net settlement fund after expenses in an order Wednesday for the US District Court for the District of Massachusetts. She also approved nearly \$130,000 in expenses and a \$7,600 lead plaintiff award.

- The investors alleged Cerence, which makes AI-powered virtual assistants for automobiles, touted "strong demand" for its software licenses through 2024, but then lowered its fiscal 2022 revenue guidance and withdrew its fiscal 2024 guidance
- The suit survived a dismissal attempt in March, with Burroughs ruling the investors adequately alleged a fraudulent scheme to boost share prices
- Burroughs granted preliminary settlement approval in September

Bernstein Litowitz Berger & Grossmann LLP and Saxena White PA are lead counsel for the investors. Goodwin Procter LLP represents Cerence and the individual defendants.

The case is *City of Mia. Fire Fighters' & Police Officers' Ret. Tr. v. Cerence Inc.*, D. Mass., No. 1:22-cv-10321, 12/18/24.

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Cedars-Sinai Retirement Plan Fee Lawsuit Denied Class Status

By Jacklyn Wille

- Would-be class representatives don't have typical claims
- They also lack basic understanding of case, judge said

A lawsuit accusing Cedars-Sinai Medical Center Inc. of mismanaging its workers' \$2.15 billion retirement plan won't move forward as a class action after a federal judge deemed the case's proposed class representatives inadequate.

The would-be representatives don't have claims that are typical of the class because they invested only in the plan's stable value fund and can't adequately mount a challenge to the other investments at issue in the lawsuit, Judge Josephine L. Staton said in an order issued Wednesday in the US District Court for the Central District of California. They also paid annual recordkeeping fees they admit are reasonable, making them ill-equipped to represent participants who may have paid more, she said.

Plaintiffs Asia Fowler and Lillian Mena also failed to clear the "low bar" of having a basic understanding of the lawsuit, Staton said. Their depositions "reveal an almost total lack of familiarity" with the facts of the case, according to the judge, and Mena's testimony through a Spanish translator showed she had no knowledge of how her account was invested and didn't understand what a recordkeeping fee was.

The lawsuit challenges the annual recordkeeping fee levels in the Los Angeles hospital's retirement plan, which workers said were about \$106 per person, when similar plans paid only about \$42 per person. The plan also offers poorly performing funds and funds in overly expensive share classes, along with an imprudent stable value fund, according to the lawsuit.

Staton ruled in February that the case was viable, and the participants asked her to certify a class of more than 16,000 people.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years. Dozens of employers sued during this period have signed class settlement agreements, including several health systems: Henry Ford Health System for \$5 million, Bronson Healthcare Group Inc. for \$3 million, Beth Israel Deaconess Medical Center for \$2.9 million, CentraCare Health System Inc. for \$800,000, Munson Healthcare for \$600,000, and Baystate Health Inc. for \$500,000, among others.

Staton gave the Cedars-Sinai plan participants three weeks to file paperwork naming a new proposed class representative.

Christina Humphrey Law PC and Bradley Grombacher LLP represent the plaintiffs. Davis Wright Tremaine LLP represents the hospital.

The case is Zimmerman v. Cedars-Sinai Med. Ctr. , C.D. Cal., No. 5:23-cv-01124, 12/18/24 .

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FDIC Board of Directors Authorizes Suit Against SVB Officials

dandodiary.com/2024/12/articles/banks/fdic-board-of-directors-authorizes-suit-against-svb-officials

December 19, 2024



By Kevin LaCroix on December 19, 2024

Posted in Banks

FDIC

The March 2023 collapse of Silicon Valley Bank (SVB) is long enough ago that it in many ways seems like ancient history. The fact is that the bank's failure was the second largest in U.S. history, and its collapse continues to cast a shadow over the U.S. banking industry. Private civil litigation against company executives, on behalf of investors and others, followed immediately in the wake of the bank's collapse, but at least until now the post-collapse lawsuits have not included an action by the FDIC, as often follows after a bank failure. However, as discussed below, on December 17, 2024, the FDIC's Board of Directors voted unanimously to authorize the agency staff's request for authorization to file a suit against six former officers and 11 former directors of SVB and its holding company, SVB Financial Group.

FDIC Chair Martin Gruenberg's December 17, 2024, statement regarding the staff's recommendation can be found [here](#). *Law360*'s December 18, 2024, article concerning the FDIC Board's vote can be found [here](#).

Background on SVB's Collapse

Readers will recall that on March 10, 2023, the FDIC announced SVB's closure and the agency's appointment as the bank's receiver, as discussed in detail [here](#). SVB was at the time of its closure the 16th largest U.S. bank. The bank had grown rapidly, with its total assets growing from \$60 billion at the end of 2019 to \$209 billion at the end of 2022, meaning that the bank's asset size more than tripled in three years. The increase in assets corresponded to an increase in deposits, which were largely invested in long-duration securities. Unusually, SVB had a high level of uninsured deposits, with about 94 percent of its deposits uninsured as of year-end 2022. (The deposits were uninsured because they exceeded the insured deposit limit under the FDIC deposit insurance program). The bank also had an unusually concentrated customer base.

The closure followed what was in effect a run on the bank. The sequence of events running up to the bank's closure began in March 2022, when the Federal Reserve began rapidly raising interest rates. The rising interest rates caused the value of SVB's bond holdings to decline. The decline in the value of the bank's bond portfolio was merely a paper loss and wouldn't have mattered if the bank didn't have to sell the bonds and instead held them to maturity.

Unfortunately, over the course of 24 hours preceding the bank's closure, depositors withdrew or sought to withdraw nearly all of SVB's deposits, causing the bank to have to sell portions of its bond portfolio at a loss. When news circulated that the bank was seeking to raise additional capital, the company's share price declined. The share price drop triggered deposit withdrawals. When news of the withdrawals began to circulate in the Silicon Valley business community, the bank run escalated and regulators had to step in. The bank's collapse threatened a contagion effect within the U.S. banking system, and over the following weekend banking regulators had to step in forcefully to prevent the SVB failure from triggering a systemic collapse.

The FDIC's Investigation and Likely Claims

As Gruenberg's statement details, when the FDIC assumes control of a bank as receiver, it has the authority to investigate and to hold directors, officers, and other professionals accountable. Units of the FDIC "investigate potential professional liability claims arising from every bank failure and pursue claims that are both meritorious and expected to be cost-effective." The staff's request for authority to pursue claims against SVB's former directors and officer represents the culmination of the agency's investigation of SVB.

In recommending that the FDIC's board authorize litigation against the former SVB officials, Gruenberg cited three ways bases on which the agency will contend that the executives should be held liable.

First, the agency will contend that the former bank officials "mismanaged the Bank's held-to-maturity securities portfolio by purchasing long-dated securities in a rising interest rate environment." These purchases resulted in the breaching of key interest rate metrics and allowed over-concentration of assets far in excess of the holdings of peer banks. This investment strategy "exposed SVB to significant interest rate risk as the value of these securities declined sharply as interest rates increased."

Second, the agency will contend that the bank officials "mismanaged the Bank's available-for-sale (AFS) securities portfolio by removing interest rate hedges in the AFS portfolio at a time of increasing interest rates." If the portfolio had continued to be hedged properly, the Bank, according to the FDIC, would have been protected against losses arising from rising interest rates.

Third, the agency will contend that bank officials, who simultaneously served in equivalent positions for the holding company, “permitted an imprudent payment of a bank-to-parent dividend from SVB to the holding company while the Bank was experiencing financial distress.

According to Gruenberg’s statement, as a result of the mismanagement of the held-to-maturity securities portfolio, the termination of interest-rate hedges in the available for sale securities portfolio, and the issuance of the bank-to-parent dividend, “SVB suffered billions of dollars of losses for which the FDIC as Receiver has both the authority and the responsibility to recover.” Gruenberg’s statement also reports that due to the Bank’s exposure to significant risks, resulting in its collapse, the Deposit Insurance Fund suffered losses currently estimated at \$23 billion.

Discussion

In light of the Board’s vote approving the staff recommendation, we can anticipate that the agency will soon file a lawsuit against the former SVB directors and officers, likely in very short order. As far as I know, the suit may have already been filed. The impending lawsuit will be far from the only litigation to be filed in the wake of the bank’s collapse. As I noted at the time (here), within days of the bank’s closure, plaintiff shareholders filed a securities class action lawsuit against the former bank’s executives. Other lawsuits followed.

In his statement, Gruenberg said that one of the factors the FDIC considers is whether or not filing a claim against former directors and officers of a failed bank will be “cost-effective.” As for whether the lawsuit will indeed prove to be cost effective, it is important to note that the FDIC lawsuit, when filed, will join the crowd of other lawsuits previously filed against the bank’s executives. Those other lawsuits, many of which have been pending for almost two years, undoubtedly have entailed significant costs of defense for the individual defendants. As discussed here, the bankruptcy court presiding over the bankruptcy of SVB’s holding company has already ruled that the bank’s directors and officers can tap the proceeds of the holding company’s D&O insurance program to fund their defense.

According to reliable sources (here), the SVB holding company’s D&O insurance program consisted of a primary \$10 million layer of traditional D&O insurance, followed by 15 additional layers of excess insurance, each with a \$10 million limit of liability. Above this \$160 million tower of traditional D&O Insurance, the SVB holding company also carried five additional \$10 million layers of Side A DIC insurance, bringing the total value of the insurance tower to \$210 million.

\$210 million is a lot of insurance, but I suspect a material amount of this insurance has already been consumed by defense fees, and the filing of the FDIC lawsuit will even further accelerate the erosion of the available limits through the accumulation of even further

defense costs. These facts put important context around the question of whether the FDIC's lawsuit will indeed prove to be cost effective.

The potential recovery for all of the claimants, including the plaintiffs in the pending securities suits and other litigation, as well as in the forthcoming FDIC lawsuit, will be significantly affected by the rate and amount of the erosion of the limits of liability in the D&O tower due to defense expense. Given the magnitude of SVB's collapse, the potential liability exposures involved here likely far exceed the amount of insurance. This fact puts the various claimants, including the FDIC, into a competition for a dwindling potential source of recovery. To be sure, none of the claimants, including the FDIC, are under any obligation to limit their claims solely to the remaining insurance fund. Whether and to what extent the claimants, including the FDIC, will seek to force the individual defendants to contribute to a claims settlement out of their own personal assets and resources remains to be seen.

It may have been, as I noted at the outset, a seemingly long time since SVC collapsed, but there still is a great deal of this story yet to be told.

Case closed (but watch for remand!)

 [reuters.com/legal/litigation/column-case-closed-watch-remand-2024-12-20](https://www.reuters.com/legal/litigation/column-case-closed-watch-remand-2024-12-20)

Alison Frankel

A bronze statue titled "Justice Delayed, Justice Denied" depicting a figure of Justice is seen on the Albert V. Bryan United States Courthouse in Alexandria, Virginia, U.S., September 1, 2020. REUTERS/Andrew Kelly Purchase Licensing Rights , opens new tab

Dec 20 (Reuters) - Today's column marks my last words as a legal journalist.

That sentence has been nearly 37 years in the making. I took a job at The American Lawyer in 1988 because I wanted to learn how to write sophisticated, deeply reported magazine features. I thought I'd stay a few years, sop up all of the wisdom I could absorb from Am Law's legendary founder Steve Brill and his insanely talented team, and move along.

But I was captivated by the subject matter, especially when I wrote about litigation. Every case is an amalgam of facts, legal issues and litigation tactics. I love telling those stories.

I came to Reuters to write a daily column about litigation in 2011. At the time, companies were pleading with federal courts to rein in securities class actions; defense lawyers were urging rulemakers to address perceived abuses in mass tort litigation; courts were struggling to figure out how to set fair fees in contingency cases; and the U.S. Chamber of Commerce was lobbying for transparency from litigation funders like Burford.

You get my point: Nearly 14 years later, we're still talking about the same things. Some business litigation controversies never seem to go away.

But others do! My first year or two at Reuters was dominated by litigation over mortgage-backed securities and other fallout from the financial crisis. Those are now almost all concluded. Shareholder class actions challenging M&A transactions were ubiquitous in my early years at Reuters because the Delaware Chancery Court's fee regimen incentivized plaintiffs lawyers to reach fast disclosure-only settlements. After the Chancery Court clamped down on those fees, the cases migrated to federal court, then stopped getting filed as class actions at all.

Courts balked during my tenure at Reuters at several attempts to transform the most complex consolidated cases. The U.S. Supreme Court declined to erase the precedent underlying shareholder class actions. In the opioids litigation brought by city, county and tribal governments, an appeals court rejected plaintiffs' proposed "negotiation class," whose members would have voted on proposed settlements. The federal district judge overseeing

litigation over Bayer's weedkiller Roundup refused to approve a settlement for future claimants that would have established a panel of experts to analyze whether Roundup is carcinogenic.

And a bankruptcy judge killed 3M's bid to ditch multidistrict litigation and use the bankruptcy process to resolve claims that its earplugs caused hearing loss for members of the military. If 3M's tactic had succeeded, you can be sure that just about every defendant embroiled in a big mass tort crisis would have adopted it. Instead, 3M ended up reaching a global settlement in court, just like almost every other mass tort defendant (except for the handful that managed to exterminate cases by discrediting plaintiffs' experts).

I covered other big ideas as they evolved into major Supreme Court precedent: class action dismissal motions contending that plaintiffs did not have constitutional standing to assert claims based on inconsequential statutory breaches; a 2016 opinion by then-appellate judge Neil Gorsuch that questioned the premise of Chevron deference; a 2015 defense dismissal motion arguing that the U.S. Securities and Exchange Commission's administrative judges were unconstitutionally appointed.

I vividly remember thinking when I read that 2015 motion to shut down an SEC administrative proceeding that the Appointments Clause theory, which built on the Supreme Court's decision in a case contesting the appointment of members to the Public Company Accounting Oversight Board, was intriguing. But I'll confess that I failed to imagine the subsequent cascade of constitutional challenges to federal agency enforcement – and most recently, to removal protections for agency heads. The litigation over SEC in-house judges, in a way, put into play the entire future of the administrative state.

I also failed at first to imagine the consequences of the Supreme Court's 2011 ruling in *AT&T v. Concepcion*. The decision allowed companies to impose mandatory arbitration and class action waivers on consumers and employees — and companies flocked to do just that. The consequences of *Concepcion* and the Supreme Court's many subsequent decisions refusing to budge on mandatory arbitration have since been a consistent theme in my coverage.

That's been particularly true in the last four or five years, as plaintiffs firms figured out how to turn mandatory arbitration provisions to their advantage in the now-burgeoning field of mass arbitration. Plaintiffs firms have become experts in assembling vast dockets of clients — as many as 70,000 or 80,000 in some cases — to demand arbitration, exposing corporate defendants to big procedural costs.

Companies keep tweaking their arbitration clauses to make it harder for plaintiffs to engage in mass arbitration campaigns, which defendants insist are tainted by inadequate client vetting. Arbitration forums have modified their fee scales, reducing plaintiffs' leverage. Over

the next few years, we will see whether these corporate tactics manage to squelch mass arbitration — or whether companies end up ditching mandatory arbitration because old-fashioned class actions turn out to be a cheaper and easier way to resolve disputes.

I'm absolutely thrilled to tell you that my colleague Jenna Greene will be taking over this column to continue tracking these big litigation questions. You probably already know Jenna from her work as a Reuters columnist. She joined our roster in early 2020 and immediately started producing work so stellar that she was honored as Reuters' columnist of the year.

Jenna has deep expertise in covering big cases. Like I did, she came to Reuters from the American Lawyer network, where she was editor for years of the Litigation Daily. She also has an authoritative voice and fantastic storytelling instincts, as her columns prove so emphatically.

I'm counting on all of you who have helped me understand and write about your cases over these last many, many years to be as generous with Jenna. Our brand of deep, thoughtful legal journalism is rarer and more vital than ever. The country's political polarization has already begun to color public perception of the judicial system, but I can promise you that Jenna will uphold the bedrock Reuters values I have tried to embody in this column: independent thinking, unbiased reporting, even-handed writing and transparency when we make a mistake.

Jenna's first column will be in the New Year. I can't wait to see what she does with the place.

It has been an honor and a privilege to write for you. The late Charlie Munger, who is best known as Warren Buffett's right-hand man but was also a longtime publisher of legal journalism as chairman of the Los Angeles Daily Journal, famously said that "the best thing a human being can do is to help another human being know more."

I hope I've helped you know more.

Reporting By Alison Frankel

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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*.

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The Inside Scoop On High-Profile Corporate Investigations Work

A abovethelaw.com/2024/12/the-inside-scoop-on-high-profile-corporate-investigations-work

Staci Zaretsky

December 20, 2024

Scandals of any kind keep general counsel awake at night, and a lingering question may be who's in charge when it comes time to handle these highly sensitive corporate investigations, which may revolve around allegations of fraud, corruption, or worse. Luckily, there are specialized firms out there that will work diligently to gather information in these high-profile matters. What does one of these investigations look like, and how are outside counsel involved?

I recently had the pleasure of chatting with Elizabeth Anscombe, the chief business development and marketing officer at Nardello & Co., one of the world's top corporate investigations firm, to get her thoughts on the matter. Here is a write-up of our lively conversation.



Elizabeth Anscombe (Courtesy photo)

Staci Zaretsky (SZ): Corporate investigations have been growing at a rapid pace, and they may see continued growth under the incoming presidential administration. What does that mean for Nardello's oftentimes high-profile work?

Elizabeth Anscombe (EA): The corporate investigations market is indeed growing, and we are expanding to keep up with it. This fall we opened an office in San Francisco, giving us eight offices around the world, and we moved into a new office in New York that is twice the size of our previous office.

Our cyber work in particular has grown and will likely continue to grow. Both new offices include cyber forensic labs with cutting-edge tools to support investigations in cyber digital forensic and incident response, deepfake forensic analysis, and cryptocurrency tracing.

It's always hard to predict the changes with any new administration. While generally speaking there may be the expectation of less regulation with the incoming Trump administration, one never knows. In any event, our core business — litigation support,

activist defense, and asset tracing — is really not affected by a change in administration.

Furthermore, the cases we take on span multiple jurisdictions. There is always a war, a changing sanctions regime, or socio-economic developments that have an impact on the nature or volume of cases that we handle.

But do these factors impact how we handle our casework or dictate our approach or methodology? Not really. High-profile work, such as ours, requires each case be treated on its individual merits and case strategies are constantly reviewed and adjusted based on those merits.

SZ: Can you please tell me a little about your firm's work in conjunction with law firms, specifically, Biglaw firms? I know, for example, that Nardello worked with Sullivan & Cromwell on the FTX collapse.

EA: We work extensively with the world's leading law firms. Ultimately, our role is to provide actionable (and legally admissible) evidence to our clients. That is a broad objective, and our role is as varied as the universe of matters any Biglaw firm might handle. Complex, high-stakes cases are where our clients see the value in our expertise — and that is what they typically come to us for. Our work can range from verifying the credibility of whistleblower claims in high-profile bribery and corruption cases, to obtaining evidence to dismantle government claims of white-collar crime, to assisting with the enforcement of arbitral awards.

Just in the last week, since the shooting of United Healthcare's CEO, we have seen a considerable uptick in the number of inquiries around physical security and risk mitigation. Perhaps not surprisingly, lawyers are being asked by their clients to help assess, among other things, their physical and cyber vulnerabilities, assess their online risk profile and/or provide a solution for physical security.

In the case of FTX, we were instructed by the new CEO to work with Sullivan & Cromwell to (among other things) assist in the tracing of \$9 billion of assets following the platform's collapse and recover those assets for creditors. Similarly, we have worked for Akin Gump pro-bono to recover assets for the families of Sandy Hook victims.

SZ: What are some of the ethical boundaries that must be adhered to in the course of corporate investigations?

EA: It comes down to three things. First, there is an ethical duty of care to our clients not to waste their time or provide information that isn't usable and might have reputational ramifications down the line. Outside of the US in particular, the investigations sector is much less regulated (no license is required, for example, in the UK). And so there are plenty of bad actors who will provide intelligence that a client can't do anything with — or who will engage

in illegal, much less unethical, practices in obtaining that intelligence and end up harming the client. We are aware of the ethical and legal obligations in all the jurisdictions in which we work and are single minded about honoring those obligations. Acting with integrity is paramount.

There is also a duty of care to the individuals conducting the investigation. Certain regions, China for example, have shown themselves to be hostile towards our sector. Oftentimes, being on the ground and obtaining valuable information for a client, can put investigators in dangerous situations. And so there is constant balance of doing things the right — and smart — way for our clients, and those parties involved in the exercise of gathering intelligence.

Finally, in some of our work there is also a duty of care to the individuals involved in the course of an investigation. Protecting whistleblowers or witnesses where possible, particularly in hostile jurisdictions and politically adverse circumstances, where there is the possibility that their testimony will be disclosed in court.

SZ: Why do you think that some lawyers opt for careers with investigations firms over careers with law firms?

EA: Lawyers don't typically think of working for investigations firms at the start of their careers. Sometimes people don't realize the sector exists until they work in a law firm or prosecutor's office and see it firsthand. And — if they are like me — once you're a part of it, you're hooked. There is a degree of creativity that is required, alongside the technical and legal know-how that is both challenging and stimulating. At Nardello, you can have two bankruptcy matters land on your desk, for example, and the approach and plan required will be completely different for each.

And lawyers can make very good investigators. Having that “legal DNA” and understanding what evidence will further your clients' case as opposed to information that is just “good to have” is critically important skill. Our Biglaw clients appreciate the lawyers on our teams.

Many of the lawyers that work for us previously served as federal prosecutors. The firm's founder, Dan Nardello, was a federal prosecutor in the US Attorney's Office for the Southern District of New York before joining the investigations sector. It seems the career change worked out pretty well for him.

On behalf of everyone here at Above the Law, we'd like to thank Elizabeth Anscombe for taking the time to help answer these questions on corporate investigations work.



Staci Zaretsky is a senior editor at Above the Law, where she's worked since 2011. She'd love to hear from you, so please feel free to email her with any tips, questions, comments, or critiques. You can follow her on Bluesky, X/Twitter, and Threads, or connect with her on LinkedIn.

Topics

Biglaw, Corporate Investigations, Elizabeth Anscombe, In-House Counsel, Nardello & Co., Partner Issues

Five Noteworthy Litigation Trends of 2024—and What to Watch in 2025

[law.com/2024/12/19/five-noteworthy-litigation-trends-of-2024and-what-to-watch-in-2025](https://www.law.com/2024/12/19/five-noteworthy-litigation-trends-of-2024and-what-to-watch-in-2025)

Mike Neighbors

This article features litigation insight from Law.com Radar's Trend Detection system, a proprietary feature that uncovers shifts and patterns in case filings using advanced data analysis. Trend Detection is included in a Law.com Radar subscription and provides early awareness of new litigation areas like those described below. [Click here](#) to learn more.

As the year winds down, we're taking a look at five key litigation trends spotted by Law.com Radar in 2024. These cases caught our eye because they explore novel legal theories, connect to shifting market dynamics and rely on new statutes or watershed decisions. With the potential to redefine key areas of the law, here are our picks for the five most interesting litigation hotspots of 2024.

The Drip Pricing Backlash

"Drip pricing," or the practice of adding hidden or "junk" fees during checkout, triggered a blitz of class actions this year, most notably in states where legislatures have enacted drip pricing statutes. In New York, for instance, dozens of lawsuits were filed accusing entertainment and hospitality companies of violating the state's Arts and Cultural Affairs Law by charging service, processing and convenience fees after a customer selects a ticket for purchase. Defendants range from [museums](#) and [movie theaters](#) to [ski resorts](#) and [tourist attractions](#).

Cases also skyrocketed after California's Honest Pricing Law took effect in July. The new law—which amended the state's Consumer Legal Remedies Act to combat drip pricing—has been used to challenge not only ticket sellers like [museums](#) and [event venues](#), but also retailers like [Target](#) and [World Market](#) and even property managers like [Greystar](#).

Legislative changes in Nevada have spurred [similar lawsuits](#), and Radar has also detected cases in [Indiana](#), [Massachusetts](#), [North Carolina](#), [Texas](#) and the [District of Columbia](#). Expect cases to continue climbing as other states (and even [Congress](#)) consider enacting similar legislation to combat drip pricing.

"Trap and Trace" in the Digital Era

Privacy litigation exploded this year under California's Trap and Trace Law, a decades-old provision of the state's penal code. The law was originally enacted to criminalize the use of "pen registers" for tracking calls on landline telephones, but scores of [civil lawsuits](#) were filed

this year accusing businesses of violating the statute by installing software on their websites and mobile apps to collect users' geolocation, device information and other data for marketing purposes.

What's driving the trend? The groundwork was set in 2023 after a judge in the Southern District of California ruled in *Greenley v. Kochava* that while "pen registers" have traditionally been machines, the statutory definition is broad enough to include software embedded in mobile apps. Then in 2024, a judge in the Central District of California held in *Moody v. C2 Educational Systems* that *Greenley* also applies to software installed on websites. Those rulings opened the floodgates for more privacy lawsuits, many of which cite either *Greenley* or *Moody*.

For now, the trend has primarily been limited to California—but litigation could expand into states with similar pen register laws like Florida, North Carolina, Pennsylvania, Texas or Virginia.

A Swarm of Collusion Claims

Waves of litigation were launched in 2024 accusing businesses of colluding by sharing prices, sales volumes and other nonpublic market info with competitors through trade publications and other aggregation services. For instance, sugar producers were sued for exchanging info through "Domestic Sugar Monthly Report," and PVC pipe manufacturers were accused of using data from "ProtoChem Wire PVC & Pipe Weekly" to hike prices. Similar lawsuits were filed against frozen potato sellers, pork and poultry plants and owners of manufactured home lots.

Cases have also surged over "pricing algorithms," or software which analyzes industry data to generate prices. For example, landlords have been sued for fixing rent at RealPage's algorithmically-generated rates; other companies in the crosshairs include hotel chains and health insurers. And in recent weeks, pharmacy benefit managers like CVS and Express Scripts have been accused of using GoodRx's algorithm to shrink reimbursements for discount drugs. We're keeping an eye out for similar lawsuits in 2025, especially any cases focusing on the role of artificial intelligence in aggregating market data.

SCOTUS and the Regulatory Landscape

Two landmark decisions by the U.S. Supreme Court this summer shook the regulatory landscape and paved the way for more legal battles. First, cases surged in the wake of *SEC v. Jarkesy*, where SCOTUS held that the Seventh Amendment right to a jury trial prohibited the SEC from pursuing monetary penalties through in-house administrative proceedings. Businesses have since cited *Jarkesy* to challenge similar proceedings by other agencies

including the [NLRB](#), [FTC](#), [DEA](#), [FDA](#) and [FDIC](#). State and local governments are also in the crosshairs: Plaintiffs have invoked *Jarkesy* to challenge monetary penalties issued in [Florida](#), [Maryland](#), [New York](#), [Utah](#) and [Washington D.C.](#)

Second, in *Loper Bright Enterprises v. Raimondo*, SCOTUS overruled the longstanding “*Chevron* doctrine,” which had directed lower courts to defer to agencies’ interpretations of ambiguous laws. Since then, businesses have invoked *Loper Bright* to challenge regulators in court—for instance, chicken and meat processing companies cited the ruling in a lawsuit opposing [anti-discrimination regulations](#), and recipients of PPP loans have invoked *Loper Bright* in cases seeking [loan forgiveness](#). Expect regulatory challenges under *Loper Bright* to continue mounting in 2025.

Spotlight on Weight Loss Drugs

A new class of weight loss drugs, including Ozempic, Wegovy and Mounjaro, burst onto the scene in 2024 and spurred litigation on multiple fronts. For instance, [Novo Nordisk](#) and [Eli Lilly](#) filed waves of cases accusing weight loss clinics and supplement companies of violating trademark, false advertising and unfair competition laws by selling compounded weight loss drugs without FDA approval. Novo Nordisk also launched several patent lawsuits to prevent competitors from selling generic versions of [Ozempic](#), [Wegovy](#) and [Rybelsus](#).

Product liability cases have also skyrocketed: Novo Nordisk and Eli Lilly were [swarmed](#) with lawsuits alleging that the new drugs, technically known as GLP-1 agonists, cause users to suffer from gastroparesis and other health issues. The cases have been consolidated as multidistrict litigation in Pennsylvania.

More lawsuits over GLP-1 agonists could be on the way: These so-called “miracle drugs” are currently being developed for other ailments including alcoholism, Alzheimer’s disease, asthma, cardiovascular issues and infertility.

New statutes, new court decisions and a new administration are on the way. Keep up with the latest trends and surges by visiting [Law.com Radar](#) for real-time [results](#). You can also use Radar’s [Create an Alert](#) feature to receive immediate email updates for litigation involving specific courts, clients, practice areas, industries and more.

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GM Convinces 6th Cir. to Rehear Class Certification Challenge

By Shweta Watwe 2024-12-19T14:23:56000-05:00

A federal appeals court on Thursday said it would rehear a challenge over whether a district court improperly certified dozens of state sub-classes in a lawsuit alleging General Motors Inc. made vehicles with faulty transmissions.

A majority of judges on the US Court of Appeals for the Sixth Circuit voted for an en banc rehearing and vacated a judgment affirming certification of 26 state sub-classes in the lawsuit. GM [told](#) the court that absent such review, the earlier opinion would “transform the Sixth Circuit into a national outlier and magnet for class-action lawsuits.”

- Nearly 40 named plaintiffs alleged they bought GM vehicles between 2015 and 2019
- GM argued the classes included members whose cars had never experienced a transmission defect
- A three-judge panel [affirmed](#) class certification in August and said all named plaintiffs had experienced issues with their vehicles

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

The case is [Speerly v. General Motors](#) , 6th Cir., No. 23-01940, order published 12/19/24 .

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Nasdaq Diversity Loss Aids Climate Rule Ruin, Ex-SEC Member Says

By Andrew Ramonas

- Fifth Circuit nixed SEC-backed board diversity regulations
- Eighth Circuit reviewing challenges to agency's climate rules

A recent Fifth Circuit decision tossing Nasdaq rules aimed at getting more women and minorities on company boards will pave the way for a different federal appeals court to scrap the SEC's corporate emissions reporting requirements, a former agency commissioner said Thursday.

The board diversity rules' demise at the US Court of Appeals for the Fifth Circuit on Dec. 11 gave another court ammunition to end the Securities and Exchange Commission's March climate regulations, said Joseph Grundfest, a Democrat appointed to the SEC during the Ronald Reagan administration.

The US Court of Appeals for the Eighth Circuit is reviewing lawsuits from business interests, Republican attorneys general, and others arguing the SEC overstepped its authority when it required companies to report their greenhouse gas emissions and make other climate disclosures.

"There's no way that the commission is going to be upheld if the Eighth adopts the Fifth Circuit's interpretation of statutory authority," Grundfest said at a webinar hosted by George Mason University's Mercatus Center.

Conservative groups also made authority-based arguments when challenging the Nasdaq Inc. rules for companies listed on its stock exchanges. The SEC approved those rules in 2021, allowing them to take effect. Thousands of public companies had to have diverse boards or explain why they didn't under the regulations.

The Democratic-led agency has disputed claims it exceeded its power in the Nasdaq and climate rules cases.

The Fifth Circuit found in the Nasdaq case that the SEC supported regulations that were outside its purview. The regulations were "far removed" from the 1934 Securities Exchange Act, which requires the SEC to approve stock exchange rules that promote "just and equitable principles of trade," Judge Andrew Oldham wrote in an opinion for the majority.

The Eighth Circuit could discuss the Fifth Circuit ruling during oral arguments, which it has yet to schedule. But there's a chance the Eighth Circuit may never weigh in on the merits of the climate rule lawsuits.

The SEC is expected to start unwinding the regulations after President-elect Donald Trump takes office in January. Former SEC Commissioner Paul Atkins, Trump's pick to lead the agency, has fought the climate rules, joining other Republicans in 2022 to urge the regulator to abandon or significantly limit its climate reporting plans.

"These rules are dead, dead, dead," said Grundfest, a Stanford Law School professor. "The only question is how they're going to be killed."

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CFPB sues top US banks, says they allowed fraud on payment platform Zelle

[reuters.com/business/finance/cfpb-sues-top-us-banks-says-they-allowed-fraud-payment-platform-zelle-2024-12-20](https://www.reuters.com/business/finance/cfpb-sues-top-us-banks-says-they-allowed-fraud-payment-platform-zelle-2024-12-20)

Reuters

By Reuters

December 20, 2024 6:39 AM PST Updated 43 min ago

Signage is seen at the Consumer Financial Protection Bureau (CFPB) headquarters in Washington, D.C., U.S., August 29, 2020. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights [↗](#), opens new tab

Dec 20 (Reuters) - The U.S. Consumer Financial Protection Bureau said on Friday it had filed a lawsuit against JPMorgan Chase (JPM.N) [↗](#), opens new tab, Bank of America (BAC.N) [↗](#), opens new tab, and Wells Fargo (WFC.N) [↗](#), opens new tab, accusing the banks of allowing "fraud to fester" on peer-to-peer payments platform Zelle.

The CFPB in a statement said it was seeking to stop the alleged unlawful practices, secure redress and penalties, and obtain other relief.

Reporting by Ismail Shakil in Ottawa; Editing by Chizu Nomiyama

Financial services

JPMorgan, Bank of America and Wells Fargo sued over alleged payment fraud

US regulator CFPB accuses big banks of failing to protect customers using Zelle



JPMorgan and the two other defendant banks collectively received complaints from more than 900,000 banks, the lawsuit said
© Bloomberg

Joshua Franklin and **Stephen Gandel** in New York 3 HOURS AGO



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The US Consumer Financial Protection Bureau has sued JPMorgan Chase, Bank of America and Wells Fargo for allegedly failing to protect customers from fraud on payments platform Zelle.

CFPB director Rohit Chopra accused the three banks, which are among a group of seven that collectively control Zelle operator Early Warning, of rushing to get the payments platform online in the face of competition from other apps such as Venmo and Cash App. Zelle's operator is also named as a defendant.

The lawsuit escalates the [brewing political debate](#) over whether banks should face greater liability when consumers are scammed on payment platforms.

The CFPB accused Zelle and the three banks of having only limited methods to verify identities, allowing bad actors to move between banks, ignoring warnings that could have detected fraud and abandoning customers after they had been scammed.

The CFPB claimed that customers at JPMorgan, BofA and Wells, the three largest US banks by deposits, had lost more than \$870mn because of these alleged failures. The three banks received fraud complaints from more than 900,000 customers, the lawsuit alleged.

[BofA](#) and [Wells](#) had no immediate comment and referred inquiries to Zelle.

A JPMorgan spokesperson referred to the lawsuit as “a last-ditch effort in pursuit of their political agenda” and that the CFPB was “overreaching its authority by making banks accountable for criminals, even including romance scammers”.

Zelle said the allegations were “legally and factually flawed” and that it was “fully prepared to defend this meritless lawsuit to ensure their service does not suffer”.

The future of any lawsuit by the CFPB is uncertain given that the agency, which has faced calls from some Republicans to be abolished, is set to come under new leadership once Donald Trump is back in the White House. The president-elect has vowed to loosen regulations across a range of sectors.

Zelle said “the timing of this lawsuit appears to be driven by political factors unrelated to Zelle”.

Jaret Seiberg, a financial research analyst at TD Cowen, said the lawsuit “could survive the inauguration, though much will depend upon Trump’s pick for CFPB director”.

Zelle launched in 2017 as a peer-to-peer payments system that can make instant money transfers. However, the speed of transactions has made it a popular tool for potential scammers, who trick customers into sending money, so-called authorised push payment fraud. Schemes include romance scams and the impersonation of government officials or agencies.

Seiberg wrote in a research the banks have a strong defence in the case “as much of the fight is over authorised transactions”.

Early Zelle advertisements from the banks touted the service as safe because “it was backed by the banks so you know it’s secure”.

One of the biggest issues was that users were allowed to sign up for multiple accounts with little verification, the lawsuit alleged. Until 2023, the lawsuit alleged, Zelle regularly allowed “bad actors” to sign up for accounts with phoney emails that allowed fraudsters to impersonate large businesses and government agencies.

Users said they were defrauded by what appeared to be official accounts of one of the three banks or Zelle itself, according to the CFPB.

In other instances, the banks regularly denied refunds to customers even in instances where customers claimed their devices had been stolen and thieves had made unauthorised transfers, according to the CFPB.

Unlike contested debit and credit card transactions, the rules for reimbursements of account-to-account payments are less clearly defined in the US than in other countries. The UK set a precedent earlier this year when it set a new requirement for banks to reimburse victims of these APP scams for up to £85,000.

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Securities Law

December 20, 2024, 9:27 AM PST

Short Seller Gotham Asks Judge to Toss Grifols Defamation Suit

By Clara Hernanz Lizarraga and Chris Dolmetsch

- Accusations of misleading accounting plunged Grifols stock
- Gotham says report is opinion protected by First Amendment

US short seller Gotham City Research asked a judge in New York to dismiss a lawsuit accusing it of conspiring to drive down shares in Grifols SA.

The drug maker's market capitalization has fallen by more than €3 billion (\$3.15 billion) since Gotham published a report accusing the company of overstating its profits and understating its debt. Grifols, which has denied any wrongdoing, [sued](#) the short seller for defamation in January in Manhattan federal court.

Gotham, run by **Daniel Yu** and **Cyrus de Weck**, said in a Friday court filing that its report was based on their opinion and that they enjoy the same First Amendment freedom of speech rights as journalists.

The report "is simply a part of the ever-contentious debate between those who are long versus short on a company's prospects," Gotham said, adding that this "social context" makes it obvious that the short seller was merely expression an opinion.

Grifols said in its own Friday filing that Gotham's report showed malicious intent and sought only to protect its short position. The company urged the judge not to dismiss the case.

"The day that defendants published the Gotham Report, a panic sell-off ensued that erased almost half of Grifols' market value, the company said. Though its share price had partially recovered, "there is still lasting damage to Grifols' reputation from defendants' short-and-distort scheme," Grifols said.

The company claims Gotham made a false statement when it said Grifols had failed to disclose a \$95 million loan in its accounts, a line it corrected in a later version of the report without notifying readers of the update.

Gotham's attempt to dismiss the case comes at the end of a horrible year for Grifols. The stock is still trading nearly a third lower than it was before the short seller report despite management changes and other measures that sought to regain investor confidence.

The firm raised €1.3 billion in a [private debt](#) placement earlier this month, in an attempt to reassure investors that it can control its leverage ratios.

The firm's woes were compounded by Brookfield Asset Management's decision last month to walk away from a potential takeover, citing [differences](#) with the board around valuation.

Grifols is the most shorted stock in the 55-member Stoxx 600 Health Care Index, according to latest data from S&P Global Market Intelligence.

Market regulators in the US and Spain launched investigations into Gotham following the January report. The US [dropped](#) its probe earlier this month, saying it did not “intend to recommend an enforcement action” against the short seller.

Meanwhile Spain’s regulator opened [disciplinary proceedings](#) against Gotham and said it would fine Grifols for publishing “untrue and misleading information” in several annual accounts.

Gotham will be [probed](#) by Spain’s National Court for allegedly releasing “biased and deceptive” information.

The case is Grifols SA v. Yu, 24-cv-576, US District Court, Southern District of New York.

--With assistance from **Lisa Pham**.

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Matt Levine's Money Stuff: Private Credit Wants to Be the Bank

By Matt Levine

Opinion

Programming note: This is the last Money Stuff of 2024. Happy holidays, and thanks so much for reading this year. We'll be back on Monday, Jan. 6, 2025.

Narrow banking

One of the big stories of modern finance is the rise of narrow banking in the form of private credit. "Narrow banking" is, in banking theory, roughly the idea that banks shouldn't make loans. Instead:

1. Banks should take money from depositors and keep it somewhere very safe. After all, the depositors might ask for their money back at any time, and it would be a crisis if the banks didn't have it. So if you deposit money in a bank, the bank should just keep your cash in an envelope with your name on it. Or, more practically, the bank should keep the money in its account at the Federal Reserve, or perhaps in short-term government securities. The bank should keep the money somewhere with basically no credit or interest-rate risk.
- 2. Meanwhile, *loan funds* should make loans. Some ambitious entrepreneur can raise a pool of money from investors, saying "I will use your money to make loans, and you'll get the interest on the loans, minus my fees." The investors in these loan funds would lock up their money for a long time, to match the duration of the loans: A fund making 30-year mortgage loans wouldn't pay back its investors for 30 years. And the investors would bear the credit risk: If the loans didn't get paid back, the investors would lose money.

This is different from normal modern banking, in which banks take deposits and use them to make loans. Mostly normal banking works fine: Although depositors can ask for their money back at any time, they mostly don't, so bank deposits are a pretty predictable and stable source of funding. And although borrowers sometimes default on their loans, the bank has a diversified portfolio of loans and does good credit analysis, so the loans mostly get paid back and there's enough money for the depositors. And there are prudential supervision and capital and liquidity requirements to make extra sure that the money will be there. But every so often it doesn't work out. Every so often, the depositors get nervous and ask for their money back at once, and it is a mess.

Normal banking is a bit of magic, a sleight of hand that transforms risky assets (loans) into risk-free ones (bank deposits), "a superposition of fraud and genius that interposes itself between investors and entrepreneurs" so the entrepreneurs can take risks with the investors' money but the investors feel safe. But this magic is fragile, the equilibrium is unstable, and every so often it blows up.

Narrow banking is an idea that is proposed from time to time — often after a financial crisis — to solve this problem. Narrow banking gets rid of most of the magic: Your safe deposits are invested only in safe assets (Fed reserves, Treasury bills), and risky loans are made only by investors who knowingly bear the risks of those loans. This is a safer, less fragile system, one that is not so vulnerable to bank runs or financial crises.

But the downside is: no magic. In particular, I have been reading about the idea of narrow banking for years, and I used to think "that's all well and good but how realistic is this loan-fund idea?" The point of banking, it seemed to me, was that you can fund a *lot* of loans with bank deposits, surely more (and more cheaply) than you could fund by going out and raising loan funds. "Put money in the bank and you can get it back whenever" is a simpler and more traditional and more appealing pitch than "give me money for seven years to fund a portfolio of consumer loans, and you'll get most of the risks and rewards of those loans." Sure some people would want to invest in loan funds, but surely those funds couldn't grow to anything like the scale of the modern banking system. Narrow banking, it seemed to me, would involve a big reduction in credit.

But I think the obvious modern answer is something like: No, Blackstone and Apollo and BlackRock really can raise loan funds that ... aren't there yet, but it is easier than it used to be to imagine them rivaling the banking system. Five years ago, "private credit" meant something like "making loans to fund leveraged buyouts without going through a syndication process." Now it means something closer to "substituting for every possible form of bank lending." Bloomberg's Paula Seligson reports:

Private credit firms want more than corporate lending. The largest are laying the groundwork to finance everything from auto loans and residential mortgages to chip manufacturing and data centers in an effort to swell the size of the market by the trillions.

It's part of a race to grab a bigger share of a universe of potential investments that Apollo Global Management Inc. has said could be as large as \$40 trillion. The staggering estimate is tied to a boom in private investment-grade debt related to infrastructure and asset-backed finance. Those areas will be top priority for firms next year, according to 10 managers interviewed by Bloomberg News. ...

Data provider Preqin currently pegs the size of private debt assets under management at around \$1.6 trillion, a number focused on corporate debt strategies.

The total assets of US commercial banks are about \$23.5 trillion, for context. So private credit right now is much smaller, but it has ambitions to be bigger. And it is getting into all sorts of consumer lending:

Asset-backed finance refers to packaging together pools of loans or assets that generate cash, and then lending against the recurring cash flow of that portfolio. The scope is broad: everything from auto loans or mortgages to music royalties or trade receivables. Small business loans and income streams from mobile phone towers or data centers can count, too. ...

Sixth Street Partners expects to grow its ABF assets under management over the next five years to make up a significant portion of its investments, said Co-Chief Investment Officer Joshua Easterly. The firm is currently focused on consumer products like mortgages and car loans and looking to expand in commercial lending.

Residential housing is another frontier for private credit funds, especially loans to consumers with good credit. One area of focus for Carlyle Group Inc. is targeting pools of capital with exposure to people who have significant home equity, such as through home equity loans, solar loans and auto loans, as they are protected from inflation, said Mark Jenkins, its head of global credit. Blackstone is looking to expand further in products such as home efficiency loans and residential solar financing, according to Zawadzki.

And the banks, meanwhile, are letting it happen:

Private debt has increasing opportunities to take market share in these spaces as banks continue on a quest to become more asset-light as a result of stricter post-Global Financial Crisis regulations. A second Trump administration might soften some requirements but isn't expected to change this long-term shift.

"The fundamental model of a bank is changing from lending to earn a return to lending to make fees and attract deposits, and I don't think that paradigm shift is changing anytime soon," said Loris Nazarian, an assistant portfolio manager at Oaktree Capital Management's private assets business.

Banks are slowly getting out of the business of "lending to earn a return," which will mean that loans have to come from somewhere else.

Who else? Well, from first principles, if some people want to borrow money now and pay it back later, they should borrow it from people who have money now and won't need it until later. This isn't *quite* true of bank depositors, or it is true only in some risky aggregate statistical sense: The money in your checking account is money that you don't need *right this minute*, but it's probably not money that you won't need for seven years.

On the other hand, there are pretty obvious sources of money who really don't need it for a long time. Life insurance companies take money from policyholders today and mostly pay it out many years later, when the policyholders die. Endowments hold a lot of money in perpetuity and spend only a fraction of it each year. And, most notably, normal people save money for retirement, and don't plan to use that money for many years.

And so private credit managers manage a lot of money for insurance companies and endowments and pensions and other traditional long-term investors. But they are also very interested in managing your retirement money. Apollo, these days, increasingly positions itself as a retirement-services company. And:

KKR & Co. Co-Chief Executive Officer Scott Nuttall said the long-term nature of 401(k)s makes them a sensible vehicle for private-market investments.

"People are saving for retirement in this target-date format, " Nuttall said Tuesday at a Goldman Sachs Group Inc. conference. "They're thinking about their asset allocation decades out — not having private markets as part of that solution just isn't really sensible."

If you were building a financial system from scratch, and you had to decide "where should the money for 30-year mortgages come from," and your choices were "people's checking accounts" or "people's retirement funds," isn't the retirement fund the obvious answer?

Meanwhile, at the Wall Street Journal, Telis Demos writes:

It may be no surprise that people are eager to put off paying in full for their holiday shopping. But who would want to fund that? Increasingly, there is an answer: private credit.

Buy now, pay later provider Affirm last week announced a \$4 billion commitment for lending from investment firm Sixth Street. ...

Via what is termed asset-based finance, private-credit managers are increasingly in the mainstream of the kinds of lending that banks or the securitization markets have long dominated. ...

Meanwhile, for buy now, pay later and consumer lenders, it shows how the challenge of high interest rates can be met. A key step is to secure longer-term commitments—a hallmark of private credit—as part of a diversified mix of incoming money.

"Who would want to fund" people who don't want to pay in full for their holiday shopping? I mean, that's a credit card! That's the point of a credit card: You buy stuff and pay for it later! For a long time, that was a core business of banking. Now it is private credit.

We talk about these ideas from time to time. One argument that I have often made is that, if banks are no longer the best source of funds for loans — if “the fundamental model of a bank is changing from lending to earn a return to lending to make fees” — then the natural evolution is for the banks, which have the customer relationships and the loan officers, to *make* the loans, and for private credit funds to give them the *money* for those loans. And so we have talked about banks shifting the risks of their loans to investors, and about how regional banks are partnering with private credit firms to make loans, and how even giant banks like Barclays Plc and JPMorgan Chase & Co. want private-credit capital to fund their loans.

The idea here is that, since banks have *historically* been the big source of loans, they have a lot of the tools needed to make loans. They have branches and loan officers and customer relationships and people who can make credit decisions and other people who can send out monthly bills. And they used to use their deposits to make loans, but now they do less of that and banking is narrower. But since they still have the customer-service side of things, they make the loans, and private credit firms fund them.

But that is perhaps a temporary state of affairs on the road to narrow banking. If banks are not where the money is, why should they make the loans? If banks don't hold the credit risk, why should they make the credit decisions? Banks have branches, yes, but who goes to a bank branch to borrow money? You go to an app. Why would a bank have the best app?

And so consumer credit might increasingly look like the Sixth Street/Affirm deal: A financial technology startup with a good app but no balance sheet does the customer-facing part of the loans, and a private credit firm with a big balance sheet puts up the money. And you don't need a bank.

M&A repricing

A story that you sometimes hear these days is that venture capital and private equity firms have a lot of money locked up in private companies, but they are having trouble cashing out, because the public markets don't want their companies. The market for initial public offerings, the story goes, is weak, so private-company investors have to hold onto companies for longer than they wanted to and resort to creative measures (continuation funds, net asset value loans) to return money to their limited partners.

This story would have some intuitive appeal if it was like “these funds bought all these companies at high prices in 2019, when the stock market was doing great, but now it's 2024 and the stock market is down so they can't sell them at attractive prices.” It is a bit of a weirder story in the real world, though, in that the US stock market is near record highs and is up more than 80% over the past five years. *Why* can't you sell your private companies to the public market? The public market seems fine?

Anyway I thought of this puzzle when I read this Bloomberg story about companies abandoning bad acquisitions:

Companies that spent billions on poorly timed acquisitions in recent years are now offloading those assets at knockdown prices.

Alibaba Group Holding Ltd. announced Tuesday it's going to sell Chinese department-store chain Intime to a local apparel group for \$1 billion. The price is around 30% of the company's valuation when Alibaba bought it during the heady days of 2017. The internet giant, which has largely abandoned its acquisitive ways amid government pressure, said it will book a \$1.3 billion loss on the transaction.

The deal came a day after BlackBerry Ltd. said it would divest its Cylance endpoint security unit to software startup Arctic Wolf for \$160 million plus a small amount of stock. That's a far cry from the \$1.4 billion BlackBerry paid when it agreed to buy the business in 2018. Under BlackBerry's ownership, Cylance reported substantial losses and its revenue fell over 50%, according to Royal Bank of Canada analysts.

The moves show how companies that were major acquirers during the boom times may sober up and regret those purchases only a few years later.

Some of this probably is a shift in market conditions, but some of it is more "we made bad deals, oops."

OpenAI

I have always thought of the OpenAI for-profit conversion problem as conceptually pretty simple:

1. OpenAI is a big company that is worth a lot of money.
- 2. Some of it is owned by shareholders (venture capitalists and employees, mostly). These shareholders' shares are a bit odd — many of them have profit caps — but roughly speaking it seems reasonable to say "if you invested \$100 million at a \$20 billion valuation then you own 0.5% of the company" or whatever, possibly with some adjustments for particular details.
- 3. A lot of it is owned by Microsoft Corp. Microsoft's shares are even odder: They are not shares at all, but a series of claims on OpenAI's profits, roughly speaking 75% of the first \$17 billion of profits, 49% of the next tranche and 0% of profits above some cap. Converting this into percentage ownership is harder than in the case above, but not conceptually impossible. You could build some discounted cash flow or option-valuation model to say "Microsoft's profit share converts to an expected 45% ownership," or whatever (I don't know the actual number). And presumably OpenAI's advisers would have a model that gets some low number, and Microsoft's advisers would have a model that gets some higher number, and they negotiate, and ultimately Microsoft and OpenAI could agree to cancel the weird profit interest and convert it into some mutually agreeable number of shares.
- 4. And the *rest* of the company — the portion not owned by VCs, employees and Microsoft — is owned by a nonprofit organization that controls OpenAI. The residual profits of OpenAI, after paying out Microsoft and everyone else, go to the nonprofit.
- 5. Now OpenAI wants to organize itself as a more normal company, not controlled by the nonprofit: Instead of the shareholders and Microsoft all owning weird quasi-shares of a capped-profit subsidiary of a nonprofit, they'd just own regular shares of a regular company. (Well, a public benefit company.)
- 6. But nonprofit law requires that, to do that, OpenAI has to give the nonprofit fair compensation for its stake: You can't just convert a nonprofit to a for-profit company and keep all of its money. You have to, effectively, buy out the nonprofit's current interest.

- 7. But that's fine: If the employees and VCs own 35% of OpenAI, and Microsoft's stake is economically equivalent to 45% of OpenAI (made-up numbers, to be clear), then just by subtracting you know that the nonprofit's stake is 20% of the company. And then you just give the nonprofit 20% of the new for-profit company's shares, and let the nonprofit keep them or sell them or whatever. The nonprofit is fully compensated for its ownership of OpenAI, because it gets exactly the same economic ownership before and after the conversion. Its compensation for its ownership stake of OpenAI *is* its ownership stake of OpenAI. You can debate the details of valuation, but the basic idea is straightforward.

But here is a New York Times article about the conversion that frames it in a way I hadn't thought of:

Under the watchful eyes of government regulators, the press and the public, [OpenAI Chief Executive Officer Sam] Altman and his colleagues are working to sever the nonprofit's control while ensuring that the existing board is properly compensated for the changes, according to four people familiar with the negotiations who spoke on the condition of anonymity.

Mr. Altman and his colleagues need to answer a question: What is a fair price for ceding control over a technology that might change the world? Proper compensation to the nonprofit is still being debated, but it could easily be in the billions of dollars, one person said. ...

"Any potential restructuring would ensure the nonprofit continues to exist and thrive, and receives full value for its current stake in the OpenAI for-profit with an enhanced ability to pursue its mission," Bret Taylor, chairman of the nonprofit board, said in a statement to The Times.

Fine, right, "receives full value for its current stake," seems simple. But:

If the nonprofit is removed from OpenAI's chain of command, it could spin off into funding research on topics like ethics in artificial intelligence, one person said. But Mr. Altman and his colleagues have not yet assigned a dollar value to the nonprofit's potential loss of control.

"Here, the asset in question is so unique and potentially so earth-shattering," said Alexander L. Reid, a lawyer advising nonprofits at the law firm BakerHostetler. "How much is it worth to control the power to bring the genie out of the bottle?"

See, the loss to the nonprofit is not just "you own the economic equivalent of 20% of this company, so here's 20% of the stock." It's "your whole purpose as a nonprofit is to make sure that our AI does not destroy humanity, by overseeing how we build it; but now we can build it however we want." The nonprofit's *upside* from controlling OpenAI is uncertain — it might flop, it might become a trillion-dollar company — but can be reasonably estimated using normal valuation principles, and thus reduced to a dollar amount or a number of shares. The nonprofit's *downside* from *not* controlling OpenAI — "without our supervision, Sam Altman might destroy humanity" — is not really susceptible to conventional valuation techniques. "It may be difficult to know what role money will play in a post-[artificial general intelligence] world," OpenAI used to tell its investors, and I suppose that's a plausible objection to any compensation the nonprofit could be offered. "You are offering us money, but money is not what we care about."

The Bitcoin Ponzi model

I feel like the basic story of Bitcoin over the last five years or so has been “more people — normal people, exchange-traded funds, corporate treasuries, institutional investors, etc. — are going to become comfortable with Bitcoin, so they will buy it, so its price will go up.” That story has played out, more types of investors have come around on Bitcoin, and its price has gone up.

How does that story end? What happens when everyone is comfortable with Bitcoin and owns some? The other day, I mentioned a Bloomberg article with the headline “Crypto Surge Lures Final Holdouts,” and while I’m not sure I would take “final” literally, it’s plausible that we’re more than halfway from Bitcoin’s foundation to maximal adoption and respectability. What happens if we get there? Possible answers include:

1. Widespread adoption of Bitcoin will make it increasingly valuable, people who allocate 1% or 2% of their portfolio to Bitcoin will say “you know what really this should be 10%,” they’ll keep buying Bitcoin and it will keep going up. Bitcoin will be something like *the stock market*, an index of global economic growth that keeps going up as the economy grows.
- 2. Widespread adoption of Bitcoin will make it *stable*: People who buy Bitcoin thinking “this is a stable store of value in an uncertain world” will be correct, and if they ever need to sell some Bitcoin to pay expenses, they’ll find a ready buyer who wants to save money in the form of Bitcoin. And the price of Bitcoin will stay stable at, you know, pick a number, \$100,000 or more, say. Bitcoin will be something like *cash*, or *gold*, a reliable store of value and a small portion of most people’s financial assets.
- 3. Widespread adoption of Bitcoin will cause a *collapse*: The only reason to buy Bitcoin now at \$100,000 is because you think that, in a month, some institutional-investor holdout will capitulate and decide to buy Bitcoin, and you’ll be able to sell it to them at \$110,000. But once there’s no one left to capitulate, there’ll be no demand for Bitcoin, and its price will collapse.

I have to say, in a heavily caveated way — I know nothing, this is not investment advice, I’ll probably be wrong, etc. — that I would bet on Answer 2? It seems to me that Bitcoin has more or less made the transition from “hey here’s a weird thing” to “this is a store of value that has a place in institutional portfolios,” and that feels like a plausible long-term equilibrium. That makes me nervous — it’s an equilibrium based solely on social acceptance, and that could change — but it’s my best guess.

Here, however, is J.P. Konig with an extremely fun articulation of Answer 3:

If you want to buy some bitcoins, go right ahead. We can even help by regulating the trading venues to make it safe. But don’t force others to play.

Alas, that seems to be where we are headed. There is a growing effort to arm-twist the rest of society into joining in by having governments acquire bitcoins, in the U.S.’s case a Strategic Bitcoin Reserve. The U.S. government has never entered the World Series of Poker. Nor has it gone to Vegas to bet billions to tax payer funds on roulette or built a strategic Powerball ticket reserve, but it appears to be genuinely entertaining the idea of rolling the dice on Bitcoin.

Bitcoin is an incredibly infectious early-bird game, one that after sixteen years continues to find a constant stream of new recruits. How contagious? I originally estimated in a 2022 post, Three potential paths for the price of bitcoin, that adoption wouldn't rise above 10%-15% of the global population, but I may have been underestimating its transmissibility. My worry is that calls for government support will only accelerate as more voters, government officials, and bureaucrats catch the orange coin mind virus and act on it. It begins with a small strategic reserve of a few billion dollars. It ends with the Department of Bitcoin Price Appreciation being allocated 50% of yearly tax revenues to make the number go up, to the detriment of infrastructure like roads, hospitals, and law enforcement. At that point we've entered a dystopia in which society rapidly deteriorates because we've all become obsessed on a bet.

A portion of the bull case for Bitcoin is something like "once every big bank and asset manager and also the US Treasury has a chunk of their assets in Bitcoin, surely they won't let the price of Bitcoin go down too much," but I guess there is something a *little* dystopian about that.

Elsewhere:

North Korea-linked hackers stole more from cryptocurrency platforms this year than ever before, according to Chainalysis Inc., showcasing rising capabilities that researchers say threaten US national security.

Digital thieves linked to North Korea utilize advanced methods such as manipulating remote work opportunities and are responsible for more than half of the total \$2.2 billion stolen from platforms in 2024, the blockchain analytics company said in a report Thursday.

One theory that you sometimes hear about fiat currencies like the dollar is that they are valuable because they can be used to pay taxes to the relevant national government. I suppose crypto is a way to pay taxes to North Korea.

Things happen

"In California, the answer is 'absolutely no, you can't insider trade private company stock.'" The Next Big Fed Debate: Has the Era of Very Low Rates Ended? NYC's Top Offices Spark a Wall Street Frenzy as Others Sit Empty. A 7-Eleven Heir's \$50 Billion Fight to Keep the Company in the Family. Brazil Spends \$8 Billion to Stem Currency Rout That Lula Sparked. The Firm That Wants to Power AI With Southern Yellow Pine. Cocoa Surges Past \$12,000 on Supply Concerns. Government Contractor KBR, Recently Hit by DOGE Fears, Draws Activist Investor. MacKenzie Scott Reveals \$2 Billion Worth of Donations This Year. Lars Windhorst apologises to H2O investors for losses. Tax Preparer Known as 'the Magician' Bilked I.R.S. Out of \$145 Million. Zestimates. "Models who look like Jesus are in high demand in Utah." New Blackstone holiday video dropped.

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- 1. That's loose, the mortgages would amortize, etc., but the point is that the cash flows and timing and risk would be passed on to the investors.
- 2. There are other potential downsides in the form of the transmission of monetary policy: If fractional reserve banking doesn't control the money supply, then monetary policy would have to change. In fact, the US Federal Reserve is skeptical of narrow banking for these sorts of reasons, and has objected to a proposed narrow bank and worried about stablecoins on partly monetary-policy grounds.
- 3. There is also a sort of shadow equity ownership by Sam Altman, OpenAI's chief executive officer. Technically he owns no equity, but if OpenAI converts to a for-profit everyone seems to think he *should* have equity, including the investors, so perhaps he'll get some.
- 4. You could say something similar about, like, the stock market, but that represents economic activity: "We won't let every company go bankrupt" is a basically positive thing. Bitcoin is, uh, different.

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Crypto Insiders Jockey for Influence on Planned Advisory Council

By Olga Kharif and Stephanie Lai

The incoming US administration is weighing two very different approaches to a council that the crypto industry hopes will dramatically increase its influence over digital-asset policy.

President-elect Donald Trump and his inner circle are considering options that would see as few as 10 people or as many as 100 on a council that would report to David Sacks, according to people with knowledge of the matter who asked not to be named as they were not authorized to speak on the record.

Sacks, Trump's pick for the first-ever AI and crypto czar, would oversee two separate councils — one for each part of his portfolio, the people said.

A smaller crypto council comprised of senior industry executives like CEOs would have more influence over policy; a larger group would be more of a ceremonial, information-gathering entity with representatives drawn from a wider pool, according to the people.

Even before the election, executives from digital-asset exchanges and Bitcoin miners had been making the trek to Mar-a-Lago, in addition to funneling sizable donations to the Trump campaign.

That concerted outreach has continued: Earlier this month, Crypto.com CEO **Kris Marszalek** met with Trump at the Florida club to discuss crypto industry appointments and regulations.

In November, **Justin Sun** said he invested \$30 million in World Liberty Financial, a crypto project promoted by the president-elect and his sons. This week, World Liberty bought tokens associated with one of Sun's projects. Sun told Bloomberg that he had "nothing to do" with the transaction. "This is their own financial choice," Sun said.

Read more: [Trump Meets Bitcoin Miners in His Latest Pro-Crypto Overture \(June 2024\)](#)

Any decision on the structure would be made in the next couple of weeks, with the final composition and membership expected to be announced in January. Trump is expected to issue an executive order officially forming the council shortly after his inauguration, one person said.

And despite the enthusiastic lobbying from different industry personalities, there's still no formal nomination process, the people said.

Sacks, who will be a special government employee and whose role is expected to operate out of the Office of Science and Technology Policy at the White House, was a surprise pick for the role — as was his dual mandate of AI and crypto.

Prior to Sacks' selection, some industry insiders had speculated that the Trump team would opt for someone like J. Christopher Giancarlo, who led the the Commodity Futures Trading Commission during the first Trump administration.

Read more: [Crypto Whales Get Nod From Eric Trump That Party's Just Starting](#)

--With assistance from **Teresa Xie**.

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Trump's Crypto Project Buys Tokens Associated With Justin Sun

By Muyao Shen

- Tokens involved have been at a center of a legal dispute
- Sun invested \$30 million earlier in the Trump-backed platform

Donald Trump's crypto platform, World Liberty Financial, appears to have exchanged roughly \$10 million of what's known as wrapped Bitcoin launched through Coinbase Global Inc. for similar tokens associated with project adviser **Justin Sun**.

A digital wallet belonging to the project on Wednesday swapped their entire holding of 103 cbBTC tokens for WBTC, the first widely adopted Bitcoin offshoot, according to blockchain data analytics firm Nansen. Wrapped Bitcoin tokens allow Bitcoin holders to participate in decentralized finance activities on the Ethereum blockchain. World Liberty has been promoted as a DeFi lending platform, though it hasn't become operational yet.

"This is their own financial choice, I have nothing to do with it," Sun said in a direct message. A spokesperson for World Liberty Financial didn't immediately respond to a request for comment.

Sun, a high-profile China-born crypto entrepreneur maybe best known as of late for paying \$6.2 million at a Sotheby's auction for a banana duct-taped to a wall, invested \$30 million in World Liberty Financial and became an adviser to the project in November. The infusion appeared to push the project over a threshold that allows Trump to profit from the enterprise.



Justin Sun, founder of Tron, eats a banana that forms part of the artwork Comedian during a news conference in Hong Kong.

Source: Bloomberg

Crypto custody firm BitGo, the operator of Wrapped Bitcoin, announced in August that it had launched a partnership and joint-venture with BiT Global in Hong Kong through a strategic partnership involving Sun. The announcement triggered a backlash from others involved in the project. Coinbase not only sought to delist WBTC from its exchange, but also launched its own version of wrapped Bitcoin, called cbBTC.

Earlier this month, BiT Global sued Coinbase over the delisting. In response to the lawsuit, Coinbase cited that at the conclusion of its diligence, Sun's "affiliation with" and "potential control over" wBTC presented "an unacceptable risk to its customers and the integrity of its exchange." A federal judge in California ruled this week in favor of Coinbase, denying BiT Global's request for a temporary restraining order to block the delisting.

The shifting of tokens follows World Liberty's purchases of cryptocurrencies such as AAVE and LINK last week. In addition, World Liberty's wallets received about \$250,000 worth of ONDO, the token of Ondo Finance, which specializes in tokenization on Dec. 15, Nansen's data show.

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[Securities Law](#)

December 20, 2024, 7:34 AM PST

Trump Moves \$4 Billion of Media Firm Stake Into Trust Run by Son

By Subrat Patnaik and Bill Allison

-
- President-elect was the largest holder in Trump Media
 - Move is similar to approach taken during Trump's first term

President-elect Donald Trump transferred about \$4 billion worth of shares in his media company to a trust that is controlled by his eldest son, **Donald Trump Jr.**

The soon-to-be president, who was the largest Trump Media & Technology Group Corp. shareholder with nearly 115 million shares, will now directly own zero shares and be the trust's sole beneficiary, according to a [filing](#) with the US Securities and Exchange Commission.

According to a separate filing on Thursday evening, Donald Trump Jr. "has sole voting and investment power over all securities owned by the Trust."

The move is similar to the approach Trump took in his first term on the conflicts of interest that his sprawling real estate empire posed. Instead of divesting his assets, Trump put them into a trust managed by his two eldest sons, Donald Trump Jr. and Eric Trump, as well as **Allen Weisselberg**, a longtime executive of his business.

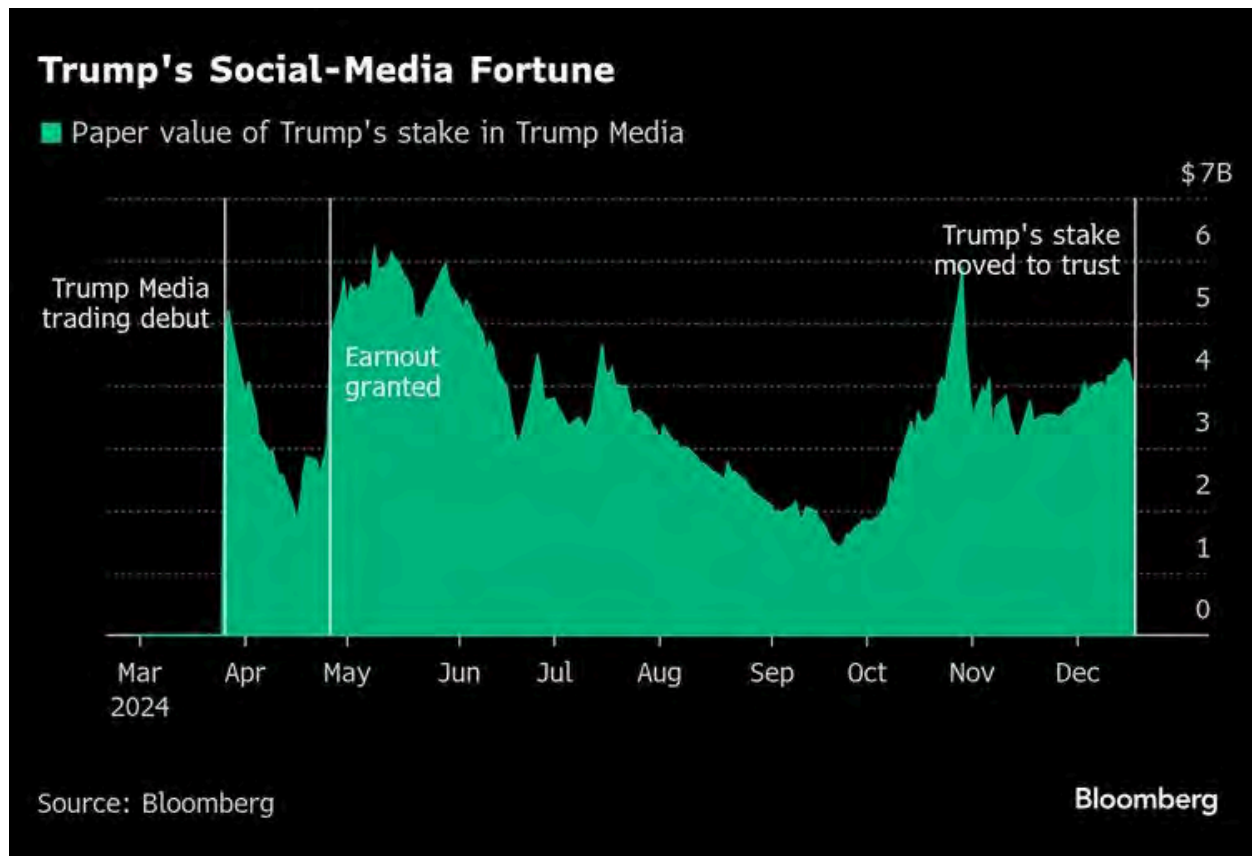
Critics, including Walter Shaub, then the director of the Office of Government Ethics, argued the arrangement didn't eliminate his potential conflicts. They said Trump was still aware of which assets were held by the trust, those running it weren't independent, and his companies continued to do business, benefiting him financially.

Unlike other high ranking members of the executive branch, including cabinet secretaries and White House officials, US presidents aren't required under federal law to divest assets, even if they pose a conflict of interest. Since the passage of the Ethics in Government Act in 1978, the post-Watergate reform measure that aims to eliminate conflicts, all other presidents voluntarily abided by it.

In the weeks prior to his reelection, Trump said he [wouldn't sell](#) any shares in the media company, which trades under his initials and went public in March through a blank-check merger.

The stock has been volatile since its debut as investors ignored its fundamentals. Shares in the company traded 4.6% lower on Friday.

Shares, which had been in decline, started to rebound during the last leg of the US presidential election. Investors used the stock as a proxy for betting on Trump's reelection odds, propelling the unprofitable company's valuation to more than \$10 billion at one point.



(Updates stock move in eighth paragraph.)

--With assistance from **Matt Turner**.

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Trump transfers his stake in Trump Media to revocable trust

[reuters.com/business/media-telecom/trump-media-shares-fall-after-trump-transfers-his-stake-company-revocable-trust-2024-12-20](https://www.reuters.com/business/media-telecom/trump-media-shares-fall-after-trump-transfers-his-stake-company-revocable-trust-2024-12-20)

Reuters

By Reuters

December 20, 2024 8:38 AM PST Updated 3 hours ago

The Nasdaq Market site is seen on the day that shares of Truth Social and Trump Media & Technology Group start trading under the ticker "DJT", in New York City, U.S., March 26, 2024. REUTERS/Shannon Stapleton/File Photo Purchase Licensing Rights 

Dec 20 (Reuters) - U.S. President-elect Donald Trump has moved the stake he owns in Trump Media & Technology to a revocable trust.

Trump transferred 114.75 million shares, or 53% of Trump Media & Technology's (DJT.O) , opens new tab outstanding stock, to the revocable trust of which he is the sole beneficiary, according to securities filings.

His stake in the company was valued at more than \$4 billion based on the stock's last closing price of \$35.41.

Trump said in November that he had no intention of selling his shares in the company, which owns the Truth Social media platform.

Trump's eldest son, Donald Trump Jr., is the sole trustee of the trust and has sole voting and investment power over securities held by it, according to the securities filings.

Trump Media has a market capitalization of around \$7.7 billion as retail traders bet on the stock as a proxy of Trump winning the 2024 U.S. presidential election.

The company's shares were down 4% at \$33.86 on Friday.

Reporting by Shashwat Chauhan in Bengaluru; Editing by Shounak Dasgupta

Tesla's 2024 deliveries growth might hinge on Musk's unorthodox Cybertruck

reuters.com/business/autos-transportation/teslas-2024-deliveries-growth-might-hinge-musks-unorthodox-cybertruck-2024-12-20

Abhirup Roy

The Tesla Cybertruck is displayed on media day at the 2024 Paris Auto Show in Paris, France, October 14, 2024. REUTERS/Benoit Tessier/File Photo Purchase Licensing Rights [↗](#), opens new tab

- Demand for Cybertruck shows signs of weakness
- High price, unusual design deter buyers, analyst says
- Tesla U.S. registrations down 7% through Oct, S&P Global Mobility data shows
- Used Cybertrucks are taking longer to sell - industry exec

SAN FRANCISCO, Dec 20 (Reuters) - Tesla (TSLA.O) [↗](#), opens new tab is aiming to post slight growth in 2024 deliveries over last year with generous incentives across its EVs - but a lot depends on the success of the new Cybertruck pickup, which is showing signs of weakness, analysts said.

After years of rapid growth, Tesla delivered a record 1.81 million vehicles in 2023. But rising competition and an aging lineup have hit the electric-vehicle market leader hard as consumers, faced with high borrowing costs, choose less expensive hybrids over battery-powered vehicles.

CEO Elon Musk is betting on plans for a robotaxi business to turn Tesla's fortunes as his ally, President-elect Donald Trump, is expected to clear regulatory hurdles. But analysts say the technology is still years away, and Musk's target of 20-30% sales growth next year hinges on his promise of a cheaper version of current cars and success of the Cybertruck.

The truck's higher-than-expected price tag and a design that has been called polarizing - a trapezoidal, stainless-steel exterior meant to stand out in a fiercely competitive market - are keeping buyers at bay, said Sam Fiorani, vice president at research firm AutoForecast Solutions.

"Unfortunately, buyers of full-size trucks are a rather conservative crowd," he said. "They're just not hitting as strong as early expectations."

Tesla slashed prices of its vehicles last year to stimulate demand, sparking a price war across the industry.

This year, the company has focused on offering lucrative incentives, including low-cost financing deals on its Model 3 sedans and Model Y SUVs as well as lower lease prices.

Tesla also offered three months of free fast-charging and Full Self-Driving, its advanced driver assistance software, for all new orders that deliver by Dec. 31.

Still, data from S&P Global Mobility showed Tesla's U.S. registrations as of end-October fell to about 500,000 vehicles, down about 7% from the year-earlier period. The decline was partly due to a fall of 32% in Model 3 registrations, and to a 24% drop in Model S luxury sedans.

Tesla does not break out sales of Cybertruck - but the S&P data showed U.S. registrations of the pickup falling to 4,335 in September and 4,039 in October, from 5,428 in August. Through October, the total was 31,451. Analysts at Bernstein expect 50,000 of them by the end of the year.

"The Cybertruck is not doing enough to bring the brand up," said Tom Libby, S&P Global Mobility's associate director of industry analysis.

Tesla is expected to report in early January that it delivered 1.81 million vehicles in 2024, which would be flat with 2023's figure, according to analysts polled by LSEG.

INDICATIONS OF SOFTENING DEMAND

In 2019, Musk said the Cybertruck would come with a \$40,000 price tag. It drew 1 million reservations, he said in 2023. But late last year, following several delays, the launch edition Foundation Series truck rolled out as high as \$120,000 apiece.

Two versions currently available for sale are the Cyberbeast at close to \$100,000 and an all-wheel-drive at about \$75,000.

Tesla has also stopped taking reservations, instead allowing buyers to place orders directly. Some Cybertrucks are even available in its inventory for immediate delivery - moves that according to analysts suggest a problem with demand.

The company also started offering the Cybertruck on lease starting at \$999 a month in November, before reducing the price to \$899 a month.

"When you see those types of deals, they are basically an indication of softening demand," S&P's Libby said. But he said it was too early to conclude there was a long-term demand challenge.

Tesla did not respond to a request for comment.

Demand and supply for the Cybertruck are closely monitored by Tesla investors and fans, as Musk has poured in resources to its development but said the company could face "enormous challenges" in ramping up production and making it cash-flow positive.

The Cybertruck is also piling up on used car lots - a red flag, according to industry executives.

Used Cybertrucks are now taking about 75 days on average to sell after being listed on CarGurus, an online marketplace for buyers and sellers of new and used cars, up from an average of about 27 days in May.

"The number of days they're sitting is getting longer and the price is coming down, and I can tell you the sales volume has come down," said Kevin Roberts, director of economic and market intelligence at CarGurus.

Reporting by Abhirup Roy in San Francisco; Additional reporting by Aditya Soni in Bengaluru; Editing by Matthew Lewis

Business Law Prof Blog

businesslawprofessors.com/2024/12/best-efforts

December 20, 2024



Best Efforts

By Ann Lipton on December 20, 2024

Like Steve Bainbridge and Matt Levine, I'm very entertained by this complaint Albertsons filed against Kroger over the breakup of their merger due to antitrust concerns.

The crux of it is that Kroger promised to make some kind of effort – more on that in a moment – to meet FTC demands in order to clear the deal, Kroger got cold feet and refused to meet those demands, and as a result, the FTC got the deal blocked in court, and now Kroger owes Albertsons damages for its breach.

As Matt Levine points out, one weakness in these kinds of disputes is establishing that Kroger's recalcitrance was, in fact, the reason for the FTC rejection. For example, not long ago, Anthem sued Cigna with a similar set of allegations, and though the court agreed that Cigna breached the contract, the court also concluded that the deal would have been blocked anyway.

But the part that I'm enjoying is the argument about what, exactly, kind of effort Kroger agreed to make. This is from the complaint:

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

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

Third, if a regulator threatened or instituted an antitrust challenge, Kroger committed to take “any and all actions” necessary to “eliminate each and every impediment under any Antitrust Law” to closing the Merger....

There was only one caveat to Kroger's "best efforts" and "any and all actions" obligations: those commitments did not require Kroger to divest more than 650 physical stores.

So the claim here is that Kroger's "best efforts" to avoid antitrust impediments should be interpreted to include conduct that goes a step *beyond* its ordinary "reasonable best efforts" to satisfy closing conditions.

Is that plausible? Presumably, Kroger argues something like, are you seriously asking a court to hold that "best efforts" is not implicitly modified by some degree of reasonableness? What, you think the default presumption should be that we agreed to *unreasonable* efforts? Doesn't it make more sense to presume parties agree to *reasonableness*, and then, if you want to hold someone to a standard of *unreasonableness*, it has to be written right there in the contract? *Cf. Alliance Data Sys. v. Blackstone Capital Partners V LP*, 963 A.2d 746 (Del. Ch. 2009) ("'Best efforts' is implicitly qualified by a reasonableness test—it cannot mean everything possible under the sun.").

For that reason, Steve Bainbridge argues that Albertsons has the weaker argument, because Delaware historically has treated all "best efforts" clauses as generally similar. Which is no doubt true. For example, here is VC Laster's opinion in *Akorn v. Fresenius Kabi AG*:

Deal practitioners have a general sense of a hierarchy of efforts clauses. The ABA Committee on Mergers and Acquisitions has ascribed the following meanings to commonly used standards:

- Best efforts: the highest standard, requiring a party to do essentially everything in its power to fulfill its obligation (for example, by expending significant amounts or management time to obtain consents).
- Reasonable best efforts: somewhat lesser standard, but still may require substantial efforts from a party.
- Reasonable efforts: still weaker standard, not requiring any action beyond what is typical under the circumstances.
- Commercially reasonable efforts: not requiring a party to take any action that would be commercially detrimental, including the expenditure of material unanticipated amounts or management time.
- Good faith efforts: the lowest standard, which requires honesty in fact and the observance of reasonable commercial standards of fair dealing. Good faith efforts are implied as a matter of law.

...

Commentators who have surveyed the case law find little support for the distinctions that transactional lawyers draw. Consistent with this view, in *Williams Companies v. Energy Transfer Equity, L.P.*, the Delaware Supreme Court interpreted a transaction agreement that used both “commercially reasonable efforts” and “reasonable best efforts.” Referring to both provisions, the high court stated that “covenants like the ones involved here impose obligations to take all reasonable steps to solve problems and consummate the transaction.”

Now, that strikes me as possibly simplifying matters for a judge, but also kinda out of step with Delaware’s recent (repeated) insistence that it is an exceptionally contractual jurisdiction. See, e.g. *New Enterprise Associates 14 LP v. Rich*, 295 A.3d 520 (Del. Ch. 2023). If deal planners claim that they understand these terms to have different meanings to the point where *ABA Guidance to lawyers says the terms have different meanings*, why would the Delaware judiciary reform the contract to strip those nuances away?

Yet again, if deal planners *contract in the shadow* of cases like *Akorn*, can’t we assume they *do* know that Delaware courts flatten the distinctions among terms, and therefore we should assume *that’s* the intent?

Maybe that’s even what’s most efficient; after all, we also know that contractual terms are not drafted from scratch; attorneys may cut and paste from different models, and god knows even sophisticated players can make rookie mistakes after things go back and forth a few times in blackline, so maybe Delaware courts are doing everyone a *favor* by presuming all best efforts clauses are roughly the same, unless someone actually goes out and writes “no this time we really *really* mean the standard is unreasonableness.”

Except maybe that actually did happen here? Take a look at the language of the merger agreement. As Albertsons pleads in the complaint, there are two different provisions: “reasonable best efforts” to close, and “best efforts” with respect to antitrust. This is what they look like:

Section 6.3 Regulatory Matters

Subject to the terms and conditions of this Agreement (**including any differing standard set forth herein with respect to any covenant or obligation, including, with respect to Antitrust Law, as provided below**), the Company, on the one hand, and each of Parent and Merger Sub, on the other hand, will cooperate with the Other Party and use (and will cause their respective Subsidiaries to use) its **reasonable best efforts** to (i) take or cause to be taken all actions, and do or cause to be done all things, necessary, proper or advisable to cause the conditions to the Closing to be satisfied as promptly as reasonably practicable and to consummate and make effective, as promptly as reasonably practicable, the Merger, **including taking actions necessary to avoid, eliminate, and resolve any and all impediments under any Antitrust Law with respect to the Transactions**, including without limitation preparing and filing promptly and fully all documentation to effect all necessary filings, notifications, notices, petitions, statements, registrations, submissions of information, applications and other documents (including filing any Notification and Report Form required pursuant to the HSR Act within fifteen (15) Business Days following the execution of this Agreement), (ii) obtain promptly all Consents, clearances, expirations or terminations of waiting periods, registrations, authorizations and other confirmations from any Governmental Entity or third party necessary, proper or advisable to consummate the Merger and (iii) defend, contest and resist any Proceedings, whether judicial or administrative, challenging this Agreement or the consummation of the Merger.

Without limiting the generality of the obligations of Parent and Merger Sub pursuant to this Section 6.3, Parent agrees to, and will cause its Affiliates to, **use best efforts, to take, or to cause to be taken**, any and all actions necessary to avoid, eliminate, and resolve any and all impediments under any Antitrust Law with respect to the Transactions...

In addition if any Proceeding is instituted (or threatened) challenging the Merger as violating any Antitrust Law or if any decree, order, judgment, or injunction (whether temporary, preliminary, or permanent) is entered, enforced, or attempted to be entered or enforced by any Governmental Entity that would make the Merger illegal or otherwise delay or prohibit the consummation of the Merger, Parent and its Affiliates and Subsidiaries **shall take any and all actions** (i) to contest and defend any such Proceeding to avoid entry of, or to have vacated, lifted, reversed, repealed, rescinded, or terminated, any decree, order, judgment, or injunction (whether temporary, preliminary, or permanent) that prohibits, prevents, or restricts consummation of the Transactions and (ii) **to eliminate each and every impediment under any Antitrust Law to close the Transactions prior to the Outside Date**.

(emphasis added)

I mean, I'll let the parties do their own briefing but my preliminary read of the contract seems to explicitly contemplate different standards for closing in general, versus antitrust in particular. That's what it says right there in the beginning.

And another thing: Final Shareholder Primacy podcast of 2024 is up! Mike Levin and I talk about what happened in 2024, and what's coming in 2025. Here at Apple; here at Spotify; and here at Youtube.

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jesse

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It's because the woke left stopped holding parties so they could socially distance

*it's because a private equity company bought it then locked it into a supply contract with a vendor the PE company also owned, meaning party city couldn't actually bargain the cost of 80% of its products

 **Unusual Whales** @unusualwhales.bsky.social · 1h

BREAKING: Party City is closing all of its stores, and corporate employees were told today is their last day of employment

December 20, 2024 at 10:51 AM  Everybody can reply

25 reposts 63 likes



4



25



63



...



Write your reply



Jesse Berney @jesseberney.com · 14m

It's crazy that we just let private equity continue to exist



2



6

...



jesse @jesseltaylor.bsky.social · 12m

sorry innovation is still legal



3

...



Melanie Butler @threebutlers.bsky.social · 17s

Sounds similar to the Red Lobster shrimp supplier situation.



...



Nancy Ann @nancyannn.bsky.social · 2m

Vulture capitalists, destroy another company. Rinse and repeat.



...

Input Sought to Rewrite Intangibles Accounting Rules for AI Era

By Amanda Iacone

- FASB seeks input as it weighs updates to intangible accounting
- Valuable assets like patents often missing from balance sheets

The US accounting standard-setter is seeking input on whether to modernize its decades-old rules for recording intangible assets like trademarks or patents that are frequently missing from corporate balance sheets.

The Financial Accounting Standards Board on Thursday issued an invitation to comment on a possible overhaul of intangibles rules, which were written for a manufacturing-based economy, not the artificial intelligence era. Updated accounting rules could shrink a yawning gap between corporate book and market values that has evolved because now-lucrative intangible assets must often be booked as a hit against income.

Among its questions, the board asked stakeholders as part of ongoing research whether it should align accounting for intangible assets that companies develop internally, like their workforce or trade names, with assets they acquire through a business merger or deal.

Intellectual property-heavy firms in the tech and pharmaceutical industries don't record core assets that drive revenues and cash flows unless they acquire them. Instead, those assets are reflected on the income statement in the form of expenses, from salaries to research and development costs.

That can create challenges for investors trying to compare companies that develop in-house intangibles with those that acquire them.

Separate standards cover how to recognize and measure intangible assets, in addition to industry specific guidance for oil and gas costs or film production costs. The board asked stakeholders whether it should develop a single model or target specific subsets of intangibles.

The board also sought input on which intangibles it should consider including in any project, whether problems accounting for such assets justify any rule changes, and how investors use information about the asset class in their analysis.

Challenges with intangible asset accounting standards aren't unique to the US market. In April, the International Accounting Standards Board launched a research project to consider what changes to adopt to address reporting gaps.

Comments are due to the board by May 30, 2025.

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Fraud Case Tied to \$100 Million NJ Deli Ends in Guilty Pleas (1)

By Chris Dolmetsch

- Father, son admit to stock manipulation scam in SPAC merger
- Son's lawyer says he has already spent 65 days in Thai prison

The last two defendants charged with scheming to inflate the value of a small New Jersey deli to more than \$100 million pleaded guilty to fraud charges, a year after the ringleader of the plot confessed.

Peter Coker Sr. and his son Peter Coker Jr. entered their pleas to securities fraud and conspiracy to commit securities fraud on Thursday before a federal judge in Camden, New Jersey, prosecutors said in a statement. They face as long as 20 years in prison and a \$5 million fine at sentencing next year.

"Your Hometown Deli" in Paulsboro, New Jersey, became infamous on Wall Street when David Einhorn of Greenlight Capital highlighted the business in an April 2021 letter to investors as an example of irrational exuberance in the market. Einhorn noted that the deli barely had sales of \$20,000 in 2019 and even less in 2020 despite reaching a nine-figure valuation in its SPAC merger with a bioplastics startup.

"The pastrami must be amazing," Einhorn observed.

The younger Coker is "happy that he is now going to be able to move forward to sentencing," said his attorney, John Azzarello.

Coker Jr., who was arrested as a fugitive in Thailand at the request of US authorities in January 2023, has already served two years in the Essex County Jail "under some really rough conditions and at least 65 days in a Thailand prison," Azzarello said. "He's very much looking forward to being sentenced and moving forward and moving on with his life."

Peter Intrater, a lawyer for Peter Coker Sr., declined to comment.

Read More: Head of \$100 Million NJ Deli Scheme Pleads Guilty to Fraud

The leader of the scheme, James T. Patten of Winston-Salem, North Carolina, pleaded guilty in December 2023, saying he worked with the Cokers to manipulate the stock prices of Hometown International Inc. and another company through coordinated trading that created the false impression that there was real supply and demand for the shares.

According to prosecutors and a parallel suit filed by the Securities and Exchange Commission, Patten helped start the deli in October 2015 but soon began conspiring with the Cokers to create a public company that would serve as a reverse-merger vehicle. Hometown merged in March 2022 with Makamer Holdings, selling the deli's inventory for \$700 and the store itself for \$15,000.

The government also alleged they used the same method drive up the shares of another company, E-Waste Corp.

Patten faces as much as 20 years in prison at his sentencing next month. Coker Jr., 56, is scheduled to learn his punishment on April 2, while Coker Sr., 82, of Chapel Hill, North Carolina, will be sentenced on May 13.

The case is US v. Patten, 22-cr-643, US District Court, District of New Jersey.

(Updates with comments from defense attorney starting in fifth paragraph.)

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<https://www.wsj.com/finance/stocks/stock-market-trading-apps-addiction-afecb07a>

More Men Are Addicted to the 'Crack Cocaine' of the Stock Market

Gamblers Anonymous meetings are filling up with people hooked on trading and betting. Apps make it as easy as ordering takeout.

By [Gunjan Banerji](#) [Follow](#)

Updated Dec. 20, 2024 12:01 am ET

A new type of addict is showing up at Gamblers Anonymous meetings across the country: investors hooked on the market's riskiest trades.

At Gamblers Anonymous in the Murray Hill neighborhood of Manhattan, one man called options "the crack cocaine" of the stock market. Another said he faced hundreds of thousands of dollars in trading losses after borrowing from a loan shark to double down on stocks. And one young man brought his mom and girlfriend to celebrate one year since his last bet.

They were among a group of about 60 people, almost all men, who sat in rows of metal folding chairs in a crowded church basement that evening. Some shared their struggle with addiction—not on sports apps or at Las Vegas casinos—but using brokerage apps like Robinhood.

Many of the men, and scores of others around the country, discovered trading and betting during the pandemic boom that began in 2020. Some were drawn in by big wins in meme stocks and other viral stock sensations, leading them into even higher-octane wagers that offer the chance to put up a small amount of cash for a potentially mammoth return—or more often, a crushing loss.

Others bought and sold cryptocurrencies on apps that make trading as easy as ordering takeout on Uber Eats or toiletries on Amazon. In an age where sports betting has become an accepted pastime—accessible by the flick of the thumb on an iPhone app—they found the same rush betting on dogecoin, Tesla or Nvidia as

wagering on Patrick Mahomes to carry the Kansas City Chiefs to the Super Bowl.

Doctors and counselors say they are seeing more cases of compulsive gambling in financial markets, or an uncontrollable urge to bet. They expect the problem to worsen. The stock market has climbed 23% this year and bitcoin recently topped \$100,000 for the first time, tempting many people to pile into speculative trades. Wall Street keeps introducing newer and riskier ways to play the market through stock options or complex exchange-traded products that use borrowed money and compound the risk for investors.

Some who are desperate to stop trading are turning to self-help groups like Gamblers Anonymous. A GA pamphlet advises members to stay away from bets on stocks, commodities and options as well as raffle tickets and office sports pools. Sometimes members hand over retirement accounts to their spouses.

Modeled after Alcoholics Anonymous, GA dates back to 1957 and now has hundreds of chapters in every U.S. state. Attendees at local GA meetings from Ponca City, Okla., to Allentown, Pa., subscribe to a 12-step program. It begins with accepting that they are powerless over gambling and can include a financial review in a so-called pressure relief group meeting. New attendees are peppered with calls from others and latch onto veteran members who commit to helping them stay on track.

'Hi, my name is Mitch'

More than 30 people interviewed by The Wall Street Journal, many of whom regularly attend GA meetings, said they've struggled with compulsive gambling in financial markets. At times, the trading led to mood swings, sleepless nights and even depression. Their trades—and spiraling losses—became a shameful secret that they kept from their partners or other loved ones.

I asked Gamblers Anonymous for permission to attend some meetings. Attendees introduced me to the groups at the start of the meetings, and I observed the discussions. Members introduced themselves by their first names, according to GA practices.

“Hi, my name is Mitch, and I’m a compulsive gambler,” one said at a GA meeting this month near Ozone Park, N.Y. “Hi Mitch,” the group responded in unison.

The suburban dad of three, slightly balding with a big smile, stood in front of more than a dozen members in a church basement. He is haunted by the rising price of bitcoin—and the riches that could have been his, he said. Up around 40% since Election Day, bitcoin prices are on a wild ride.

What would have happened, he wondered out loud, if he had just left his bitcoin in a digital wallet and handed it over to his wife?

Then he reminded himself and the group that he was never able to just buy and hold. “I needed more and more,” Mitch told the group. “I’m a sick, compulsive gambler. That’s why I keep making these

Gamblers Anonymous brochures. PHOTO: SARAH BLESENER FOR WSJ

meetings. I don’t trust myself.”

One attendee told him to stop eyeing cryptocurrency prices. Another reminded him of the toll trading had taken on his family and asked: “What’s more important, crypto or your kids?”

The entrepreneur, based in Long Island, N.Y., said cryptocurrencies caught his eye when he was in his late 40s and had gone more than 20 years since placing his last bet. He had sworn off gambling after a penchant for bold bets had led him to Gamblers Anonymous meetings in his early 20s.

He invested \$100 in bitcoin and watched it soar. He poured thousands of dollars into ether and smaller, more speculative coins. Something kept him from sharing

with his GA group that he was trading.

When his portfolio rose above \$1 million, he thought to himself, “That’s four Lambos.” He flew to Florida to look at potential vacation homes for his family near Walt Disney World.

Within months, he found himself in a familiar cycle. The rush of adrenaline he got when he bought and sold tokens pushed him to trade more frequently—to the point where he was trading hundreds of times a day—and taking bigger risks. He would wake at 4 a.m. to monitor his portfolio.

He parked his car in the lot of a Long Island shopping plaza near his home to trade in isolation. His neck grew tense from hunching over the screen.

When crypto prices started tumbling, snowballing losses left him sullen. “Sometimes I would get a passing thought as I went to bed: I hope I don’t wake up in the morning,” he said. His portfolio had fallen around \$1 million from its peak.

Desperate for a way out, he typed “crypto gambling treatment center” into Google. He confessed to his GA mentors that he had been gambling.

A spiking problem

Pennsylvania’s gambling hotline has fielded more calls tied to gambling in stocks and crypto since 2021 than it did in the prior six years combined. At a New York-based treatment center, Safe Foundation, clinical director Jessica Steinmetz estimates about 10% of patients are seeking help for addictions tied to trading. Before 2020, there were no such patients.

Lyndon Aguiar, a clinical director at Williamsville Wellness, a gambling treatment center in Hanover, Va., said counselors sit down with traders and delete dozens of stock, sports and financial news apps from their phones when they walk in the doors for its inpatient treatment program. The center has seen a 25% increase in gambling tied to markets since 2020, compared with the prior four years.

Patients might install Gamban, an app that locks individuals out of gambling on their phones. The app started blocking Robinhood and Webull in July 2021.

A Robinhood spokesperson said it includes “robust safeguards to help customers make informed decisions” and that individuals deserve the freedom to become stewards of their own finances. A spokesperson for Webull said the platform offers educational tools to foster responsible investment decisions.

Prices of options trades listed on the Robinhood app. PHOTO: SARAH BLESENER FOR WSJ

New patients often suffer from withdrawal symptoms including severe anxiety and depression when they first stop trading, he said. Some start fidgeting or repeatedly tapping their fingers against a table, itching to place a trade.

Abdullah Mahmood, administrative coordinator of a gambling program at the Maryhaven addiction treatment center in Columbus, Ohio, said he has seen several clients enter the treatment center’s doors this year for trading addictions. Options are particularly problematic, he said.

Activity in options is on track to smash another record this year. Trading in contracts expiring the same day, which are the riskiest, has soared to make up more than half of all trades in the market for S&P 500 index options this year, according to figures from SpotGamma. These trades are more electric than traditional stocks, with the potential to rocket higher or plunge to zero within minutes.

Similar to wagering on how many points Mavericks point guard Luka Dončić will score in the first quarter of an NBA game, traders are increasingly using options to speculate how stocks will fare during the trading session, rather than at the closing bell.

This year, “a client came down to my office, suicidal,” Mahmood said. “He had lost \$14,000 in just five minutes in options trading on the app Robinhood.”

The rise of apps

Doug Royer, 61, has been attending Mahmood’s group counseling sessions every Monday.

He initially entered the center’s doors for help with his drinking. Then, he saw signs for a gambling program while walking the halls of Maryhaven’s treatment center. Immediately, the six figures he lost trading came to mind.

After selling his house in 2022, he had poured thousands of dollars into investments like the Grayscale Bitcoin Trust, Lockheed Martin and Texas Pacific Land before amping up the risk with options trading. He traded in and out of

companies such as Spirit Airlines and Estée Lauder, while borrowing on margin in an attempt to magnify his bets, brokerage statements show.

Eventually, he said he had almost no money left to trade with after losses in options and lotteries. He said he has been working part-time as a massage therapist near Columbus, Ohio.

“It’s very easy to make a lot of money,” Royer said. “It’s also easy to lose everything really fast.”

Addiction counselors say gambling in financial markets often goes undetected and can be tough to track because individuals confuse their actions with investing. Unlike sports betting apps such as FanDuel and DraftKings, most brokerage apps don’t post warnings about gambling or offer hotlines to seek help.

The proliferation of financial instruments, along with flashy brokerage apps that make them easy to trade, has also helped some gamblers convince themselves that they weren’t actually placing bets.

The National Council on Problem Gambling started including questions about investing in its annual survey in 2021, after its gambling hotline received an influx of calls during the meme-stock mania. The council’s executive director, Keith Whyte, said NCPG reached out to apps like Robinhood to suggest they adopt consumer protections ingrained in gambling apps.

“In some cases, the consumer protections in the gambling industry exceed that in the financial markets,” Whyte said.

Like the anticipation of sex or delicious food, a financial gamble like an options trade can flood your brain with feel-good chemicals, said Brian Knutson, a professor of psychology and neuroscience at Stanford University. The bigger the financial payout or tastier the dish, the stronger the rush. That anticipation can keep a trader going back to place another bet, forming a reinforcing habit, added Knutson, who has studied risk-taking in financial markets for more than two decades.

“It’s not just the release, per se, of the dopamine, but the speed of the release that’s reinforcing,” Knutson said.

An ultimatum

Chris Cachia, a 38-year-old power-plant technician in Ontario, Canada, got swept up with trading during the meme-stock mania in 2021. After turning around 7,000 Canadian dollars into roughly 50,000 trading stocks like GameStop and BlackBerry, he found short-dated stock options when he went hunting for fatter profits.

He scored some early wins. Before long, the thousands he made evaporated and his account sank into a deep hole. Yet he said he couldn’t walk away—he was consumed by a fear of missing out on the riches that others boasted about online.

One week while his wife was traveling, he holed up in his home office for days trading. He grew desperate for a win and bet more money than he had in his

brokerage account. It didn't work out.

The subsequent loss left him so depressed that he skipped his brother's bachelor party.

Advertisements in Pennsylvania for online betting apps. PHOTO: STEPHANIE STRASBURG FOR WSJ

"It was causing erratic changes in my behavior as I got deeper and deeper in," Cachia said. "I was basically a full-out gambling addict."

He said he tried to quit countless times since his trading ramped up during the pandemic, deleting brokerage and social-media apps from his phone, only to quickly download them again.

He wasn't able to pull away until his wife threatened to leave him. "She gave me an ultimatum: You need to stop this, or I'm done," Cachia said.

Write to Gunjan Banerji at gunjan.banerji@wsj.com

—*Jim Oberman and Elisa Cho contributed to this article.*

We Want to Hear From You

What has been your experience (or a family member's experience) using online brokerage apps? *



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'Hawk Tuah' Memecoin Promoters Sued Over Crypto Flop

By **Aislinn Keely**

Law360 (December 19, 2024, 9:09 PM EST) -- Buyers of the viral "Hawk Tuah" meme-themed cryptocurrency sued the project's promoters and developers in New York federal court Thursday for failing to register the asset as a security while they "created a speculative frenzy" that led holders to lose thousands of dollars.

A group of nearly 20 crypto buyers claim they collectively lost \$151,000 on \$HAWK, a memecoin themed around the viral video moment that launched the social media career of "Hawk Tuah Girl" Haliey Welch, who is not named as a defendant. The buyers claim the project's promoters Alex Larson Schultz and Clinton So, along with So's development platform overHere and an entity called the Tuah the Moon Foundation, used Welch's notoriety to sell the asset as an unregistered security.

"The pre-launch marketing for \$HAWK framed the token as more than a speculative asset, portraying it as a cultural movement with significant growth potential," says the complaint. "Welch's involvement and her reputation as a trusted public figure signaled to her followers and potential investors that the project was poised for success, fostering an expectation of profits based on her efforts."

\$HAWK is a so-called memecoin, which are tokens tied to cultural references and online communities and are historically easy to create, according to the complaint.

Welch rose to social media fame this summer after she coined the now-viral phrase, which is an onomatopoeia and refers to a sex act, during a street interview in Nashville, Tennessee, that was broadcast on YouTube. The moment amassed Welch millions of followers online and led to an array of deals, including the launch of her podcast, "Talk Tuah with Haliey Welch."

The complaint alleges that Welch also went on to announce the planned token to her followers and that the defendants used her celebrity to not only build hype around the project and as a tool for community engagement but also to stoke excitement with a presale campaign.

Upon launch, the token's market value surged to \$491 million, but within hours it suffered a precipitous 90% drop, leaving many investors holding tokens "that had lost substantial value," said the complaint.

"Investors were drawn to the project by the \$HAWK's marketing materials, which emphasized its long-term vision and Welch's direct association with its success," they said.

Larson and So spoke on social media site X about what led to the crash and detailed certain efforts to structure the project to skirt U.S. securities laws, like setting up the Tuah the Moon Foundation as an offshore entity, according to the complaint.

But the pair marketed the project to Americans and there was "no serious attempt was made to restrict purchasers to non-American purchasers," the buyers argued. The project pooled investor funds and used them to further fund the development of the project, they said.

"The reliance on Welch's celebrity status, promotional reach, and the project team's technical capabilities established a clear link between the fortunes of investors and the efforts of the token's promoters," said the complaint.

The buyers are requesting damages, including the \$151,000 they say they lost, as well as disgorgement.

So's platform overHere posted to social media site X on Monday that the firm "trusted wrong partners" and "should've spoken up sooner" during the \$HAWK controversy, and said Larson's team was in charge of treasury decisions that have been scrutinized online.

Larson and So could not be reached for comment Thursday.

In a joint statement to Law360, the plaintiffs' counsel at Wolf Popper LLP and Burwick Law said the Hawk Tuah case "underscores a troubling pattern in the crypto space: the targeted exploitation of celebrity and public figures' names to generate profit, often at the expense of everyday people."

"Our goal is to pursue justice and uncover the truth for our clients by holding accountable those responsible for creating and promoting these schemes," said the firms. "We aim to recover the money they lost while promoting transparency and accountability in the crypto market to protect investors from future harm."

The buyers are represented by Chet B. Waldman, Matthew Insley-Pruitt and Terrence Zhang of Wolf Popper LLP and Max Burwick of Burwick Law PLLC.

Counsel information for the defendants was not immediately available Thursday.

The case is Albouni et al. v. Schultz et al., case number 1:24-cv-08650, in the U.S. District Court for the Eastern District of New York.

--Editing by Michael Watanabe.



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Biotech Co. Hid Eye Drug's Safety Risks, Investor Says

By **Elliot Weld**

Law360 (December 19, 2024, 7:54 PM EST) -- A biotech company concealed the potential risks that emerged during clinical trials of a drug meant to treat age-related vision degradation, according to an investor complaint filed in Massachusetts federal court Thursday.

Patrick Campbell said in his **investor derivative suit** that Apellis Pharmaceuticals Inc. and its board of directors had made unfounded reassurances about the drug Syfovre, only for the company's stock price to tumble once a report revealed experts' concerns with it.

Syfovre, a "pegcetacoplan injection for treating geographic atrophy due to age-related macular degeneration," entered two studies called Oaks and Derby, according to the suit.

"Even with potential FDA approval, the patient risk/benefit assessment was especially significant for investors, as pegcetacoplan had not shown an ability to improve eyesight in [age-related macular degeneration] patients," the suit read. "Instead, the data indicated only a possible benefit in slowing the progression of vision loss caused by the disease."

According to the suit, a Sept. 2021 report by Credit Suisse found that the potential benefits of the drug were "at the low end of what physicians we spoke to highlighted as meaningful." Other treatments administered with eye injections had been associated with inflammation and side effects including vision loss, the suit read, meaning that elderly patients might want to avoid using Syfovre.

As results began to come in from the Oaks and Derby studies, Campbell said Apellis and its board publicly said there were no cases of vasculitis or occlusive vasculitis shown, side effects that had been considered serious in similar treatments.

Despite knowing this, Apellis did not implement a clear protocol to detect retinal vasculitis, and only performed an angiography on a participant at least 30 days after either the study's end or if the participant dropped out, the suit stated. The dropout rate in the treatment arms of the studies were higher than those in the arm of participants who did not receive pegcetacoplan, suggesting participants might have been leaving due to adverse side effects, the suit read.

On July 15, 2023, the American Society of Retina Specialists issued a letter saying they had "serious concerns" about Syfovre, with a report from doctors about six cases of occlusive retinal vasculitis, which the suit described as "a form of inflammation that obstructs blood flow to the retina, potentially leading to blindness."

In the following days, Apellis' stock price dropped by about 38%, according to the suit. On July 17, 2023, Apellis released a statement saying that, of those six cases, two were confirmed as occlusive, one was not occlusive and three were undetermined. Apellis' stock price fell an additional 24% by the time markets closed the following day, the suit said.

A securities fraud class action was filed against Apellis in August 2023 as a result of the clinical studies. The parties in that case held oral arguments on a motion to dismiss on Nov. 14, but U.S. District Judge Julia Kobick has not yet ruled on the motion.

Counsel for Campbell did not immediately respond to requests for comment, nor did a representative for Apellis.

Campbell is represented by Mitchell Matorin of Matorin Law Office LLC and Justin Kuehn of Kuehn Law.

Counsel information was not immediately available for Apellis or the board.

The case is Patrick Campbell v. Cedric Francois et al., case number 1:24-cv-13128, in the U.S. District Court for the District of Massachusetts.

--Editing by Dave Trumbore.

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Mining Co. Wants Out Of Investor Suit Over Turkey Landslide

By **Sydney Price**

Law360 (December 19, 2024, 8:06 PM EST) -- Colorado-based SSR Mining Inc. has asked a federal judge to drop a shareholder lawsuit alleging the company understated the likelihood of a deadly February landslide at its Turkish mine, arguing that the company sufficiently warned the public of potential catastrophes and that its executives had no knowledge of deficiencies at the mine.

The **investor's suit**, filed in March, alleges SSR Mining's share prices fell after the disaster occurred at the company's mine in Copler, Turkey, earlier this year. In February, the company announced it was suspending operations at the mine after a "large slip" on a mining structure. In the days following the incident, which was reported to be a landslide, news outlets said that several miners were missing and that the Turkish government had arrested some of SSR Mining's employees.

The Turkish government launched an investigation into the incident shortly after it occurred, and the Union of Chambers of Turkish Engineers and Architects filed lawsuits against the company, according to the suit.

However, SSR Mining said in a motion to dismiss the investor's suit filed Tuesday that the company repeatedly warned investors about the "serious risks" associated with mining. SSR Mining claims it specifically told its investors that it could "experience landslides, workers could be harmed and previously obtained permits could be revoked" in its financial filings, the motion states.

SSR Mining's executive chairman and former CEO Rodney P. Antal and former Chief Financial Officer Alison White, who departed the company in March, are also defendants in the suit.

SSR Mining argues that even though an investigation by the Turkish government concluded that warning systems at the Copler mine did not operate to prevent the individual deaths that occurred in the landslide, the government's report does not address the accuracy of SSR Mining's public disclosures at the time they were made.

"There is no finding that the individual defendants were involved in, or responsible for, the Copler incident, or had any warning that the landslide might occur," SSR Mining said.

The class period begins Feb. 23, 2022, nearly two years before the incident at the Copler mine and the day after SSR Mining filed its 2021 annual report with the U.S. Securities and Exchange Commission. In the filing, SSR Mining stated that it had a "robust commitment" to health and safety and that it maintained safe working environments for employees. Those statements, and similar statements made throughout the class period, were false and misleading since they understated regulatory risks the company faced as a result of its "unsafe business practices," the complaint alleges.

Although several of its employees face charges, SSR Mining claims that the suit does not and cannot allege any of the defendants received information concerning the mine's safety and monitoring systems. The suit's assertion that the defendants were "in a position to know" contradictory information is merely speculation, SSR Mining says.

"The report focuses primarily on lower-level employees of SSR's Turkish affiliate, as well as third-party contractors and engineering firms who worked on Copler," the motion states. "None of these individuals or entities are alleged to have had any contact or communication with the individual

defendants."

The proposed class is represented by Phillip Kim of The Rosen Law Firm PA.

SSR Mining and the individual defendants are represented by Lyle Roberts of Allen Overy Shearman Sterling LLP.

The case is Akhras v. SSR Mining Inc. et al., case number 1:24-cv-00739, in the U.S. District Court for the District of Colorado.

--Editing by Jay Jackson Jr.

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Medical Device Investors Get Final OK On \$15M Deal

By **Katryna Perera**

Law360 (December 19, 2024, 7:03 PM EST) -- A North Carolina federal judge has given final approval to a \$15.25 million settlement that will resolve a suit claiming Bioventus Inc. misled investors about its internal controls and financial health and its readiness to implement new Medicare regulations, leading to inflated stock prices, along with \$5 million in attorney fees.

U.S. District Judge Catherine C. Eagles issued an **opinion and order** on Wednesday saying that based on the lack of objections to the deal and other factors, the court finds the settlement fair and reasonable.

She also awarded \$5 million in attorney fees and roughly \$623,000 in litigation expenses to class counsel from Bleichmar Fonti & Auld LLP, saying the case required the attorneys to "understand technical details of healthcare benefits and analyze an extensive and complex record."

Additionally, the judge awarded lead plaintiff, the Wayne County Employees' Retirement System, a nearly \$12,000 service award.

Investors initially filed suit in January 2023, alleging that Bioventus misled investors about the impact of the rebates it was required to pay to third-party insurers, which resulted in \$12.4 million in inflated revenue that did not exist.

The complaint also alleged that the medical device company falsely assured investors that it was "fully prepared for the implementation of new Medicare regulations in 2022 that reduced pricing and reimbursement on Bioventus's key products," according to the court filings.

The certified class includes all individuals and entities that purchased or acquired Bioventus Class A common stock between Feb. 11, 2021, and Nov. 21, 2022.

The case is Ciarciello v. Bioventus Inc. et al., case number 1:23-cv-00032, in the U.S. District Court for the Middle District of North Carolina.

--Editing by Nicole Bleier.

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Del. Justices Affirm Toss Of Co.'s Suit Against Gusrae Kaplan

By **Rose Krebs**

Law360 (December 19, 2024, 9:57 AM EST) -- Delaware's Supreme Court has affirmed a trial court's dismissal of an Applied Energetics Inc. suit accusing Gusrae Kaplan Nusbaum PLLC and a former partner of launching a frivolous securities fraud suit in order to hobble other litigation against the laser weapons maker's former CEO.

In a brief order Wednesday, a three-justice panel upheld a Superior Court ruling from April that tossed Applied Energetics' suit for jurisdictional reasons, saying it was evident given the record and oral argument this month that the decision should be affirmed.

In his April decision, Superior Court Judge Eric M. Davis ruled that Applied Energetics "failed to identify sufficient Delaware contacts to establish personal jurisdiction over defendants" when dismissing the lawsuit.

Applied Energetics had **argued** in a July filing to the state Supreme Court that Judge Davis wrongly ruled that Delaware had no personal jurisdiction in the matter. But in August, Gusrae Kaplan and former partner Ryan Whalen **accused** Applied Energetics of making "fanciful" arguments in its appeal. They argued Judge Davis was correct in tossing the suit and said the company had not "established specific jurisdiction" for its malicious prosecution claim against them.

Applied Energetics filed the Superior Court complaint in July 2023, accusing Gusrae Kaplan and Whalen of filing a "frivolous" federal securities fraud suit in New York, intending to hinder Delaware Chancery Court litigation against George Farley, the company's former CEO. Whalen, who left Gusrae Kaplan in October 2021, is now general counsel at global investment bank D. Boral Capital LLC, formerly EF Hutton LLC, according to his LinkedIn profile.

The law firm and Whalen had represented Farley in Chancery Court litigation, including a 2018 breach of fiduciary suit filed by Applied Energetics, according to Judge Davis' April decision. Applied Energetics had accused Farley of wrongfully awarding himself 25 million company shares.

In its 2019 suit filed in New York federal court, the firm alleged Applied Energetics committed securities fraud, claiming the company's attorney sent a letter to Gusrae Kaplan demanding that the firm return shares of Applied Energetics stock issued to it via an agreement negotiated with Farley.

In the Superior Court suit, Applied Energetics accused Gusrae Kaplan of using the New York litigation to deliberately depress the price of Applied Energetics' publicly traded stock and create a conflict between the company and its counsel in the Farley litigation, Stein Riso Mantel McDonough LLP, now Mantel McDonough Riso, named as co-defendant in the securities fraud action.

But Judge Davis rejected Applied Energetics' argument that "jurisdiction exists over" Gusrae Kaplan and Whalen, tossing aside the company's claim that their pro hac vice appearances in the Chancery Court litigation subjected them to the court's jurisdiction.

Applied Energetics settled its 2018 Chancery action against Farley and others in 2020, and Gusrae Kaplan voluntarily dismissed its New York federal action in 2021, according to Judge Davis' ruling.

Chief Justice Collins J. Seitz Jr. and Justices Gary F. Traynor and Abigail M. LeGrow sat on the panel for the Supreme Court.

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

Gusrae Kaplan and Whalen are represented by Robert J. Katzenstein, Robert K. Beste and Lauren A. Ferguson of Smith Katzenstein & Jenkins LLP.

Applied Energetics is represented by Theodore A. Kittila, James G. McMillan III and William E. Green Jr. of Halloran Farkas & Kittila LLP.

The case is Applied Energetics Inc. v. Gusrae Kaplan Nusbaum PLLC and Ryan Whalen, case number 178,2024, in the Supreme Court of the State of Delaware.

--Additional reporting by Tracey Read. Editing by Robert Rudinger.

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Philips CPAP Suits Against SoClean Tossed From MDLs

By **Mike Curley**

Law360 (December 19, 2024, 2:53 PM EST) -- A Pennsylvania federal judge has tossed two complaints from Philips RS North America against SoClean Inc. from multidistrict litigation stemming from a CPAP machine recall, saying one would disrupt the wrap-up of the MDL surrounding Philips' products, while the other should not have been filed directly into the SoClean MDL.

In a **memorandum opinion** filed Wednesday, Senior U.S. District Judge Joy Flowers Conti ordered that a third-party complaint in which Philips is seeking contribution from SoClean for a number of settlements be severed, noting that while Philips did not technically violate court rules by filing the complaint, filing it at this late stage is disruptive to the proceedings, which look to be resolved early next year.

Judge Conti wrote that Philips did not need to seek leave of the court to file the **third-party complaint** in the Philips MDL, and technically it was not filed too late, as while such a complaint must be filed within 14 days of the company's answer to be filed without leave, it never filed an answer to the MDL's master complaints.

However, in this case, the third-party complaint was filed four months after the claims Philips seeks contribution for were settled and finally approved, which undermines the purpose of the court rule, which is to resolve underlying and third-party claims at the same time, according to the opinion.

Allowing the third-party complaint to continue under the Philips MDL would unnecessarily delay resolution of that MDL, the judge wrote, opting to sever the complaint while retaining the pending motions to dismiss and setting a briefing schedule for early next year.

The other complaint — a new proposed class action in which Philips seeks to represent all the customers whose breathing machines and attachments were allegedly damaged by SoClean's ozone-based cleaning products — should not have been filed in the SoClean MDL at all, the judge wrote, dismissing the case but allowing Philips to refile it and then seek to have it included in the MDL.

In that complaint, the company alleges that SoClean's products caused or worsened the breakdown of sound-insulating foam in the machines, triggering a massive recall and setting off the lawsuits that were consolidated into the MDLs.

In October, SoClean asked the MDL court to throw out Philips' proposed class action, arguing that after it settled with its own customers, Philips was really only representing its own interests in the new complaint.

Philips had reached a number of settlements over the breakdown of the sound-insulating foam in its breathing machines, including **\$1.1 billion** for customers who claim the foam particles and chemicals injured them, **\$25 million** for customers who demanded medical monitoring for any long-term health problems that may be attributable to the foam breakdown, and upward of **\$500 million** for customers who suffered economic losses when they had to replace their recalled devices.

As part of those settlements, the individual non-opt-out class member plaintiffs for the economic loss settlement assigned their claims to Philips, and those claims are the ones it is pursuing in its proposed class action against SoClean.

In Wednesday's memorandum, Judge Conti did not opine on the merits of Philips' suit or its standing to bring claims on behalf of the customers it settled with, saying instead that a new civil case must be filed under a new case number, and should not have been filed under the SoClean MDL's case number.

Should Philips refile the case, however, the judge advised that it consider whether it has a good faith basis to assert its claims as a class action on behalf of those customers and whether it is within that class and is an adequate representative.

The judge further noted that the court is not aware of any decision that allowed a defendant like Philips to receive assignments from plaintiffs as part of a class action settlement, while denying liability, and then attempt to act as class representative for those same plaintiffs against another party.

Attorneys for SoClean declined to comment Thursday.

Representatives for Philips could not immediately be reached for comment.

SoClean is represented by Michelle R. Gilboe and Ashley N. Rodgers of Lewis Brisbois Bisgaard & Smith LLP.

Philips is represented by Erik T. Koons of Baker Botts LLP and Andrew T. George of Bourelly George & Brodey.

The MDLs are In re: SoClean Inc., Marketing, Sales Practices and Products Liability Litigation, case number 2:22-mc-00152, and In re: Philips Recalled CPAP, Bi-Level PAP and Mechanical Ventilator Products Litigation, case number 2:21-mc-01230, in the U.S. District Court for the Western District of Pennsylvania.

--Additional reporting by Matthew Santoni. Editing by Patrick Reagan.



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Chemours, DuPont Say New Info Undermines Class Cert.

By **Mike Curley**

Law360 (December 19, 2024, 4:35 PM EST) -- The Chemours Co. FC LLC and EIDP Inc. are asking a North Carolina federal judge to decertify classes in a consolidated suit alleging that they knew about PFAS leaks into their water systems, saying information that's come to light since the certification disqualifies the named plaintiffs from representing the class and undermines the alleged common proof of their claims.

In a **motion** filed Wednesday, the companies argued that the three class representatives — Victoria Carey, Marie Burris and Brent Nix — are inadequate and atypical, as none have any evidence that they are entitled to replacement heaters, one of the primary claims of the class.

Testing of their properties since certification has shown that Carey, for instance, has no evidence that PFAS was contained in her water heater, pipes or tap water, and Nix and Burris have been unable to offer evidence that their water systems have been contaminated, according to the motion.

In addition, Nix moved out of the class area, while Carey lives in an area that draws its drinking water from sources that do not contain PFAS, so neither of them are eligible for the class's proposed relief, while Burris hasn't resided at her residence since 2015, and so can't establish any monetary loss, the companies argued.

The companies urged the court to reject the plaintiffs' argument that the case be allowed to proceed "headless," saying that the fate of the class claims is the same as the named plaintiffs' claims.

The consolidated lawsuit claims that DuPont and its spinoff business Chemours knew as early as the 1960s that per- and polyfluorinated alkyl compounds posed risks to human health. That only became clearer to them between 1970 and 2017, the years they operated the Fayetteville Works plant in North Carolina and discharged 17 different types of PFAS into the river, the lawsuit says.

The class was certified in **October 2023**, and in June, U.S. Magistrate Judge Robert T. Numbers II **chastised the class counsel** for "unacceptable" misstatements of the cases they'd cited in an earlier brief.

In Wednesday's motion, the companies also argued that the plaintiffs made representations about how they would prove common evidence of causation, injuries and damages that are now known to be untrue, further undermining the class certification.

For instance, the companies said none of the plaintiffs' experts purports to offer classwide causation and harm opinions, and they haven't opined that any of the named plaintiffs, let alone all class members, have water heaters contaminated with PFAS.

In addition, the types of PFAS at issue are not unique to the Fayetteville Works plant, the companies argued, so the court would have to analyze each property to determine whether the defendant companies are responsible for any properties that did show the substances.

And while the court granted class certification in part on the basis that federal regulators had not set any regulations on the amount of PFAS that is safe, the U.S. Environmental Protection Agency in April set maximums for some of the compounds, according to the motion.

As a result, the class cannot now claim that any amount of PFAS is inherently unsafe, and must show that class properties are contaminated at levels above the EPA's new thresholds, the companies argued, saying that the testing that has been done is still too small of a sample size, and shows too much variance, to be used as classwide proof.

"The line of excess risk resulting in damage has been drawn, and who crosses that line cannot be shown with classwide evidence," the companies wrote.

Finally, the companies argued that new evidence shows that large areas within the class area now draw drinking water from sources that do not detect PFAS or levels above the EPA's maximums, so whether a class member needs filtration and bottled water must be determined on an individual basis.

"This filing is just another attempt by DuPont and Chemours to try to escape taking responsibility for the consequences of their contamination of the Cape Fear River," Theodore J. Leopold of Cohen Milstein Sellers & Toll PLLC and Steve Morrissey of Susman Godfrey LLP, representing the class, said in a statement Thursday. "The motion has no merit and we look forward to responding."

In June, the defendants moved to strike and seal economist David Sunding's report, as well as two pages from his earlier testimony, and argued that information in the report is predicated on Sunding's class certification report that the court maintained under seal. The following month, the class **argued** that the report contains no confidential information that needs to be protected.

Representatives for the other parties could not immediately be reached for comment Thursday.

The class is represented by Theodore J. Leopold, Leslie Mitchell Kroeger, Jay Chaudhuri, S. Douglas Bunch and Alison Deich of Cohen Milstein Sellers & Toll PLLC, Vineet Bhatia, Allen J. Hernandez, Stephen Morrissey, Jordan Connors and Steven Seigel of Susman Godfrey LLP, Andrew Whiteman of Whiteman Law Firm, Gary W. Jackson of The Law Offices of James Scott Farrin PC and Neal H. Weinfield of The Dedendum Group LLC.

The companies are represented by Kenneth J. Reilly, Andy Carpenter, Brent Dwerlkotte and Britta Todd of Shook Hardy & Bacon LLP and Thomas H. Segars of Ellis & Winters LLP.

The case is Nix et al. v. The Chemours Co. FC LLC et al., case number 7:17-cv-00189, in the U.S. District Court for the Eastern District of North Carolina.

--Additional reporting by Jonathan Capriel and Ryan Harroff. Editing by Patrick Reagan.



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X Corp. Fails To Toss Data Breach Suit

By **Rae Ann Varona**

Law360 (December 19, 2024, 9:40 PM EST) -- A California federal judge has refused to toss a twice-amended putative class action accusing X Corp. of failing to protect over 200 million users' personal information but tossed a breach of contract claim, saying users couldn't lean on the social media company's blog posts to allege X broke express security promises.

U.S. Magistrate Judge Kandis A. Westmore on Wednesday dismissed an express breach of contract claim in the nearly 2-year-old suit, rejecting former and current users' contention that blog posts and statements that X, formerly Twitter, made on its website were incorporated via links into a user agreement and thus showed that the company broke an express promise to protect their data and privacy.

"The user is not guided to the other documents as part of the user agreement itself, but, rather, these are merely links that appear at the bottom of the same webpage, rather than in the body of the agreement," Judge Westmore wrote.

In tossing the claim, she said the users also conflated a privacy policy's promise of not disclosing users' information to third parties without their consent with a promise to maintain adequate data security measures.

"This is simply not the same, as 'disclosure' is tantamount to selling user information," Judge Westmore wrote. "Thus, there are no express promises made in the user agreement regarding data security."

Judge Westmore's ruling is the latest in the proposed class action **lodged** in January 2023 that accuses the company of failing to prevent a defect in its application programming interface that allegedly led to a security breach from June 2021 through January 2022 and exposed users' usernames, email addresses, phone numbers and other information. The suit asserted that the combined set of information also deanonymized tens of millions of users who wanted to stay anonymous on the social media platform.

Users later amended the suit, after which X, as successor in interest to Twitter, **moved to toss** it, criticizing the amended complaint as being "rife with legal defects." X argued that Twitter's terms of service, which stated that the company couldn't guarantee the security of its users' information, barred the users' claims. It argued that the users also failed to adequately allege all of their claims, including contract and negligence claims, and claims under the California Unfair Competition Law and the California Consumers Legal Remedies Act.

Judge Westmore in March **refused** to dismiss the whole suit but dismissed without prejudice most of the users' claims, including their breach of contract, negligence, negligence per se, and unjust enrichment claims.

In April, current and former users Stephen Gerber, Eric Cohen and Casey Weitzman filed a second amended complaint alleging a total of seven causes of action for breach of contract, breach of implied contract, negligence, gross negligence, unjust enrichment, violation of the UCL, and declaratory judgment.

X again moved to dismiss the suit, arguing in a June motion that the users' latest complaint fell "far short" of making any showings the court had asked for in March. It said that the users had, for instance, failed to identify any promises in the terms of services or privacy policy that supported their

breach of contract and unjust enrichment claims. The users also failed to plausibly allege a breach, causation, or damages required for their negligence claims, X asserted.

But while dismissing the users' express contract claim, Judge Westmore on Wednesday allowed their implied contract claim to survive. Pointing to X's user agreement and representations on its website regarding the security and privacy of user data, Judge Westmore said the users signed up for the social media platform "with the understanding that Twitter could protect their [personal identifying information]" and also "trusted the company" to do so.

"At the pleadings stage, these promises to protect users' [personal identifying information] are sufficient to establish the existence of an implied contract, and Twitter's alleged failure to safeguard that information is sufficient to state a claim for its breach," Judge Westmore wrote.

The judge also allowed the rest of the users' claims to survive. For instance, when it came to their UCL claim, which requires plaintiffs to show they personally lost money or property as a result of unfair competition, Judge Westmore pointed to the users' claim that Weitzman was required to spend money on credit monitoring that otherwise wouldn't have been necessary if not for the data breach.

"Courts have found that such allegations are sufficient to establishing standing to pursue a UCL claim," Judge Westmore wrote.

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

The users are represented by Joseph P. Guglielmo and Joseph A. Pettigrew of Scott+Scott Attorneys at Law LLP, Israel David and Madeline Sheffield of Israel David LLC, Jeff Westerman of Zimmerman Reed LLP, Gary F. Lynch, Jamisen A. Etzel and Nicholas A. Colella of Lynch Carpenter LLP, and E. Kirk Wood of Wood Law Firm LLC.

X is represented by John MacGregor, Joel Kurtzberg, Jason D. Rozbruch and Lisa J. Cole of Cahill Gordon & Reindel LLP and Adrian Sawyer of Sawyer & Labar LLP.

The case is Stephen Gerber et al. v. Twitter Inc., case number 4:23-cv-00186, in the U.S. District Court for the Northern District of California.

--Additional reporting by Dorothy Atkins. Editing by Jay Jackson Jr.



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Judge Says Some Paraquat Plaintiffs Being Left In Dark

By **Cara Salvatore**

Law360 (December 19, 2024, 9:57 PM EST) -- Amid a hearing targeting fall 2025 for a first bellwether trial over the alleged link between the pesticide paraquat and Parkinson's disease, an Illinois federal judge told plaintiffs' lawyers to keep in better touch with their clients after her chambers received calls from plaintiffs wondering what's happening with their cases.

U.S. District Judge Nancy Rosenstengel told parties in a status conference Thursday that she's likely to set October or November for a first bellwether trial in the long-running multidistrict litigation, which has seen some plaintiffs and at least one expert witness **fall by the wayside** over its years in the courts. Banned in many European countries and restricted in the U.S. due to its high toxicity, paraquat still remains one of the most widely used herbicides in the nation and is currently sold by Syngenta as Gramoxone.

More important than knowing the exact trial date right now is communication between lawyers and plaintiffs, the judge said.

"I certainly want to get a case teed up for trial in late 2025. I think October sounds reasonable, October or early November," the judge said.

Then she said she would "encourage all plaintiffs' lawyers that are on this call, keep in touch with your clients."

"We're starting to get calls in chambers from plaintiffs, individual plaintiffs, who say, 'What's going on? I haven't heard from my lawyer in over a year,' et cetera. So reach out. They shouldn't be calling the court," the judge said.

There was no suggestion that the lawyer or lawyers in question were the same ones representing plaintiffs in the hearing; rather, Judge Rosenstengel suggested relevant lawyers might be listening as observers on the call for the remote hearing. There are about 5,800 open cases in the litigation, according to the most recent case statistics from the Judicial Panel on Multidistrict Litigation. That means almost certainly hundreds if not thousands of plaintiffs lawyers are involved in representing claimants.

Meanwhile, the judge's preferred fall trial date aligned with what plaintiffs represented by Plaintiffs Executive Committee member Peter Flowers of Meyers & Flowers LLC had asked for in the conference; Flowers also suggested a second bellwether trial in "early 2026."

Syngenta and Chevron, represented in the hearing by Ragan Naresh of Kirkland & Ellis, said there are currently six cases proceeding in discovery and that Daubert motions could be ready to be heard by the summer.

There are also state court cases pending in Illinois, California, Delaware, Pennsylvania, and Washington, with the latter two states likely seeing trials in the coming months. Pennsylvania is set for four trials starting in late March, while Washington has a case set for trial in May, Naresh told the judge.

Chevron and Syngenta have been arguing throughout the year that many of the claimants in that group of 5,800 do not have valid claims. Most recently, they told Judge Rosenstengel that about 50

cases are ripe to be dismissed after allegedly flouting a court order to provide proof of paraquat exposure.

The companies had earlier asked for dismissal of 600 plaintiffs who had allegedly flouted Judge Rosenstengel's late February order that each plaintiff serve subpoenas by March to document their paraquat use.

Prior case management orders, or CMOs, have spurred over 1,400 voluntary case dismissals, the companies have said. That includes two prior bellwether-selected cases in May 2023 and nine of 25 selected for limited discovery in January.

Chevron, which no longer sells paraquat, is also a defendant because it sold the pesticide until the 1980s. Both Syngenta and Chevron maintain no peer-reviewed research supports the plaintiffs' cases.

The plaintiffs are represented by Sarah Shoemake Doles of Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA, Khaldoun Baghdadi of Walkup Melodia Kelly & Schoenberger and Peter Flowers of Meyers & Flowers LLC.

Syngenta is represented by Ragan Naresh, Leslie Smith and Bradley Weidenhammer of Kirkland & Ellis LLP and Michael Nester of Donovan Rose Nester PC.

Chevron is represented by Steven Geise, Sharyl Reisman, Leon DeJulius Jr., Traci Lovitt and Jihan Walker of Jones Day and Joseph Orlet, Bryan Hopkins and Megan Scheiderer of Husch Blackwell LLP.

The case is In re: Paraquat Products Liability Litigation, case number 3:21-md-03004, in the U.S. District Court for the Southern District of Illinois.

--Editing by Dave Trumbore.

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Insurer Win In Lead Abatement Row A Blow To Policyholders

By Jennifer Mandato

Law360 (December 19, 2024, 7:28 PM EST) -- The Ohio Supreme Court's ruling that insurers for Sherwin-Williams Co. needn't cover the paint-maker's portion of a \$305 million settlement to abate lead paint in California marked another win for carriers in public nuisance litigation, as policyholder experts remain unconvinced by the court's evaluation of "damages" in commercial general liability policies.



Matthew Chiricosta of Calfee Halter & Griswold LLP, who filed an amicus brief in favor of Sherwin-Williams in the dispute, told Law360 the Ohio Supreme Court's interpretation went against "insurance law 101," in which the rules of interpretation say that doubts or ambiguities should be resolved in favor of coverage. (Sipa via AP Images)

The state high court **reversed** the Eighth Appellate District's 2022 finding that Sherwin-Williams is entitled to insurance coverage, instead holding in a Dec. 10 slip order that the underlying abatement fund payment was intended to prevent future harm, not compensate for past harm.

As a result, the payment didn't constitute damages because of bodily injury or property damage under the policies issued by certain underwriters at Lloyd's of London, Zurich and units of AIG and Chubb.

Insurance industry experts told Law360 the decision contributes to the mixed bag in both lead abatement cases and the broader field of public nuisance litigation. Carrier-side and policyholder attorneys remained split over whether they thought the court ultimately got this pro-insurer decision correct.

"I think the fundamental basis for this court's ruling is that 'damages' doesn't constitute compensation for future harm," Michael Hamilton of Goldberg Segalla LLP told Law360. "With respect to the assessment of insurable damages against an insured, future risks and things that are to be determined at a later date isn't really what liability insurance is designed to do; it's to look to the past and deal with damages for past injuries or past harm."

In other words, a liability carrier doesn't pay out now under a policy to address a future harm or future liabilities, Hamilton said.

Thomas Breen of Mound Cotton Wollan & Greengrass LLP echoed approval of the court's decision, noting that the state's court of last resort has been "remarkably consistent" in its examination of possible CGL coverage with respect to governmental entities suing for harm they have incurred in the past or that they're going to remediate in the future.

Policyholder attorneys had a different reaction to the court's opinion, voicing concern over how the court dealt with ambiguous policy language.

According to the opinion, Sherwin-Williams and its insurers have looked to exemplar language from nine policies. While the policies utilize different phrasing, the court noted that each contained some version of the language used in a Lloyd's-issued policy for the period of 1964 to 1967.

This policy stated that certain underwriters at Lloyd's agreed to indemnify Sherwin-Williams for all sums the company is obligated to pay for damages as a result of personal injuries and property damage it's liable for. Most of the policies defined "personal injuries" or "property damage," but none defined "damages," the Ohio Supreme Court said.

Matthew Chiricosta of Calfee Halter & Griswold LLP, who filed an amicus brief in favor of Sherwin-Williams in the dispute, told Law360 the Ohio Supreme Court's interpretation went against "insurance law 101," in which the rules of interpretation say that doubts or ambiguities should be resolved in favor of coverage.

"The Ohio Supreme Court did the exact opposite here by basically superimposing its own view of what was and was not being remedied here and giving the insurers the benefit of the doubt here," Chiricosta said.

How Sherwin-Williams Fits In With Other Mass Tort Litigation

Heather Habes of Covington & Burling LLP told Law360 the court's opinion also failed to address that the policies at issue covered loss of use to property that hasn't been physically injured or destroyed so long as the loss of use is caused by an occurrence.

Comparable to the arguments raised when policyholders and insurers disputed coverage for losses stemming from the COVID-19 pandemic, Habes said the Ohio Supreme Court seemed to anchor its opinion on the idea that there has to be physical injury to the property.

"The court does a similar thing here and says, 'Well there has to be physical injury, there has to be a structural alteration to the property for there to be property damage,'" Habes said, rebutting that, again, "damages" was not defined by the policy and thus should be construed broadly in favor of coverage.

Hamilton countered that the buildings at issue, which include California homes and public buildings that contain lead paint, could still be used.

"So you're not really suffering a loss of use of the building itself; you're addressing future harm or remediating down the road," Hamilton said.

Habes chalked up the court's decision not to address the "loss of use" component as residual of COVID-19 coverage disputes where the courts were more reluctant to find loss of use coverage and how to distinguish the circumstances in which it could apply.

Looking ahead, Hamilton said the Ohio Supreme Court's analysis here may be instrumental in other disputes.

"You can certainly look to the reasoning here of the Sherwin-Williams court to determine whether the definition of damages is implicated under a CGL policy by the creation of that abatement fund in other

types of mass tort litigation," Hamilton said.

Breen also noted similarities between the present suit and other public nuisance disputes, including those between governmental entities and pharmaceutical companies as it pertains to opioid use.

"The governmental entities get the big verdict, but the issue then becomes do the pharmaceutical companies get insurance coverage for that settlement or judgment," Breen said, "You look to the CGL policies and the answer, I think, is pretty consistently that this is not a bodily injury because the governmental entities can't suffer bodily injury, so there's no damages."

How The Industry May Respond

In evaluating the intersection of the present decision and the larger landscape of public nuisance litigation, Chiricosta told Law360 that the Ohio Supreme Court handed down another **decision** on the same day in multidistrict litigation involving certain companies in the opioid distribution chain.

The court "wiped out" a \$650 million verdict entered against certain companies in the distribution chain of opioids and took public nuisance as a common law theory off the table for these types of claims, Chiricosta said. The award was an abatement remedy, like in Sherwin-Williams, and the court's decision in the MDL answered a certified question from the Sixth Circuit over whether the Ohio Product Liability Act preempts public nuisance claims, he explained.

"With that decision at hand, I don't know that the Sherwin-Williams case is going to have a lot of future impact in terms of coverage because you're probably not going to see plaintiffs successfully pursuing these types of claims against entities in the future," Chiricosta said.

Breen told Law360 that instead of carriers shouldering the response to this decision, those who advise policyholders must ensure they're giving a clear picture of the coverage they purchase.

Covington's Habes also offered short-term advice for policyholders as she believed that the decision would narrow the scope of what constitutes covered damages.

The ruling may also be useful for insurers taking the stance that an underlying agreement, in this case the abatement fund, isn't clear that a policyholder is paying or compensating for past harms, the Sherwin-Williams decision may be useful for insurers taking the stance that those kinds of losses aren't covered, she added.

"There's a word to the wise about this case, which is that as a policyholder, be careful and exercise discretion and thought when determining how you're going to structure an order, a settlement or a resolution of a claim and ensure that you are maximizing the coverage available," Habes said.

--Editing by Amy Rowe and Nick Petruncio.



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Aviation Co. AAR To Pay \$55M Over Alleged Bribery Schemes

By **Hailey Konnath**

Law360 (December 19, 2024, 10:36 PM EST) -- AAR Corp. has agreed to shell out \$55 million to resolve allegations from both the U.S. Securities and Exchange Commission and U.S. Department of Justice that the aviation services provider bribed government officials in Nepal and South Africa, the agencies announced Thursday.

Illinois-based AAR entered into an 18-month nonprosecution agreement with the Justice Department, which claims the company conspired to bribe the government officials to retain business with state-owned airlines in Nepal and South Africa between 2015 and 2020. Prosecutors allege that AAR came away with nearly \$24 million in profits as a result of the alleged scheme.

As part of the agreement, AAR will pay a roughly \$26.4 million penalty and \$18.6 million in administrative forfeiture. AAR has also agreed to continue to cooperate with the DOJ's Criminal Division and U.S. Attorney's Office for the District of Columbia in any future or ongoing criminal investigations during the term of the agreement and to keep bolstering its compliance program, the DOJ said.

Specifically, prosecutors alleged that AAR corruptly secured business with Nepal Airlines Corp., relating to the sale of two Airbus A330-200 aircraft, by "offering and paying bribes to Nepali officials through various intermediary companies." Meanwhile, in South Africa, AAR secured a contract with South African Airways Technical by offering and paying bribes through a third-party agent, they said.

On top of that, AAR will pay \$29.2 million in disgorgement and prejudgment interest as part of a separate but related agreement with the SEC. And Deepak Sharma, a former AAR subsidiary executive who previously pled guilty to his role in the bribery scheme, also reached a settlement with the SEC, the agency said Thursday.

Sharma, who was president of international supply chain at an AAR subsidiary, pled guilty to conspiracy to violate the Foreign Corrupt Practices Act in August, according to the DOJ. The SEC said Sharma has agreed to pay \$184,597 total in disgorgement and prejudgment interest, \$130,835 of which he already paid via a forfeiture order in his earlier agreement with the DOJ.

According to the SEC, Sharma orchestrated and implemented the bribery scheme to win a contract for the sale of the Airbus aircraft from 2015 to 2018. The contract was valued at roughly \$210 million, it said. Sharma was also involved in the South African Airways scheme, per the agency.

Under its consent order with AAR, the company consented to the SEC's finding that it violated the anti-bribery, recordkeeping and internal accounting controls provisions of the FCPA, the SEC said.

Charles Cain, chief of the SEC's FCPA Unit, said in the statement that the bribery schemes reflect "that a deficient control environment creates fertile ground for mischief that can cross borders."

"This matter serves as another reminder that companies must have robust compliance and accounting controls that are commensurate with the FCPA risks they face, including with respect to their work with third parties across their business operations," Cain said.

AAR said in its own statement Thursday that it self-reported the potential violations in 2019 and cooperated with both the SEC and DOJ in their investigations.

"The resolutions with both the DOJ and SEC make clear that the relevant conduct was principally carried out by a former employee of a company subsidiary and former third-party agents," AAR said.

The company added that it expects to fund the nonprosecution agreement and SEC settlement using cash and borrowings under its revolving credit facility.

John M. Holmes, AAR's president and CEO, said in the statement that the company is "pleased to resolve these matters with the DOJ and SEC."

"AAR remains committed to transparency and accountability and operating in an ethical and compliant manner," Holmes said.

According to the Justice Department, while AAR self-reported the conduct "that forms, in part, the basis for the resolution," it wasn't a "voluntary self-disclosure" under DOJ policy. That's because media outlets in Nepal and South Africa had reported on the potential misconduct already, and an independent source also reported the allegations to the DOJ before the company self-reported, according to Thursday's release.

Still, AAR cooperated with the DOJ investigation, promptly provided information to the department and engaged in "extensive and timely remedial measures," the DOJ said. All of that contributed to the company facing a significantly reduced penalty, it said.

Counsel for Sharma didn't immediately respond to a request for comment late Thursday.

The government is represented by Katherine Raut and Paul Ream of the U.S. Department of Justice's Criminal Division and Madhu Chugh of the U.S. Attorney's Office for the District of Columbia.

AAR Corp. is represented in-house by Jessica A. Garascia and by Daniel S. Khan and Mari Grace of Davis Polk & Wardwell LLP.

Sharma is represented by James Parkinson of Orrick Herrington & Sutcliffe LLP.

The cases are In the Matter of AAR Corp., administrative proceeding file number 3-22369, and In the Matter of Deepak Sharma, administrative proceeding file number 3-22370, both before the U.S. Securities and Exchange Commission.

--Editing by Emily Kokoll.



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Genworth Can Get Docs Explaining Atty's Role Amid Sale Row

By **Rose Krebs**

Law360 (December 19, 2024, 3:39 PM EST) -- A Delaware vice chancellor has ruled Genworth Life Insurance Co. can access certain documents from policyholders who sued over the sale of valuable subsidiaries, including discussions involving a former law partner of one of the plaintiffs who is representing certain entities believed to be funding the litigation.

In an order on Wednesday, Vice Chancellor Nathan A. Cook ruled on the remaining aspects of a motion to compel filed by Genworth and affiliated entities seeking information about fee arrangements and litigation funding for the proposed class action in Chancery Court.

The vice chancellor ordered the plaintiffs to turn over certain documents related to discussions involving attorney Harold Horwich, a former law partner of one of the plaintiffs, William E. Kelly.

During depositions, questions as to the plaintiffs' relationships to Horwich were "repeatedly cut short," the vice chancellor said, "with plaintiffs' counsel from the law firm of Shapiro Haber & Urmy LLP ... objecting on privilege grounds."

In an April motion, Genworth asserted the plaintiffs "had improperly withheld based on assertions of attorney-client privilege," according to the order. Among documents that Genworth sought were communications between the plaintiffs or their counsel and Horwich, as well as details about litigation funding, including any funding made to Shapiro Haber, the order said.

Although Horwich was never counsel of record in the case, he had numerous discussions about the matter with Kelly, sent him a draft complaint, participated in "front-end case development for this litigation" and referred the plaintiffs to Shapiro Haber, according to the order.

The Chancery suit, which dates to 2018, **alleged** Genworth subsidiary Genworth Financial International Holdings LLC had sold its interests in valuable international mortgage subsidiaries to divert assets away from policyholders, among other alleged efforts to "bleed capital from GLIC, a wholly owned insurance subsidiary of Genworth upon which over a million policyholders depend for long-term care insurance benefits in the event that they become disabled."

Horwich and Kelly were law partners at Horwich's former firm Hebb & Gitlin, which later became Bingham McCutchen LLP, according to a footnote in Wednesday's order. After leaving Bingham McCutchen, Kelly worked as in-house counsel for nine years before retiring from practicing law in 2017, the footnote said.

The two were not working together when they began communicating about Genworth, the order said. However, eventually, the plaintiffs were informed Horwich was representing certain entities that were "differently situated" from them in the litigation.

"It seems that a reasonable lay person — or former attorney such as Mr. Kelly — should have been on notice after receiving that email that Mr. Horwich and his firm did not, and would not, represent plaintiffs or Mr. Kelly," Vice Chancellor Cook said. "But there also could be arguments that Mr. Kelly retained a good faith, reasonable belief that Mr. Horwich was nonetheless his lawyer or prospective lawyer. Neither party had a chance to make any of those arguments, however, because plaintiffs obscured the nature of Mr. Horwich's role from defendants."

The vice chancellor said the plaintiffs "should have been upfront and transparent about the identity of Mr. Horwich's clients."

Although they have not identified Horwich's clients, "it appears that some or all of the clients referenced in" a document "eventually became the 'funders' backing the current action," the order said.

"I draw this inference from certain of the in-camera documents, including wherein Mr. Horwich states that he represents major medical insurance companies willing to pay the cost of a suit brought by policyholders against Genworth," the vice chancellor said. "Although I include this information for context, the specific identities of Mr. Horwich's clients do not impact my privilege analysis."

The vice chancellor said that based on his in-camera review of documents, he concludes "the circumstances of Mr. Horwich's interactions with Mr. Kelly were, at least initially, sufficiently muddy that plaintiffs' invocation of privilege was generally not improper for documents created through May 21, 2018."

However, he ruled "there can be no privilege for any communications between Mr. Horwich and plaintiffs after May 21, 2018."

The vice chancellor also ruled that certain documents from before May 21, 2018, "cannot properly be withheld as privileged," including multiple email chains between Kelly and Horwich to set up meeting times and another that shouldn't have been withheld, as it didn't "convey any legal advice."

Also, the vice chancellor ordered the plaintiffs to sit for additional depositions, saying he agreed with Genworth in finding plaintiffs' counsel's objections during prior proceedings "were overbroad and prejudiced the defendants' ability to properly depose plaintiffs." Plaintiffs must pay the costs for additional depositions, the vice chancellor said.

In August, Vice Chancellor Cook **ruled** on other aspects of the motion to compel, saying certain fee agreements with Genworth's counsel must be disclosed.

Counsel for the parties didn't immediately respond on Thursday to requests for comment.

The policyholders are represented by Peter B. Andrews, Craig J. Springer and David M. Sborz of Andrews & Springer LLC and Edward F. Haber, Michelle H. Blauner and Patrick J. Vallyely of Shapiro Haber & Urmy LLP.

Genworth Financial Inc. and its affiliates are represented by Srinivas M. Raju, Elizabeth Freud and Kevin M. Gallagher of Richards Layton & Finger PA and Reid L. Ashinoff, Kenneth J. Pfaehler and Carter White of Dentons US LLP.

The case is Burkhardt et al. v. Genworth Financial Inc. et al., case number 2018-0691, in the Court of Chancery of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Philip Shea.