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Court Reporter Group Hit With Certification Market Monopoly Suit

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By Katie Arcieri

(Bloomberg Law) --

The National Court Reporters Association has been sued over claims the group illegally requires stenographers to pay costly annual membership dues and other fees in order to maintain key certifications.

Two certified court reporter plaintiffs allege NCRA ties certification designations to separately purchased memberships, allowing the association to inflate the price it charges for dues in violation of antitrust law, according to a proposed class action filed Jan. 3 in the US District Court for the District of New Jersey.

The suit adds to other litigation accusing professional associations in the US of antitrust violations, including claims of monopolizing certification markets, bullying members and price-fixing.

Employers and courts commonly rely on NCRA certification to select competent stenographers, who create accurate transcripts of legal proceedings.

But the “obligation to maintain NCRA membership coupled with the high costs required for maintaining their certification, prohibits Stenographers from joining other professional organizations and associations that offer similar benefits further strengthening NCRA’s hold over the Stenographic Membership Market,” the complaint says.

The plaintiffs claim that NCRA requires stenographers to pay for and complete continuing education credits on top of a \$300 annual membership, and failure to satisfy continuing education requirements can result in the loss of NCRA membership and certification.

“NCRA’s membership fee requirement has no legitimate purpose and does nothing but produce additional revenue for NCRA,” the complaint says.

The plaintiffs seek relief under Section 1 of the Sherman Act, which prohibits agreements that restrain trade.

NCRA said it will be reviewing the case and declined to comment.

The plaintiffs are represented by Robbins Geller Rudman & Dowd LLP and Seeger Weiss LLP.

The case is *Palazzi v. Nat'l Court Reporters Ass'n*, D.N.J., No. 2:25-cv-00077, 1/3/25.

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January 6, 2025

(Reuters) - The national trade association for court stenographers is facing a new lawsuit for allegedly creating an illegal monopoly over professional certification and overcharging its members for dues.

In a proposed class action filed on Friday in Newark, New Jersey, two court reporters said the National Court Reporters Association was illegally forcing them and thousands of others to pay annual membership fees for fear of losing their certification.

The lawsuit said the court reporters association violated U.S. antitrust law by "tying" certification with member fees. The two plaintiffs, from New Jersey and Illinois, accused the association of abusing its power in the certification market, allowing it to charge inflated fees.

The National Court Reporters Association (NCRA) has used an "unlawful tying arrangement to minimize any threats from potential competitors," according to the lawsuit. The plaintiffs said the association "faces no meaningful competition."

The association said it was reviewing the complaint and declined to comment further.

An attorney for the plaintiffs, Stuart Davidson, in a statement said, "court reporters play an essential and under-appreciated role in our legal system; we intend to use that very system to protect them against antitrust violations."

Court reporters attend hearings and make transcripts of the proceedings. The Virginia-based association represents more than 12,000 court reporters and captioners. Many states and courts require NCRA certification.

"Stenographers cannot expect to obtain or maintain steady employment without being NCRA certified," the plaintiffs told the court.

The lawsuit said there are no "reasonable substitutes" for NCRA certification. State court reporter associations do not provide certification, the lawsuit said.

To maintain their NCRA certification, stenographers must pay for and complete continuing education credits, according to the lawsuit, and they must purchase NCRA membership to maintain their certification. Court reporters pay \$300 annually for NCRA membership.

The plaintiffs want to represent a class of court reporters who purchased membership from the association since 2014.

The lawsuit is seeking unspecified monetary damages and other penalties.

The case is Kelly Palazzi and Cindy Jenkins v. National Court Reporters Association, U.S. District Court, District of New Jersey, No. 2:25-cv-00077-MEF-JSA.

For plaintiffs: Stuart Davidson and Anny Martin of Robbins Geller Rudman & Dowd, and Christopher Ayers of Seeger Weiss

For defendant: No appearance yet

References

ROBBINS GELLER RUDMAN & DOWD LLP

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Class Certification, Cash-Sweep Cases Among Securities Litigation Trends to Watch in 2025

 [law.com/nationallawjournal/2025/01/03/class-certification-cash-sweep-cases-among-securities-litigation-trends-to-watch-in-2025](https://www.law.com/nationallawjournal/2025/01/03/class-certification-cash-sweep-cases-among-securities-litigation-trends-to-watch-in-2025)

Alyssa Aquino

Securities attorneys have several key issues on their minds as they head into 2025, including settling the law on class certification and a spate of consumer lawsuits against bank cash sweep programs. And, of course, the law continues to address challenges posed by artificial intelligence and cryptocurrency.

That's all before they even get to considering how the next Trump administration might impact the legal landscape.

Here's a tour of the issues at the front of mind of securities lawyers who spoke with the New York Law Journal:

Goldman Sachs Lives On

Some experts are heading into 2025 with the U.S. Supreme Court's 2021 decision, *Goldman Sachs Group v. Arkansas Teacher Retirement System*, as one of their main concerns.

In 2010, a trio of pension funds filed a \$13 billion suit against Goldman Sachs on claims that it issued false and misleadingly generic statements about its ability to manage conflicts of interest.

The case made its way up to the justices on the class certification issue after a district court certified the investor class. But the justices in June 2021 ruled that courts could consider, at the class certification stage, the generic nature of a misrepresentation as evidence against price impact. In the wake of the decision, the Second Circuit decertified the *Goldman* class.

The high court decision continues to reverberate through the lower courts, with James Christie, a Labaton Keller Sucharow securities partner, noting an increase in defendants bringing *Goldman* challenges to class certification. In roughly 90% of the cases he's seeing, defendants are signaling plans to make such a challenge, Christie said.

One of the cases to feature a *Goldman* challenge was his own, *Shupe v. Rocket Cos.* In September, Michigan's U.S. District Judge Thomas Ludington sided with the defendant, the fintech holding company Rocket Companies Inc., and refused to certify the investor class.

"We're seeing defendants take their shot at trying to get [*Goldman*] to apply to much more particularized and much more specific statements, and we've seen some courts at least take them up on that," Christie said. "I do think that there's going to be some battle lines drawn in

the next year on *Goldman*-style challenges in almost every case, if the statements are even a little generic.”

Jonathan Youngwood, the global co-chair of Simpson Thacher & Bartlett’s Litigation Department, explained that the *Goldman* decision gave the defense bar the chance to eliminate securities cases at the class certification stage and to push some merits arguments in advance of summary judgment. The decision’s relevance also goes beyond that.

“It’s probably played as big a role in how people structure the cases, and sometimes ... whether or not they choose to litigate them all the way through,” said Youngwood, who leads the firm’s Civil Securities Litigation Practice.

Cryptocurrency Amid Regulatory Uncertainty

Cases involving cryptocurrency were on the rise throughout 2024, and Lara Flath, a Skadden Arps Slate Meagher & Flom complex litigation and trials partner, only expects the field to heat up under the second Trump administration.

The president-elect has already set the stage for a reverse course by lining up the crypto-friendly Paul Atkins to replace Gary Gensler as the head of the U.S. Securities and Exchange Commission.

Under Gensler’s watch, the agency filed enforcement actions against cryptocurrency exchanges, Binance and Coinbase, and other cryptocurrency actors. But an Atkins-led agency will likely take a less aggressive stance, Flath said.

“It remains unclear what’s going to happen with pending actions, or some of those not yet public actions that are waiting in the wings,” she said.

Moreover, would a drop in enforcement convince private litigants to get more aggressive? Flath wondered.

Historically, bringing private suits related to security fraud is “difficult at best,” according to Christie, the plaintiffs attorney from Labaton, as a lot of the altcoin and cryptocurrency companies are either insolvent. That, or applying the law to them is a “little more difficult,” he said.

“But as the industry becomes more legitimate—and I think the political climate is right for that—you’re seeing bigger companies that are far more sophisticated and have more resources. You may start to see a number of securities fraud cases in that,” Christie said.

Artificial Intelligence, Not Just a Tech Problem

A wave of artificial intelligence cases is also likely for the year, with experts forecasting that artificial intelligence issues won’t just be the purview of companies offering AI products.

Flath said she's been seeing a number of cases alleging violations of Section 10(B) and Section 20 of the Exchange Act, with investors claiming that companies have falsely advertised their AI capabilities, or exaggerated the efficiency of a flagship product.

"With just the sheer increase in scope of AI and all of the ways that it is affecting so many different companies, even ones that aren't your classic companies developing that technology...[there will be] more and more to come," she said.

The legal issues could even boil down to something as fundamental as how AI is defined, according to Lissa Percopo, a partner at Gibson Dunn & Crutcher. As she's watching the courts, Percopo is cautioning people to focus on how they describe any AI in public disclosures.

"Basically every company that we work with is going to have to think about the disclosures, the statements, the use that they're making of AI," she said. "Any company could have a potential securities litigation related to that. There's always the risk of a stock drop correlating with some sort of disclosure related to AI."

"It's a hot topic, and it's something that businesses can't avoid having to deal with," Percopo said. "The crafting of those disclosures is gonna have to be something that people are paying attention to."

Cash-Sweep Programs

While others were looking at new technologies, litigators at Bernstein Litowitz Berger & Grossmann highlighted a growing trend within traditional banking spaces that they expect to gain speed over the next year, consumer lawsuits against bank cash sweep programs.

Nearly every major bank offers such a program, which allows participants to have their uninvested funds automatically swept into interest-bearing accounts. Over the past few years, the SEC has investigated how banks are managing their programs, and now private litigation is rolling down the pipeline. Bank of America, JPMorgan Chase and Wells Fargo are all facing legal heat from clients who allege that they're being paid interest rates that are significantly lower than what the banks are making on their cash.

John Rizio-Hamilton, the co-head of Bernstein Litowitz's Securities Litigation Department, expects the lawsuits to keep piling up.

"These cases are really, by and large, just getting started," he said. "The way that they play out over the next 12 to 18 months will be consequential."

His colleague, securities partner, Salvatore Graziano, is wondering what types of allegations will be enough to sufficiently allege an unreasonable interest rate. Beyond that, how do the courts resolve the question of reasonableness on the merits? he wondered.

“The key issues are going to be, what are the best benchmark comparisons to judge the reasonableness of the interest rate that was paid, because the prevailing interest rates are way way above what these customers received,” he said. “Courts are going to have to figure out whether plaintiffs are entitled to the entire difference or just a little of the difference.”

The Supreme Court DIGs securities cases, leaving important questions unanswered

 [reuters.com/legal/legalindustry/supreme-court-digs-securities-cases-leaving-important-questions-unanswered-2025-01-06](https://www.reuters.com/legal/legalindustry/supreme-court-digs-securities-cases-leaving-important-questions-unanswered-2025-01-06)

Virginia Milstead, Mark Foster

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

January 06, 2025 - This term, the Supreme Court was poised to decide a securities case involving Facebook and another involving NVIDIA. Both cases raised recurring and important issues that arise in securities class action litigation. Following oral argument, the Court issued so-called "DIG" orders — orders indicating that the Court dismissed the cases as "improvidently granted," referring to the decisions to grant review of the cases.

The Supreme Court issues DIG orders after granting certiorari when, for example, justices realize the case before it is not the best vehicle to rule on an issue, where parties' merits arguments diverge from those that they urged when seeking Supreme Court review, or where a majority of justices cannot reach a consensus.

In the wake of these two DIG orders, questions regarding when allegedly false risk factor disclosures are actionable and whether and under what circumstances plaintiffs can rely on expert reports to satisfy the heightened pleading requirements of the Private Securities Litigation Reform Act (PSLRA) will remain open. This article discusses the cases left undecided and the potential implications of the Supreme Court's silence on these issues.

The *Facebook* case and the recurring risk of risk factor disclosures

Plaintiffs' lawyers increasingly target the risk factor disclosures in annual reports when bringing securities fraud claims. Because companies' risk disclosures must address all material factors that could make an investment in the company risky, there is almost always an on-point risk factor that relates to the subject matter of some subsequent, adverse event disclosed by the company. When that adverse event happens, Plaintiffs will claim in hindsight that the company knew of that event when the risk factor was published but failed to disclose it.

Plaintiffs relied on a variation of that playbook in *Facebook, Inc. v. Amalgamated Bank*, Case No. 23-98. In *Facebook*, the Supreme Court was asked to decide whether risk disclosures are false or misleading when they do not disclose that a risk has materialized in the past,

even if that past event presents no currently known risk of ongoing or future business harm. Following argument, the Supreme Court issued its DIG order, which let the 9th U.S. Circuit Court of Appeals' ruling in Facebook stand.

The Supreme Court's decision not to rule in the Facebook case will allow a circuit-split to persist. In the case that had been under review, the 9th Circuit reversed dismissal of a securities fraud claim against Facebook. The plaintiffs in that case alleged that Facebook's risk disclosures in its annual report (mandated by Item 105 of Regulation S-K) were materially misleading for failing to disclose that its data had been improperly harvested by Cambridge Analytica in connection with political campaigns in 2016.

In a split decision, the 9th Circuit reversed in relevant part. The majority opinion criticized Facebook for representing the risk of improper access to or disclosure of Facebook data "as purely hypothetical when that exact risk had already transpired." A reasonable investor, the majority opinion concluded, "would have understood the risk of a third party accessing and utilizing Facebook user data improperly to be merely conjectural."

The majority opinion reasoned that it was irrelevant that Facebook "did not yet know the extent of the reputational harm it would suffer as a result of the breach" by Cambridge Analytica.

In conflict with the 9th Circuit's materialized risk standard, the 1st, 2nd, and 10th Circuits have adopted a "virtual certainty test." Under that test, risk disclosures only imply that the company is unaware of any previous occurrence of a triggering event if that event is almost certain to cause the warned-of harm to the company's business. That rule makes it harder (but not impossible) for plaintiffs to bring viable claims based on allegedly misleading risk factor disclosures.

In light of the Supreme Court's decision not to rule in Facebook, it is likely that courts around the country will continue to take distinctly different approaches when ruling on risk factor claims. In the absence of a clear, uniform rule, public companies will need to proceed with caution in the face of a circuit split relating to the circumstances that will trigger securities fraud liability for statements and alleged omissions in risk factor disclosures. Companies will need to decide whether more or less risk disclosure creates a greater risk of being sued down the road.

The *NVIDIA* case and the use of expert reports at the pleading stage

In *NVIDIA Corp. v. E. Ohman J:or Fonder AB*, Case No. 23-970, the Supreme Court was asked to decide two related issues: whether plaintiffs seeking to allege scienter under the PSLRA based on allegations about internal company documents must plead with

particularity the contents of those documents; and whether plaintiffs can satisfy the PSLRA's falsity requirement by relying on an expert opinion to substitute for particularized allegations of fact. The expert question became the focus of the case at the Supreme Court.

Like the Facebook case, the Supreme Court issued its DIG order shortly after oral argument when justices expressed skepticism towards NVIDIA's arguments and even questioned why the Court agreed to review the case when it sounded like NVIDIA was merely seeking "error correction," rather than a categorical rule regarding expert reports.

The NVIDIA case arose from a recurring pattern in securities litigation: the announcement of disappointing revenue results and downward guidance revisions following a sustained period of success. The plaintiffs alleged that NVIDIA fraudulently understated the extent to which its revenues for its graphics processing units (GPUs) depended on sales for crypto mining, rather than for gaming. When cryptocurrency prices fell in 2018, demand for GPUs declined, and NVIDIA's stock price also declined. In the wake of the stock price decline, the plaintiffs filed a putative securities class action.

In support of their securities fraud claim, plaintiffs alleged that contemporaneous internal NVIDIA reports regarding GPU sales contradicted public statements about them. Plaintiffs did not, however, allege the contents of any internal NVIDIA report. Instead, Plaintiffs sought to bolster their fraud claims by retaining an expert firm, the Prysm Group, which purported to estimate the amount by which NVIDIA's quarterly gaming revenues were driven by cryptocurrency miners, rather than gamers.

Using generic market research, Prysm estimated the overall amount of computing power needed during the relevant time period to mine cryptocurrencies, estimated how many GPUs that would require, estimated NVIDIA's market share, and then multiplied the number of units implied by that market share times an estimated revenue per unit. Plaintiffs alleged that the amount by which the estimated revenue exceeded the amount NVIDIA reported in its OEM segment for sales of its crypto-specific GPU product was the amount by which NVIDIA fraudulently understated its exposure to cryptocurrency mining demand.

After the district court dismissed the securities fraud claim, a divided panel of the 9th Circuit reversed in relevant part. The panel majority held that falsity was sufficiently alleged based on the revenue estimates generated by Prysm. As for the element of scienter, the panel majority held that there was a strong inference of scienter because internal NVIDIA documents "would have" reflected Prysm's post hoc calculations and that NVIDIA's CEO "would have" known about those internal documents given allegations about his "detail oriented" and "meticulous" oversight of company operations.

The panel majority credited the Prysm report's conclusion that NVIDIA underreported its crypto revenues by \$1.126 billion, observing that a "CEO who does not know the source of \$1.126 billion is unlikely to exist."

In the wake of the Supreme Court's decision not to rule in NVIDIA, the 9th Circuit's decision will stand. Some have argued that the 9th Circuit's purportedly permissive standard will give plaintiffs a roadmap to evade the PSLRA's heightened pleading requirements. That may lead to forum shopping by plaintiffs lawyers who may try to avoid filing their securities cases in circuits that do not credit expert reports at the pleading stage.

That is the state of play in the Second Circuit, which has ruled that expert opinions "cannot substitute for facts under the PSLRA" unless the opinion "was based on particularized facts sufficient to state a claim for fraud." *Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squib Co.*, 28 F. 4th 343, 354 (2d Cir. 2022).

The 5th Circuit has similarly held that "opinions cannot substitute for facts under the PSLRA." *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 285-86 (5th Cir. 2006). Courts have also referenced evidentiary complications relating to the admission of expert reports in connection with a pleading stage analysis to support their rejection of expert report allegations.

Plaintiffs may seize upon the Supreme Court's decision not to decide NVIDIA as an invitation to use expert reports more frequently and more aggressively. If that happens, expert reports may become a focal point of motions to dismiss, leading to extensive litigation over such things as the purported expertise of offered experts, the reliability of the opinions reached, the reasonableness of assumptions used by experts, the failure of plaintiffs to disclose the assumptions used by experts, the level of details plaintiffs must allege about an expert's opinions and methodologies, and whether and when an expert's opinions will be treated as facts sufficient to meet the PSLRA's requirement that plaintiffs expert report's conclusions will be construed as "facts" that satisfy the PSLRA's heightened requirements for pleading falsity and a "strong inference" of scienter.

Without a uniform rule, it is likely that there will be litigation for years to come over these recurring and important questions. Perhaps then a suitable case will be ripe for the Supreme Court to provide much-needed guidance to lower courts and litigants.

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The Top Ten D&O Stories of 2024

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January 6, 2025



By Kevin LaCroix on January 6, 2025

Posted in Director and Officer Liability

2024

The directors' and officers' liability environment is always changing, but 2024 was a particularly eventful year, with important consequences for the D&O insurance marketplace. The past year's many developments also have significant implications for what may lie ahead in 2025 – and possibly for years to come. I have set out below the Top Ten D&O Stories of 2024, with a focus on future implications. Please note that on Wednesday, January 15, 2025 at 11:00 AM EST, my colleagues Marissa Streckfus, Chris Bertola, and I will be conducting a free, hour-long webinar in which we will discuss The Top Ten D&O Stories of 2024. Registration for the webinar can be found [here](#). I hope you can join us for the webinar.

Trump 2.0 Set to Launch Early in the New Year

The top news story overall in 2024 was also the top story in the world of D&O liability insurance as well – that is, that in the November 2024 U.S. Presidential Election, Donald Trump was elected to a second term as U.S. President. He is set to be inaugurated on Monday, January 20, 2025. On the basis of his announced policies and proposed cabinet and other political appointments, Trump's second term seems likely to usher in a period of significant social, economic, and political change. As a result, there could also be significant changes ahead in the D&O insurance and liability arena as well.

One important way the upcoming Trump administration will likely impact the D&O arena is through the Presidential power to appoint federal judges. During his first administration, Trump appointed 234 federal judges, including three U.S. Supreme Court justices and 54 circuit court judges. Sitting Trump appointees currently represent about 26.2% of all authorized federal judge slots, including one-third of the sitting U.S. Supreme Court justices.

In a second administration, Trump will have the opportunity to further shape the federal judiciary, with the possibility that by the end of his upcoming term, about half of the sitting federal judges could be Trump appointees. Indeed, the day Trump takes office again, he will

have as many as 45 federal judge seats to fill. Depending on how events unfold, he could also have the opportunity during his upcoming term to further shape the U.S. Supreme Court, as well.

In his first administration, Trump tended to appoint judges who were young and conservative. If, as seems likely, he follows this same judicial appointment approach in his second term, his judicial appointments potentially could shape federal jurisprudence for the next generation. There are many potential implications of a federal judiciary largely composed of Trump appointees, including for example with respect to, say, civil rights, environmental law, or consumer protection issues; from the perspective of potential D&O liability, a Trump-appointed judiciary potentially could be beneficial for companies and their executives, as Trump-appointed judges so far have tended to be business-friendly and conservative.

Trump's cabinet and other political appointments could also have an important impact on the D&O liability arena. One appointment that in particular could have a significant impact on the D&O liability arena is his appointment of the new Chair of the SEC. As discussed in detail here, President-elect Trump has announced that he will nominate former SEC Commissioner Paul Atkins as SEC Chair. This appointment, if confirmed, could result in a significant change of direction at the SEC, which in turn could have important implications for the world of D&O.

The SEC under the outgoing SEC Chair, Gary Gensler, is generally perceived to have been aggressive from an enforcement standpoint, and certainly was very active in issuing new regulations as well. It seems likely that certain regulatory priorities of the agency under Gensler will be rolled back or deemphasized under the new administration.

The Wall Street Journal in a December 4, 2024, editorial referred to Atkins as the "Anti-Gensler," saying that Atkins is the "opposite of Gensler in temperament and regulatory ambition." Atkins, as *Politico* commented in article about Atkins's nomination, has "sharply criticized what he considers to heavy-handed policymaking for the last two decades" and as an "outspoken critic of everything from the reform measures enacted in the wake of the 2008 financial crisis to corporate penalties to climate-related disclosures."

One area on which the agency under Gensler focused that is likely to also be a priority under Atkins is with respect to cryptocurrency. A variety of high-profile crypto firms and crypto agencies previously hired Atkins's consulting firm, and Atkins himself is not only well known to the crypto community but he has served, according to the *Wall Street Journal* (here), as its "trusted consigliere." The crypto community, the *Journal* reports, "expects to see clearer guidelines that define digital assets as securities or commodities," and they also expect that under Atkins the agency will "dismiss the dozens of lawsuits that the agency has filed against

companies under the current chair, Gary Gensler.” As a more general matter, Atkins is likely to move the agency away from what has been criticized (particularly with respect to crypto) as the “agency’s habit of regulation by enforcement.”

Atkins has, according to *Politico*, “sharply criticized what he considers heavy-handed policy making over the last few years.” One area in which he has a long track record is with respect to ESG. In its editorial about Atkins appointment, the *Journal* observed that Atkins “was an early critic of how asset managers and proxy advisers used environmental, social and governance (ESG) standards to bully public companies” and suggests that one of Atkins’s “top priorities” will be “rolling back Mr. Gensler’s 885-page climate-change disclosure rules.” As discussed here, other commentators have suggested that Atkins may also seek to withdraw or narrow the cybersecurity disclosure guidelines that went into effect in December 2023.

As a general matter, Atkins likely will steer the agency away from regulating in order to address social policies. Cydney Posner, in a post on the Cooley law firm’s *PubCo* blog (here), cites a prior statement by Atkins that “The SEC, CFTC or whatnot can look at its own patch, but it really can’t change the world. There are certainly enough societal and economic problems that need to be addressed. I think the agencies have got to figure out what is the highest and best use for them, and let Congress and others figure out what the public policy should be.”

The agency under Atkins will of course continue to fulfill its role protecting investors and the financial markets. The agency’s efforts likely will focus on more traditional areas, such as including issuer accounting and disclosure matters, offering fraud, market manipulation, insider trading, and similar matters. One issue the agency will have to continue to deal with in the months ahead is the fallout from U.S. Supreme Court’s June 2024 decision in the *SEC v. Jarkesy* case, in which, as discussed in greater detail below, the Court struck down the agency’s use of administrative tribunals in civil penalty actions. Due to this ruling is that the agency has curtailed its use of administrative tribunals, which has in turn may result in reduced enforcement activity overall.

Finally, the upcoming Trump administration’s economic and trade policies could potentially have a significant impact on companies’ operations and financial performance, which in turn could affect the D&O liability and claims environment. The new administration’s commitment to deregulation and lower taxes potentially could have a salutary benefit on the business environment, at least in the short run. However, the administration’s trade and immigration policies could create challenges for at least some companies. Trump’s proposed tariff increases could risk a global trade war, which could in turn could impair supply chains and increase costs for businesses and consumers. Trump’s proposed deportation of unauthorized immigrants potentially could disrupt certain industries, such as agriculture, construction, and hospitality, and could also drive up labor costs.

These macroeconomic considerations are relevant not just for the business environment in which companies must operate, they could also significantly affect D&O claims activity. Readers will recall that in the wake of the global pandemic, macroeconomic factors such as supply chain disruption, labor supply shortages, and economic inflation led to significant numbers of D&O claims. And as is discussed in detail below, geopolitical issues, such as trade and sanctions, can also contribute to D&O claims exposures, as well. Time will tell how the new administration's economic, trade, and immigration policies will play out, but among the risks and uncertainties is the possibility for a new wave of D&O claims arising from macroeconomic and geopolitical factors' impact on company operations and financial performance.

Federal Court Securities Suit Filings Increased in 2024

D&O insurers closely track the annual number of securities class action lawsuit filings. The number of annual filings can provide some indication of the insurers' ultimate loss costs for the year. The current year's filing patterns can also inform the insurers' efforts to try to determine the profit-making price for their insurance product.

The number of federal court securities class action lawsuits filing increased in 2024 for the second year in a row, to the highest level since 2020. The increased number of federal court securities suit filings during the past year is due to several factors, including continuing filings relating to ongoing trends such as new lawsuit filings relating to SPACs, COVID-related suits, and cryptocurrencies.

There were 222 federal court securities class action lawsuit filings in 2024, compared to 212 in 2023, representing about a 4.7 % increase. The 222 federal court securities suit filings represent the highest annual number of federal court filings since 2020, when, due to significant number of federal court class action merger objection lawsuit filings that year, there were 313 federal court securities class action lawsuit filings. Please note that these numbers reflect only federal court securities suit filings; the numbers do not include state court securities class action lawsuit filings.

There were five federal court class action merger objection lawsuit filings in 2024, meaning that there were 217 "core" or "traditional" lawsuit filings during the year. The number of federal class action merger objection lawsuit filings has declined significantly since the 2016-2020 time frame, resulting in significant decrease in the overall annual number of federal court securities suit filings since that time. It is important to note that significant number of federal court merger objection lawsuits continue to be filed; however, in more recent years, plaintiffs' lawyers, for tactical reason, have chosen to file these actions as individual lawsuits rather than as class actions, and as a result these filings do not show up in the class action filing numbers.

The 2024 federal court securities class action lawsuit filings were first-filed in 40 different federal district courts. The federal district court with the highest number of first-filed securities suit complaints in 2024 was the Southern District of New York, which had 50 class action securities suit filings. The district courts with the next highest number of first-filed securities suit complaints were the Northern District of California with 38, and the Central District of California, with 23.

Of the 222 federal court securities class action lawsuits filed in 2024, a total of 66 were filed in district courts in New York, representing about 29.8% of all 2024 federal court securities suit filings, and 64 were filed in district courts in California, representing about 29% of all 2024 federal court securities suit filings. Of the 222 federal court securities lawsuit filings, a total of 130 were first-filed in either California or New York federal district courts, representing about 59% of all 2024 federal court securities class action lawsuit filings.

The 2024 federal court securities class action lawsuit were filed against a wide variety of different kinds of companies. The 222 federal court securities class action lawsuits were filed against companies in 100 different Standard Industrial Classification (SIC) codes. The SIC Code with the highest number of 2024 filings was the SIC Code Category 7372 (Prepackaged Software), which had 24 federal court securities class action lawsuit filings in 2024, representing about 10.8% of all 2024 federal court securities suits.

The SIC Code Group with the highest number of 2024 securities suit filings was the 283 SIC Code Industry Group (Drugs), which had 37 securities suit filings during the year, including 22 in the 2834 SIC Code category (Pharmaceutical Preparations). In addition to the 2024 filings in the 283 Industry Group, there were an additional ten securities suits filed in the 384 SIC Code Industry Group (Surgical and Medical Instruments). Together lawsuits against companies in these two groups totalled 47 federal court securities suit filings in 2024, meaning that 21.1% of the total number of 2024 suits were filed against biotechnology companies.

Companies in the SIC Code group 737 SIC Code Industrial Group (Computer Programming and Data Processing) collectively had 36 securities lawsuit filings in 2024, meaning that lawsuits filed against companies in the high technology industry represented 16.2% of all 2024 federal court securities class action lawsuit filings.

There was a total of 83 securities lawsuits filed in 2024 against companies in the biotechnology and high tech industry groups taken collectively, meaning that during 2024, lawsuits against companies in these two industry groups represented 37.3% of all federal court securities class action lawsuit filings.

Of the 222 federal court securities class action lawsuit filings in 2024, 37 were filed against companies either organized under the laws of a country outside the United States or that have their principal place of business outside the U.S. The companies named in these suits represented 16 different countries. The countries with the highest number of 2024 securities suit filings were the United Kingdom, with 7; and Israel and China, with five each.

2024 was an Active Year for U.S. Supreme Court Securities Law Cases – Although Not Nearly as Active as it Promised to Be

2024 was an active year for the U.S. Supreme Court's consideration of securities law cases – although not nearly as active as it looked like it was going to be. The Supreme Court did issue opinions in two important securities law cases, as discussed below. But in connection with two other cases the Court had agreed to consider during the current term, the Court dismissed the cases – without issuing substantive opinions – after the cases had been fully briefed and argued.

The first of the cases in which the Court did issue an opinion during 2024 was *Macquarie Infrastructure Corp. v. Moab Partners L.P.* As discussed in detail here, on April 12, 2024, in a short, unanimous opinion written by Justice Sonja Sotomayor, the U.S. Supreme Court held that a failure to disclose information required under Item 303 of Regulation S-K, standing alone, is not an actionable omission under Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. The Supreme Court said that in the absence of an affirmative statement rendered misleading by the omission, an Item 303 violation alone is not sufficient to state a claim under Rule 10b-5. As the Supreme Court opinion put it, “pure omissions are not actionable under Rule 10b–5.”

This *Macquarie* case had the potential to produce a significant holding that could have affected many liability actions under the U.S. securities laws; if the Court had ruled in favor of the plaintiffs and held that pure omissions cases were actionable, it could have significantly affected many cases and indeed could have perhaps encouraged many more cases to be filed.

As it turned out, however, with the Court rejecting the position that the plaintiffs had urged the court to adopt, the case likely will have a more modest impact. At a practical level, the court's opinion rejecting plaintiffs' attempt to rely on Item 303 is unlikely to affect the number of securities cases filed. While plaintiffs' lawyers frequently include Item 303 omission allegations in securities complaints, their complaints rarely allege only Item 303 omissions (indeed, the complaint in the *Macquarie* case itself alleged multiple violations of which the alleged Item 303 omissions were only one).

The likeliest impact is that the decision in this case will cause plaintiffs' lawyers to alter the way they plead Item 303 allegations – plaintiffs' lawyers are likely to replead Item 303 omissions cases as “misleading statement” cases. Intriguingly, by emphasizing that it was only considering pure omission cases, the Court expressly did not consider the pleading requirements with respect to cases alleging “half-truths,” leaving an issue for another day.

The second of the two cases in which the Court issued substantive opinions during 2024 was the *SEC v. Jarkesy* case. As discussed in detail here, on June 27, 2024, the U.S. Supreme Court held in the *Jarkesy* case that, in light of the Seventh Amendment's right to a jury trial, the SEC must pursue enforcement actions seeking civil penalties in a jury trial proceeding in federal court rather than in an action before an administrative law judge.

The Court's opinion in the *Jarkesy* case is a landmark decision with important implications for the SEC's future enforcement efforts. As Justice Gorsuch noted in his concurring opinion in this case, the SEC has frequently used its in-house administrative courts to pursue enforcement actions, where it has prevailed with much greater frequency than it has in civil actions in federal court. According to Justice Gorsuch, the SEC has won about 90% of its contested in-house proceedings compared to 69% of its cases in court. Without the ability to pursue claims in what has been for the SEC a more hospitable forum, the agency at a minimum may not prevail as frequently, and perhaps might even pursue fewer enforcement actions.

The Court's *Jarkesy* decision could also have important ramifications for other agencies' abilities to pursue proceedings within their bailiwick in their own administrative courts. As Justice Sotomayor noted in her dissenting opinion, Congress has enacted more than 200 statutes authorizing dozens of agencies to impose civil penalties for violations of statutory obligations. At least in statutory proceedings involving actions that are analogous to common law claims, the defendants in these actions potentially could argue that they are entitled to a civil court jury trial rather than an administrative proceeding and seek to have their claims dismissed. Potentially, the enforcement efforts of federal agencies generally could be significantly undermined, or at minimum substantially altered.

The Court addressed the *Macquarie* and the *Jarkesy* cases as part of its *prior* court term, ending in June 2024. As part of the Court's *current* term, which commenced in October 2024, the Court had agreed to take up two *additional* securities law cases. Corporate and securities law observers and commentators were excited that the Court had agreed to take up the two cases – the Facebook Cambridge Analytica case and the Nvidia case – as both had significant potential to provide insights about securities lawsuit pleading standards and processes.

However, as noted here, in November 2024, the court dismissed the Facebook Cambridge Analytica case. Then, in a terse, one-line December 11, 2024, order, the Court dismissed the Nvidia case, the second of the two cases, meaning that instead of addressing two securities law cases during the current term, the Supreme Court did not and will not consider *any* securities cases. A copy of the Court's December 11, 2024, order in the Nvidia case can be found here.

The Facebook case had arisen out of the Facebook-Cambridge Analytica User Data Scandal. Cambridge Analytica allegedly improperly used Facebook user data to target voters in connection with the 2016 U.S. Presidential election. Whistleblower-based news report revealed the extent of Cambridge Analytica's use of the data, and its continued use of the data even after Facebook had become aware of the misuse and had asked Cambridge Analytica to destroy the data. In the consolidated securities litigation that followed, the claimants raised several allegations; of greatest relevance to the issues the Supreme Court agreed to take up, the plaintiffs alleged that the company in its risk factor disclosures had referred to the risks to the company of an unauthorized user data disclosure, but had presented the risk as hypothetical when in fact it has already materialized.

In the Nvidia case, the plaintiff shareholders alleged that Jensen Huang, the company's CEO, knowingly understated the extent to which demand for certain of the company's GPUs was being driven by cryptocurrency miners (as opposed to demand from gamers). In order to support their claims, the claimants cited not internal documents or witness statements, but rather relied on expert witnesses to analyze public data about activities of the crypto mining companies, using assumptions about the amount of computing power needed to facilitate the disclosed activities, and from that estimating the number of GPUs needed for the activity and what percentage of those GPUs would have been NVIDIA's. Among other things, the Court agreed to take up the question of the extent to which claimants may satisfy the PSLRA's requirements to plead falsity in reliance on expert testimony. The court also agreed to take up the question whether a plaintiff relying on documents to plead scienter must specify the contents of those documents.

Both cases were fully briefed and argued. (The court heard oral argument in both cases in November 2024.) However, in the days following oral argument, the Court entered nearly identical terse one-line order dismissing the cases, saying only that the writ of certiorari in the cases had been "improvidently granted." As is customary with such actions, the Court provided no further explanation.

The immediate practical effect of the Court's dismissal of the cases is that the Ninth Circuit's rulings in the two cases, in which the appellate court had in each case sustained the plaintiffs' cases, at least in part, will stand. The portions of the two cases that the appellate court had sustained will now go forward for further proceedings.

The other immediate practical effect of the Court's dismissal of the two cases is that the Supreme Court will now not be issuing substantive opinions on the issues that the two cases raised. The dismissals mean that important legal questions regarding securities fraud and disclosure requirements remain unresolved at the highest judicial level. This could lead to continued uncertainty and variability in how lower courts interpret and apply securities laws. The lack of definitive rulings from the Supreme Court in the two cases potentially could encourage more securities litigation, as plaintiffs may feel emboldened by the Ninth Circuit's rulings in the two cases that were left standing.

There arguably is another important potential implication from the Court's dismissal of the two cases. The dismissals could be interpreted to suggest a possible hesitance by the Supreme Court to engage in securities law disputes. If this view is correct, the implication could be fewer securities law cases being taken up by the Court in the near future.

AI Emerges as a Significant Corporate and Securities Litigation Risk

Since OpenAI launched ChatGPT in November 2022, the race to capitalize on emerging artificial intelligence (AI) technologies has super-charged the financial markets. The stock prices of AI-associated companies, such as Nvidia and Broadcom, have soared. Several AI-related companies — such as, for example, Astera Labs and Rubrik —successfully completed IPOs in 2024, one of the main reasons that the IPO market showed signs of life during the year.

With interest in AI surging in the financial markets, many companies want to try to catch some of the lightning for themselves. However, what companies say about AI, their AI capabilities, and their AI prospects could have significant consequences for the companies' corporate and securities litigation risks, as well as for their risks of regulatory scrutiny. During 2024, a number of different companies faced either SEC enforcement action or private securities class action litigation based on their alleged statements about their AI-related capabilities or prospects.

In December 2023, SEC Chair Gary Gensler specifically warned against AI-related misrepresentations, and cautioned reporting companies against so-called "AI-washing," echoing concerns about climate change-related "greenwashing," and referring to companies that attempt to burnish their investment profile with outsized claims about their AI-related opportunities. More recently, then-SEC Enforcement Director Gurbir Grewal warned about the potential for AI-washing to mislead investors, harm consumers, and violate the securities laws.

These warnings have been followed by SEC enforcement activity, including at least one enforcement action involving a publicly-traded company. As discussed here, in September 2024, the SEC filed a civil enforcement action against the former Chairman and CEO of

Kubient, alleging that in connection with the company's IPO and in other statements, the CEO and others had inflated the company's revenues and also misrepresented the capabilities of its supposedly AI-powered product which the company promoted for its alleged ability to detect ad fraud in the digital advertising industry. The SEC alleged that the company's claims about its product were false. Interestingly, the SEC's civil action was accompanied by a parallel U.S. Department of Justice action against the former CEO.

In addition to the action against Kubient, the SEC has also brought a number of other enforcement actions against investment advisers (as discussed, for example, [here](#)) and other commercial companies (see, for example [here](#)), in each case alleging that the target companies misrepresented their use of AI or the AI-related capabilities of their products or services.

The Federal Trade Commission (FTC) has also been active in pursuing companies for allegedly false AI-related claims. As discussed [here](#), in September 2024, the FTC announced that it had launched an initiative called Operation AI Comply as part of a "crackdown against deceptive AI claims and schemes." The agency also announced five enforcement actions the agency has launched against "operations that use AI hype or sell AI technology that can be used in deceptive and unfair ways." The agency's initiative highlights the regulatory scrutiny companies can face with respect to the AI-related operations and marketing.

In addition to the SEC's and FTC's enforcement actions, there also were a number of AI-related private securities class action lawsuits filed in 2024. According to the Stanford Law School Securities Class Action Clearinghouse website ([here](#)), there were a total of 13 AI-related securities class actions filed in 2024. A typical example of these suits is the securities class action filed in July 2024 against the Israeli-based online cosmetics company Oddity. As discussed [here](#), the claimant alleges that the company overstated the extent to which AI processes and tools enhanced its delivery of consumer services.

The Oddity lawsuit, along with most of the other AI-related securities lawsuits filed in 2024, all were more-or-less AI-washing-type suits. That is, the plaintiffs in these cases alleged that the defendant companies had overstated their AI capabilities or prospects. Obviously, there is significant risk that more of these cases could be filed in the months ahead. There is another, different type of AI-related lawsuit that could materialize in the future, and that is a lawsuit based not on a company's overstatement of its AI-related *capabilities or prospects*, but rather that the company understated its AI-related *risks*. The risks involved might not only relate to the company's own use of AI, but also to the company's competitor's use of AI.

An example of the kind of circumstances that might be involved in these kinds of lawsuits pertains to the online homework services company, Chegg. Chegg's fortunes rose during the pandemic, as stay-at-home students became dependent on the company's homework help services. However, more recently, the company's prospects declined and its share price has

dropped more than 99%. As discussed in a November 9, 2024 *Wall Street Journal* article (here), the company's former and prospective future customers have turned to ChatGPT, which has provided AI-powered homework help that seemingly captured the market. There has been no lawsuit filed against Chegg based on these events, but the sequence shows how AI-related risks can affect a company, and highlight the fact that AI-related risks are not limited solely to the company's own use of AI.

There are other potential sources of AI-related risk for companies, having to do with regulatory and legislative initiatives, particularly the EU's Artificial Intelligence Act, which the European Parliament approved in March 2024. The Act seeks to classify and regulate AI applications based on their risk to cause harm, with the highest risk level uses banned entirely, and other high-level risk uses subject to security, transparency, and quality requirements. The Act applies to both suppliers and users of AI within the EU. It can apply to companies from outside the EU if they have products or services within the EU. Many of the Act's provisions will stage in over the next two years. The newly created EU AI Office will oversee the Act's implementation and enforcement. The consequences for noncompliance can be significant, ranging from penalties of up to €35 million or 7 percent of global revenue, depending on the type of violation and size of the company. With potential penalties that large, the risk attendant to the Act extends not only to enforcement but also to the possibility of a follow-on civil action brought by investors alleging that management misrepresented their company's compliance with the Act or violated their duty of care with respect to the implementation of the Act.

There have also been AI-related legislative developments in the U.S. While there is no comprehensive AI-related legislation at the federal level, the legislatures of several U.S. states – including California, Colorado, Illinois, New York, Utah, and Virginia — have enacted or are considering legislation that seeks to regulate AI in some way. These laws generally focus on transparency, accountability, and protecting consumer rights, particularly regarding data privacy and protection against discrimination. They often require businesses to disclose AI usage, obtain consent, and ensure their AI systems do not produce biased or unfair outcomes.

In short, as companies attempt to navigate their way through the rapidly evolving technological environment, they also face a host of corporate and securities litigation-related risks, as well as a complex regulatory environment. The likelihood is that we will continue to see AI-related litigation, as well as regulatory enforcement action, in the months and years ahead. A wild card, of course, is the extent to which the policies of the incoming administration will impact the regulatory and enforcement environment.

ESG as a Source of D&O Risk Continued to Evolve in 2024

ESG has been a perennial D&O hot topic for years, but the nature of ESG as a source of D&O risk exposure has changed significantly during that time. When ESG first emerged as a D&O concern several years ago, it arose because companies felt pressured to burnish their sustainability qualifications. However, some companies soon faced so-called “greenwashing” claims, in which it was alleged that the companies had overstated their green credentials. In addition, an ESG “backlash” developed in certain U.S. states, with conservative politicians pushing back against a supposed ESG agenda. At that point, some companies found it expedient to try to lower their ESG profile, a development that has been called “greenhushing.”

ESG as a topic and as a source of potential D&O exposure continued to evolve in 2024. Perhaps no development symbolizes the change more than the news, which emerged in September 2024, that the SEC had quietly disbanded its ESG and Climate Change Task Force. The Task Force had been announced with a great deal of fanfare in March 2021, with the mission of developing “initiatives to proactively identify ESG-related misconduct.” At the time the disbanding of the Task Force became public, the agency tried to message that notwithstanding the dismantling of the Task Force, its ESG enforcement efforts would continue. But the closing down of the Task Force arguably symbolizes the extent to which the profile on ESG initiatives has changed.

Another 2024 development showing how the environment for corporate ESG initiatives has changed is that during the year, a number of prominent U.S. companies – for example, Ford, Harley-Davidson, and Walmart – under pressure from conservative activists, walked back or closed down their DEI initiatives. These efforts from conservative activists sustained a significant amount of momentum from the U.S. Supreme Court’s 2023 decision in *Students for Fair Admissions v. Harvard College*, in which the Court ruled that race-based policies should not be used in university admissions. As discussed in a December 28, 2024, *Wall Street Journal* article (here), the pressure against companies relating to DEI could increase in the Trump Administration.

Yet another significant ESG-related development during the year was the December 2024 decision of the Fifth Circuit, sitting *en banc*, striking down the SEC’s approval of Nasdaq’s board diversity guidelines, as discussed here. The Nasdaq guidelines were one of several high-profile initiatives announced in 2020, after the death of George Floyd, to address diversity concerns in corporate America. Prior court decisions had previously struck down other board diversity requirements; for example, both federal and state courts had previously struck down California’s board diversity statute. With the Fifth Circuit’s decision, it appears that mandated board diversity requirements are pretty much dead.

There were also significant developments in 2024 with respect to anti-ESG litigation, as well. For starters, and as discussed here, in November 2024, a coalition of eleven conservative states’ attorneys general filed an anti-ESG action against the three largest institutional

investors — BlackRock, Vanguard, and State Street — alleging that as part of their ESG-related efforts the three conspired in violation of the antitrust laws to restrict the U.S. production of coal.

With respect to pending anti-ESG litigation, and as discussed here, in the securities class action lawsuit filed against Target in connection with the company's disclosures of its Pride Month-themed marketing initiative, in December 2024, the court denied the defendants' motion to dismiss, holding that the plaintiff's allegations were sufficient to survive the initial pleading hurdles.

However, and characteristic of the way ESG has developed over time, not all of the 2024 ESG developments pointed in only one direction. For starters, the SEC brought a number of ESG-related enforcement actions – including several filed after the ESG Task Force was disbanded. For example, in September 2024, the SEC filed a settled enforcement action against Keurig Dr. Pepper, in which the agency alleged that the company had misleadingly claimed that its single-serve pods, known as K-Cups, could “effectively” be recycled. The company neither admitted nor denied the allegations but did agree to pay a \$1.5 million civil penalty. The agency also filed at least two enforcement actions against investment firms after it disbanded the Task Force in connection with the firms' allegedly misleading statements about its ESG-related funds or investments, as discussed here and here.

There were also important developments, contrary to the overall anti-ESG narrative, in other pending ESG-related lawsuits. For example, and as discussed here, on August 29, 2024, the DC Court of Appeals reversed a lower court's dismissal of an action brought against beverage company Coca-Cola, in which the advocacy group plaintiff, Earth Island Institute, alleged that the company had violated the DC Consumer Protection Procedures Act (CPPA). The advocacy group had alleged that the company's efforts to promote its sustainability efforts and goals amounted to greenwashing.

In addition, and as discussed here, in November 2024, a plaintiff shareholder filed a derivative lawsuit against the board of the athletic clothing company Lululemon, alleging that notwithstanding the company's adoption of a DEI program, the company's efforts were not “structured so as to meaningfully combat discrimination” at the company and that as a result the company's employees continued to experience discrimination.

There were also other ESG-related lawsuits filed in 2024 that were contrary to the general run of anti-ESG actions. For example, as discussed here, in August 2024, the publishing and data company RELX was sued in a “greenwashing” lawsuit in which the claimant alleges the company misled investors about the company's climate commitments and its climate-related actions.

In addition, and also in August 2024, in a lawsuit involving the “S” ESG pillar, the online retail platform firm PDD was sued in a securities lawsuit in which it was alleged that the company allowed products made in China using forced labor to be sold on its platforms, as discussed here.

In other words, notwithstanding the ESG backlash, companies are still being sued for failing to live up to the values that the ESG concept represents.

Indeed, other regulators are also continuing to pursue enforcement actions that reflect ESG supportive values. For example, in February 2024, the New York Attorney General sued Brazilian the meat company JBS in connection with the company’s sustainability claims, including specifically the company’s net zero claims, as discussed here. Similarly, as discussed here, the Australian securities regulator has brought, and in March 2024, won, a “greenwashing” enforcement action, in which the regulator established that Vanguard’s Australian affiliate made misleading statements about its ESG-sorting processes for one of its index funds.

There is one other 2024 development that will have important ESG-related ramifications in 2025 and beyond, and that is the November 2024 election of Donald Trump as the next U.S. President. As noted in the first section above, Trump has already indicated his intent to nominate Paul Atkins as the next SEC Chair. Observers and commentators uniformly seem to believe that under Atkins one step the agency seems likely to take is the withdrawal of the agency’s Climate Change Disclosure guidelines. The agency only just finalized the guidelines in March 2024, and since that time have faced a legal challenge. The expectation is that under the new administration the guidelines will be withdrawn. Commentators also expect the agency under Atkins to be less focused on ESG-related enforcement actions.

However, even if the SEC guidelines are withdrawn, that is not the end of potential climate change disclosure requirements for many companies. The climate change disclosure guidelines that the California legislature adopted for companies “doing business” in the state remain on the books, for now at least. To be sure, the California statutes do face ongoing legal challenge.

But perhaps even more significantly, and notwithstanding the potential withdrawal of the SEC’s climate change disclosure guidelines and the pending legal challenge to the California laws, many U.S. companies will continue to face the E.U.’s disclosure requirements. On July 31, 2023, the European Commission adopted the first set of European Sustainability Reporting Standards (ESRS), as part of the EU’s Corporate Sustainability Reporting Directive (CSRD). The first set of reporting standards require EU and non-EU companies with specified levels of EU activity to file annual sustainability reports with their financial statements. The standards will soon become law and apply in all 27 EU Member states, with some compliance requirements effective as early as 2025 for the 2024 reporting period. The

ESRS set out detailed reporting requirements for EU companies, including general reporting requirements; a list of mandatory disclosure requirements related to the identification and governance of sustainability matters; and ten ESG-related topics on which disclosure is required, subject to a materiality assessment. It is estimated that as many as 3,000 North American companies will have to comply with the EU sustainability reporting requirements.

In other words, notwithstanding the anti-ESG backlash, ESG-related issues are not going away any time soon. It may be that ESG-related initiatives as such may change; it may even be that the ESG label itself will fade as it become politically expedient to drop the term. But even if ESG by that name disappears, it seems likely that the underlying initiatives will continue. Companies will continue to face competing pressures both from events and from competing interest groups. And companies likely will continue to face litigation and other investor or activist group initiatives, relating to climate change, social justice, and corporate governance issues.

Cybersecurity Remains an Important D&O Risk Exposure

Just as is the case with respect to ESG, Cybersecurity has also been a perennial D&O hot topic in recent years. And just as the corporate risks associated with ESG have evolved in recent years, so too has the cybersecurity-related D&O risk changed as well.

One good place to start with respect to the question of cybersecurity as a source of D&O risk in 2024 is with the \$350 million February 2024 settlement of the Alphabet Google+ securities class action lawsuit. As discussed here, the lawsuit related to the company's disclosures concerning alleged exposure of personal profile data of users of the Google+ social media site. The case had initially been dismissed, but after the Ninth Circuit reversed the dismissal, the parties reached the \$350 million settlement, which is as far as I know the largest ever cybersecurity-related securities class action lawsuit settlement. The Alphabet Google+ settlement certainly underscores the fact that cybersecurity remains a significant source of potential corporate and securities litigation exposure.

Settlements like the one in the Alphabet case will continue to motivate the plaintiffs' lawyers, and indeed, as detailed on the *Stanford Law School Securities Class Action Clearinghouse* website (here), the plaintiffs' lawyers have continued to file these kinds of suits. To be sure, while these kinds of lawsuits do continue to be filed, they have never really been filed in the volume that many have long expected. It seems that the circumstances involved when many companies announce a data breach lack a key factor the plaintiffs need to pursue these kinds of cases; that is, because the financial markets are so inured to news of a data breach, the share price of the target company often does not move significantly in response to news of the breach. The plaintiffs' lawyers are not simply less interested in a prospective lawsuit that does not involve a significant share price decline.

What has been interesting in recent months has been the way that the kinds of things the plaintiffs' lawyers allege has changed. Arguably, this change has simply followed events.

First, in late July 2024, the cybersecurity firm CrowdStrike was hit with a securities class action lawsuit related to the massive global IT outage for which CrowdStrike is alleged to have had responsibility. The plaintiff in the case alleges that the company's market capitalization fell by \$12 billion in the wake of news surrounding the outage. The complaint alleges that during the class period, the defendants misled investors as they "repeatedly touted the efficacy" of the company's Falcon software platform, "while assuring investors that CrowdStrike's technology was 'validated, tested, and certified.'"

It could be argued that the new CrowdStrike lawsuit is not a cybersecurity-related lawsuit at all, as it does not involve an intrusion or breach, nor does it involve a hostile actor. Nevertheless, the underlying incident did involve massive IT systems' disruption – not in the defendant company's own systems, but rather in the systems of the company's customers and other third-parties. The involvement of the systems disruption does at some level make the new lawsuit network systems security-related. The absence of underlying hostile actions by a malicious third-party actor makes the lawsuit an interesting new variant in the evolution of network security-related litigation.

Second, in August 2024, the ecommerce company PDD Holdings (formerly known as Pinduoduo) was sued by investors in a securities class action lawsuit which alleges that apps that the company developed and maintain introduced malware into the company's customers' devices. The malware allegedly overrode the devices' security controls and allegedly allowed the company to access user information on the devices, including text messages. When these allegations came to light in news reports, the company's share price declined. The plaintiff in the case alleges, among other things, that the company misrepresented its protocols and processes for protecting user privacy and for complying with applicable privacy-related laws and regulations.

The new lawsuit against PDD also represents an interesting new variant in cybersecurity-related securities litigation. This new lawsuit also does not involve a hostile third-party actor, as no third-party action is alleged. Instead, the hostile actor involved allegedly is the defendant company itself, which allegedly installed malicious malware on its customers' devices. These two new cases reflect different types of circumstances not involving an intrusion or a hostile third-party actor but that nevertheless resulted in IT security related claims.

In addition to the changing trends in cybersecurity-related securities class action litigation, there have been developments in SEC cybersecurity-related enforcement activity as well.

For example, and as discussed here, in July 2024, the SEC brought a settled civil enforcement action against the U.K.-based and U.S.-listed business communications provider R.R. Donnelly & Sons, in which the agency alleged in connection with cybersecurity incidents the company suffered in late 2021 that the company's accounting and disclosure controls were deficient. The company, which the SEC credited for its cooperation and remedial measures, agreed to pay a \$2.125 million civil penalty and voluntarily adopted corrective processes and procedures.

Second, in a July 2024 decision in SEC's enforcement action against SolarWinds, the district court presiding in the action dismissed a claim nearly identical to the one asserted in the R.R. Donnelly case. The court held that the failure to detect a cybersecurity deficiency cannot reasonably be construed as an accounting problem. The court held that internal accounting controls are controls to ensure that companies "accurately report, record, and reconcile financial transactions and events," and a "cybersecurity control" does not "naturally" fit within the term "internal accounting controls." The court dismissed the SEC's allegations that the company had ineffective accounting controls. Though the court did allow some claims related to misleading statements in SolarWinds' "Security Statement" to proceed, the court's decision in the SolarWinds case is a setback in the SEC's efforts to enforce corporate cybersecurity controls.

In addition, and as discussed here, in October 2024, the SEC announced that it had filed settled charges against four companies for alleged misleading disclosures concerning cybersecurity incidents at the companies. The charges against the companies arose out of the SEC's investigation of companies potentially affected by the compromise of SolarWinds' Orion software. One of the four companies was additionally charged with disclosure controls and procedures violations. Without admitting or denying the SEC's charges, each company agreed to the entry of a cease-and-desist order against them. The companies agreed to pay civil penalties ranging from \$4 million to \$990,000.

Probably the most important cybersecurity development during 2024 with respect to D&O risk has been the implementation of the SEC's new cybersecurity disclosure guidelines, which took effect in December 2023. The guidelines are complex but have two general requirements – first, the companies must regularly report on their cybersecurity governance and oversight processes; and second, that companies must report cybersecurity incidents within four days after the companies have determined that the incidents were material. A comprehensive December 2024 survey by the Paul Hastings law firm showed that between December 18, 2023 and October 31, 2024, 48 companies made 75 cyber security incident disclosures, representing, according to the survey, a 60% increase in the number of cyber incidents reported to the SEC.

Cybersecurity is yet another area where there are questions about what approach the incoming administration will take. A number of public commentators have suggested (as discussed, for example, [here](#)), that the SEC under Paul Atkins may withdraw or non-enforce the cybersecurity disclosure guidelines, or at least some of its specific aspects or requirements. It also seems likely that the agency will take a different enforcement approach in at least some respects with respect to cybersecurity enforcement. Several of the enforcement actions discussed above featured dissenting opinions from the agency's Republican Commissioners criticizing the agency's actions. For example, In the R.R. Donnelly case the dissenters criticized the agency's action in treating cybersecurity controls as accounting controls (which of course was one of the concerns in the SolarWinds case discussed above). The dissenting opinions suggest that in the incoming administration the agency will take a different enforcement approach with respect to cybersecurity than under outgoing chair Gary Gensler.

The bottom line is that cybersecurity as a source of D&O risk has changed and likely will continue to change in the months ahead. The one thing is for sure is that cybersecurity will remain a hot button issue. It also seems likely that plaintiffs' lawyers will continue to push the envelope in certain cases when it comes to information and network security and privacy issues.

Breach of the Duty of Oversight Claims Remain a Hot Topic

For many years, Delaware's courts emphasized that duty of oversight claims (often known as *Caremark* claims) involve "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." However, in a line of cases beginning with the Delaware Supreme Court's 2019 decision in *Marchand v. Barnhill*, Delaware courts have sustained a number of different plaintiffs' assertion of breaches of the duty of oversight.

The high water mark for these kinds of cases arguably was the Boeing 737 Max air crash case, which survived a motion to dismiss and ultimately settled for \$237.5 million (all of which was funded by D&O insurance). During 2024 there was also yet another significant breach of the duty of oversight case settlement; as discussed [here](#), in October 2024, the parties to the Walmart opioid-related shareholder derivative claim, which raised claims for the breach of the duty of oversight against Walmart's board, settled for \$123 million.

The success of some *Caremark* claims encouraged more claimants to file duty of oversight claims, a development that apparently set off alarm bells in the Delaware courts. The more recent result has been a series of cases in which the Delaware Chancery Court has emphatically shot down would-be duty of oversight claims.

For example, as discussed here, in December 2023, Vice Chancellor Lori Will granted the defendants' motion to dismiss in the *Segway* case. Similarly, in February 2024, and as discussed here, VC Will granted the defendants' motion to dismiss in the *Walgreens Boots Alliance* case. These two cases are similar in that in each case the court emphasized the high bar to establish liability in *Caremark* cases. In the *Walgreens* case, VC Will bemoaned the "proliferation" of lawsuits alleging breach of the duty of oversight, observing that while there may be the "rare event" when directors "cross the red line of bad faith," and liability can arise, "more harm than good comes about if *Caremark* claims are reflexively filed" whenever the company "encounters an adverse circumstance."

Similarly, in July 2024, in the *Bricklayers Pension Fund of Western Pennsylvania v. Brinkley (Centene)*, Vice Chancellor Morgan Zurn granted the defendants' motion to dismiss the plaintiff's breach of the duty of oversight claims against the Centene board, in yet another opinion that emphasizes the high bar for *Caremark* liability. The board, she found, had accepted management's statements that the compliance risks "were being handled," and the board "did not make a conscious decision to violate the law" adding that "A bad outcome, without more, does not equate to bad faith."

While these three recent Delaware Chancery Court decisions dismissing breach of the duty of oversight cases highlight the difficulty for claimants of maintaining breach of the duty of oversight claims, there nevertheless have been subsequent rulings in which breach of the duty of oversight claims have been sustained.

For example, as discussed here, in September 2024, in a breach of the duty of oversight case filed against the board of Wells Fargo, the court denied in part the Wells Fargo defendants' motion to dismiss in the case. Of importance here, the court in that case sustained the claimants' allegations that the Wells Fargo directors breached their duties by failing to oversee the company's allegedly discriminatory lending practices. It is worth noting that while the court applied Delaware law in reaching the ruling, the court that sustained the breach of the duty of oversight claims was not the Delaware Court of Chancery, but rather the United States District Court for the Northern District of California.

Similarly, and as also discussed here, in August 2024, the United States District Court for the Northern District of Illinois, applying Delaware law, sustained breach of the duty of oversight claims against the board of Abbot Labs with respect to the safety of the company's infant formula products.

The bottom line is that notwithstanding recent Delaware Chancery Court skepticism toward breach of the duty of oversight claims, there is life for these kinds of suits, at least in some cases – including in cases filed outside of the Delaware state courts.

The potential continued viability of these kinds of suits may be relevant in another way; that is, there has been a great deal of speculation that oversight duty breach cases could emerge from the current litigation risk exposures, such as, for example, with respect to cybersecurity, ESG, and AI. There could well be future claims involving these issues and alleging the breach of the duty oversight. Whatever else might be said, it seems to remain the case that breach of the duty of oversight claims remain difficult to sustain.

Geopolitical Concerns Increasingly Contribute to D&O Risk

We live in a time of significant geopolitical risk, from the highly volatile conditions in the Middle East, to the ongoing war in Ukraine, to continuing tensions in the South China Sea, among many other concerns. As I noted in the first section above, the incoming Trump administration's trade policies, including the imposition of tariffs, could exacerbate geopolitical tensions. These concerns have important ramifications, including, among other things, as a source of potential D&O liability exposure. In prior posts on this site (for example, [here](#)), I have highlighted ways that geopolitical issues, such as, for example, trade sanctions, can translate into corporate and securities litigation. During 2024, there were additional concrete examples where these kinds of factors contributed to corporate and securities litigation.

As discussed [here](#), in October 2024, plaintiff shareholders filed a securities class action against the technology company Super Micro Computer. The lawsuit filing followed, and significantly relied upon, the publication of a short seller report which alleged a variety of alleged financial shortcomings at the firm. In addition to the alleged accounting misconduct, the report also alleged that the company had violated U.S. export controls. The report alleged that despite the company's claims of having halted sales to Russia following the 2022 invasion of Ukraine, the company, the report alleged, had circumvented U.S. export controls between February 24, 2022, and June 30, 2024. During this period, the report alleged, the company's sales to Russia surged, allegedly with \$210 million in products shipped to the country.

A separate securities class action lawsuit filed in December 2024 provides another example of the ways in which trade and sanctions issues can lead to securities litigation. The case involves Joint Stock Company Kaspi.kz, a Kazakh based firm whose operations include a bank and an online consumer product sales platform. The lawsuit against Kaspi.kz also followed a negative report from a short seller. As discussed at length [here](#), in its SEC filings, the company claimed it had no exposure to Russia or Russian businesses. The short seller report alleged that the company's platforms were being used for unlawful purposes, including assisting Russians with evading sanctions in the wake of the 2022 Russian invasion of Ukraine. The short seller report also alleged that the company's banking services were being used by Russians for money laundering purposes.

In addition to these two 2024 examples, in a post I published in late 2023, I noted the securities class action lawsuit filed against memory storage device company Seagate Technology Company, after the company agreed to a \$300 million Department of Commerce penalty for violation of export control violations pertaining to the Chinese company, Huawei.

The litigation risk arising from geopolitical concerns is not limited just to issues involving export controls. International trade regulatory regimes have become increasingly important for companies and their executives. These regulatory regimes include U.S. sanctions, anti-money laundering (AML), and anti-bribery and corruption laws. Recent developments, such as the War in Ukraine, trade tensions with China, and issues involving digital assets have heightened these concerns. Violations of these regimes can result in regulatory enforcement actions as well as in related civil litigation. The cases discussed above show how these concerns can translate into securities litigation.

As I have previously pointed out, the prospect for securities litigation arising out of trade sanctions and export control-related issues is not necessarily new; there have been examples of corporate and securities lawsuits arising out of trade sanction and export control issues over the last several years. However, in the current tense geopolitical environment, all of these concerns loom larger.

Not only that, but the topic of geopolitical risk is one that is about to get a lot more complicated, if, for example, incoming President Trump follows through on his threats to impose tariffs on many U.S. trading partners. Any move along those lines could hazard a global trade war, and an already complex geopolitical risk environment would become even more fraught – which among many other things could contribute significantly not only to operating risks but also to potential corporate and securities litigation exposures for many companies.

In short, while I have long thought that geopolitical risks represent an important area of corporate and securities litigation risk, that risk could become significantly greater as we head into 2025 — and beyond.

D&O Insurance Buyers Enjoy A Favorable Marketplace, For Now

With all that is going on in the D&O liability arena, it might well be expected that underwriters might pull back or even seek to raise prices in the months ahead. However, and despite everything discussed above, the D&O insurance marketplace remains competitive, with most buyers enjoying relatively advantageous pricing for relatively broad terms and conditions.

To understand what is going on, we have to go back a few years, to the 2019-2021 timeframe. Following years of underpricing and after years of claim reserve strengthening, the D&O insurers were experiencing widespread underwriting losses. For most buyers during this period, their D&O insurance costs increased, in some cases dramatically, and in

many cases their self-insured retentions increased as well. In short, the industry was in what is known as a “hard market.” The hard market conditions coincided with a boom in the financial markets, including significant IPO and SPAC activity, meaning there was significant demand for insurance as well.

The insurance business is cyclical, and the hard market conditions that prevailed during the period 2019-2021 eventually gave way as the industry moved to the next phase in the cycle. The hard market pricing conditions attracted new capital and new market participants. The arrival of the new capacity coincided with the collapse of the market for IPOs and SPACs, meaning that as insurance supply expanded, insurance demand declined. Abundant supply and diminished demand meant that competition returned to the D&O insurance marketplace. Starting in early 2022, many buyers saw their management liability insurance costs drop compared to the hard market years.

The softening market conditions that began in 2022 continued through 2023 and on into 2024, although the extent of the pricing reductions for many buyers has levelled off somewhat in more recent periods. Most D&O insurance buyers are continuing to see their overall insurance costs decline slightly, with even companies that have had issues or complications seeing flat renewals. Of course, financially troubled companies, companies in certain disfavored industries, and companies with complex claims histories may face a more challenging marketplace, but for most other buyers the D&O insurance marketplace has been and remains relatively benign.

There are some industry observers who have been saying that they anticipate the possibility of marketplace tightening in 2025. There are voices in the D&O space (as there always are when the insurance market is in the soft phase of the cycle) saying that the price decreases have gone too far and have fallen below risk-based pricing levels. Perhaps these concerns could cause the D&O insurance market to shift to the next phase of the cycle. However, it is important to remember that — at least historically — the soft market phase of the cycle generally lasts a lot longer than the infrequent and usually brief hard phases of the cycle. It probably should also be noted that the most important cause of the current softer market conditions — that is, abundant insurance capacity — remains fully in place, meaning that a significant move toward a harder market in 2025 could be unlikely.

The laws of supply and demand generally control the D&O insurance marketplace, and at the current moment supply remains ample. For the moment, at least, generally competitive conditions remain in effect, and it remains a favorable pricing environment for most D&O insurance buyers. What the future may bring remains to be seen.

A Final Note: Those of you keeping score at home may have noticed that although this post’s title refers to the “Top Ten” stories, I have only set out nine stories above. To try to bring the number up to a nice, round total of ten stories, I had drafted up two alternatives for

the tenth slot. But in the end I decided to reject both alternatives, as I didn't think the topic of either qualified as a "top" story, and I also feared that including either would make an already lengthy blog post even longer. I kept the traditional article title though, because "Top Ten" has a better ring to it than "Top Nine." I apologize to anyone that feels short-changed.

Federal Court Securities Class Action Lawsuit Filings Increased in 2024

[dandodiary.com/2025/01/articles/securities-litigation/federal-court-securities-class-action-lawsuit-filings-increased-in-2024](https://www.dandodiary.com/2025/01/articles/securities-litigation/federal-court-securities-class-action-lawsuit-filings-increased-in-2024)

January 5, 2025



By Kevin LaCroix on January 5, 2025

Posted in Securities Litigation



The number of federal court securities class action lawsuit filings increased in 2024 for the second year in a row, to the highest level since 2020. The increased number of federal court securities suit filings during the past year is due to several factors, including continuing filings relating to ongoing trends such as new lawsuit filings relating to SPACs, COVID-related suits, and cryptocurrencies, as discussed further below.

D&O insurers closely track the annual number of securities class action lawsuit filings. The number of annual filings can provide some indication of the insurers' ultimate loss costs for the year. The current year's filing patterns can also inform the insurers' efforts to try to determine the profit-making price for their insurance product.

According to my tally, there were 222 federal court securities class action lawsuit filings in 2024, compared to 212 in 2023, representing about a 4.7 % increase. The 222 federal court securities suit filings represent the highest annual number of federal court filings since 2020, when, due to significant number of federal court class action merger objection lawsuit filings that year, there were 313 federal court securities class action lawsuit filings. Please note that these numbers reflect only federal court securities suit filings; the numbers do not include state court securities class action lawsuit filings.

The 2024 federal court securities suit filings total reflect a number of continuing securities lawsuit filing trends. For example, of the 222 federal court securities suit filings, nine involved SPAC-related lawsuits, representing 4% of all 2024 filings. Similarly, there were 16 COVID-related securities lawsuit filings, representing 7.2% of 2024 filings. There were also seven cryptocurrency-related federal court securities lawsuit filings in 2024, representing 3.2% of all filings. In addition to the impact of these continuing trends, the number of 2024 securities suit filings was also increased by filings related to artificial intelligence; of the 222 federal court securities suit filings in 2024, 13 were AI-related, representing 5.8% of all 2024 federal court

securities class action lawsuit filings. The theme-related filings from these four categories collectively total 45, representing 20.2% of all 2024 federal court securities class action lawsuit filings.

In addition, there were five federal court class action merger objection lawsuit filings in 2024, meaning that there were 217 “core” or “traditional” lawsuit filings during the year. The number of federal class action merger objection lawsuit filings has declined significantly since the 2016-2020 timeframe, resulting in significant decrease in the overall annual number of federal court securities suit filings since that time. It is important to note that significant numbers of federal court merger objection lawsuits continue to be filed; however, in more recent years, plaintiffs’ lawyers, for tactical reason, have chosen to file these actions as individual lawsuits rather than as class actions, and as a result these filings do not show up in the class action filing numbers.

The 2024 federal court securities class action lawsuit filings were first-filed in 40 different federal district courts. The federal district court with the highest number of first-filed securities suit complaints in 2024 was the Southern District of New York, which had 50 class action securities suit filings. The district courts with the next highest number of first-filed securities suit complaints were the Northern District of California with 38, and the Central District of California, with 23.

Of the 222 federal court securities class action lawsuits filed in 2024, a total of 66 were filed in district courts in New York, representing about 29.8% of all 2024 federal court securities suit filings, and 64 were filed in district courts in California, representing about 29% of all 2024 federal court securities suit filings. Of the 222 federal court securities lawsuit filings, a total of 130 were first-filed in either California or New York federal district courts, representing about 59% of all 2024 federal court securities class action lawsuit filings.

The 2024 federal court securities class action lawsuit were filed against a wide variety of different kinds of companies. The 222 federal court securities class action lawsuits were filed against companies in 100 different Standard Industrial Classification (SIC) codes. The SIC Code with the highest number of 2024 filings was the SIC Code Category 7372 (Prepackaged Software), which had 24 federal court securities class action lawsuit filings in 2024, representing about 10.8% of all 2024 federal court securities suits.

The SIC Code Industry Group with the highest number of 2024 securities suit filings was the 283 SIC Code Industry Group (Drugs), which had 37 securities suit filings during the year, including 22 in the 2834 SIC Code category (Pharmaceutical Preparations). In addition to the 2024 filings in the 283 Industry Group, there were an additional ten securities suits filed in the 384 SIC Code Industry Group (Surgical and Medical Instruments). Together, lawsuits

against companies in these two industry groups totalled 47 federal court securities suit filings in 2024, meaning that 21.1% of the total number of 2024 suits were filed against biotechnology and medical device companies.

Companies in the SIC Code group 737 SIC Code Industry Group (Computer Programming and Data Processing) collectively had 36 securities lawsuit filings in 2024, meaning that lawsuits filed against companies in the high technology industry represented 16.2% of all 2024 federal court securities class action lawsuit filings.

A total of 83 securities lawsuits were filed in 2024 against companies in the biotechnology and high-tech industry groups taken collectively, meaning that during 2024, lawsuits against companies in these two industry groups represented 37.3% of all federal court securities class action lawsuit filings.

Of the 222 federal court securities class action lawsuit filings in 2024, 37 were filed against companies either organized under the laws of a country outside the United States or that have their principal place of business outside the U.S. The companies named in these suits represented 16 different countries. The countries with the highest number of 2024 securities suit filings were the United Kingdom, with 7; and Israel and China, with five each.

Nine of the 222 federal court securities suit filings in 2024 involved IPO companies, representing 4% of all 2024 filings. Of these nine lawsuits, one represented the IPO class of 2020; three represented the IPO class of 2021; two represented the IPO class of 2023; and three represented the IPO class of 2024.

Notes about Data and Methodology: I count each company that has been sued in a securities class action lawsuit for essentially the same allegations only once, regardless of the number of complaints filed. This counting methodology may differ from the methodology used by other public sources that track securities lawsuit filings, which in turn may cause my tallies to differ from other published tallies.

In tracking the securities lawsuits, I rely on several different sources, including the Stanford Law School Securities Class Action Clearinghouse; Law 360; Justia; ISS Securities Class Action Services; and Stanford Securities Litigation Analytics. I also audit my tally against other resources periodically throughout the year.

Top Ten Stories of 2024 Webinar: Please note that on Wednesday, January 15, 2024, at 11:00 AM EST, my colleagues Marissa Streckfus, Chris Bertola, and I will be conducting a free, hour-long webinar in which we will discuss The Top Ten D&O Stories of 2024. Registration for the webinar can be found [here](#). I hope you can join us for the webinar. In addition, keep your eyes out for my annual Top Ten blog post, which I will be publishing tomorrow.

Class Action

Jan. 6, 2025, 7:26 AM PST

Grab Agrees to \$80 Million Settlement in Suit Over SPAC Merger

By Gillian R. Brassil

- Investors asked judge for preliminary approval of settlement
- Lawyers asked for up to a one-third sum in attorneys' fees

Grab Holdings Ltd. and shareholders agreed to settle for \$80 million in a case alleging the rideshare and delivery app operator omitted key information in its SPAC merger, the plaintiffs told the federal court.

Investors want Judge Jennifer L. Rochon's preliminary approval in the US District Court for the Southern District of New York, writing that the sum was "well above the range of the average recovery" in a memorandum supporting the agreement docketed on Jan. 2. They estimated it would be between 8.9% and 13.4% of the maximum likely recoverable damages if the shareholders prevailed in trial, the memorandum said. The motion for preliminary approval of the settlement is unopposed, it says.

The lead plaintiffs want Rochon to okay class status for the settlement, writing that continued litigation would be particularly strenuous given Grab—which operates ride-hailing, food delivery, and other services in Southeast Asia—is international. Members would include those who got shares from Aug. 2, 2021 through March 3, 2022 of Grab or the special purpose acquisition company it merged with. In exchange, shareholders cannot sue Grab over allegations related to this case, the memorandum said.

Co-lead counsel Pomerantz LLP and Levi & Korsinsky LLP requested up to a third of the settlement amount in attorneys' fees, plus interest accrued in the escrow account.

Investors said they and Grab met in July and October with a third-party mediator who issued a double-blind recommendation of \$80 million, leading the parties to tell the court in November that they had agreed to resolve the case. They finalized the stipulation on Dec. 30, the investors said.

Shareholders had sued Grab in 2022, alleging securities law violations after a fourth-quarter 2021 year-over-year revenue decline caused the stock price to drop 37% that March—the most since it merged with Altimeter Growth Corp. to become public in December 2021, according to data compiled by Bloomberg. The investors advanced claims the app maker omitted key information about marketing expenses in its SPAC merger proxy, the SDNY said in March 2024.

Skadden, Arps, Slate, Meagher & Flom LLP represents Grab. Neither side's attorneys responded to emails seeking comment.

The case is In re Grab Holdings Ltd. Sec. Litig. , S.D.N.Y., No. 1:22-cv-02189, 1/2/25 .

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This Week in Chancery Court: Skechers Jets, Skillz, Pioneer

By Jennifer Kay

Skechers USA Inc.'s win in the Delaware Chancery Court over an investor's complaint about the use of its corporate jets is set for review by the state's top court.

Here's a look at the Chancery Court's schedule this week:

Tuesday: Hanna v. Paradise, Del. Ch., No. 2024-0228, oral arguments 1/7/25.

At issue: A shareholder sued Skillz Inc. founder Andrew Paradise and scores of corporate insiders, saying they manipulated the gaming platform's share price in order to save tens of millions of dollars dumping stock when they knew the company was about to reveal bad news. The March 2024 lawsuit initially included former NBA All-Star Luol Deng among the defendants, but the plaintiff has since dismissed him, along with dozens of others, according to a filing. Paradise and the remaining defendants have asked the court to dismiss the complaint and its "baseless assumptions," according to a brief.

Court action: Oral arguments on the motion to dismiss will be held in Wilmington, Del.

Skillz Founder, Former NBA Star Sued Over Insider Trading Claims

Wednesday: Conte v. Greenberg, Del., No. 76,2024, oral arguments 1/8/25.

At issue: A Skechers shareholder is asking Delaware's highest court to overturn a Chancery Court decision that rejected claims the footwear company's board failed to police excessive personal use of its two planes by CEO Robert Greenberg, his two sons, and COO David Weinberg. The complaint "was only one stockholder's personal preferred course of action," the executives said in an answering brief.

Court action: The Delaware Supreme Court hears oral arguments in Dover, Del.

Skechers CEO, Board Win Lawsuit Over Personal Use of Company Jet

Thursday: Sjunde AP-Fonden v. Activision Blizzard Inc., Del. Ch., No. 2022-1001, oral arguments 1/9/25.

At issue: Last February, Chancellor Kathaleen St. Jude McCormick allowed a Swedish pension fund to proceed with a lawsuit challenging Microsoft Corp.'s \$69 billion acquisition of video game studio Activision Blizzard Inc. Microsoft, Activision, and former Activision directors now seek the dismissal of at least some of the claims in the pension fund's third amended complaint. The pension fund said it "still has had no significant discovery in this two-year-old litigation," according to an answering brief.

Court action: Oral arguments on the motions to dismiss will be held in Wilmington, Del.

Microsoft, Activision Ordered to Face Lawsuit Over Merger (1)

Thursday: Operating Eng'rs Constr. Indus. & Miscellaneous Pension Fund v. Pioneer Nat. Res. Co., Del. Ch., No. 2024-0101, trial 1/9/25.

At issue: A pension fund sued Pioneer Natural Resources Co. last February ahead of a planned \$60 billion sale to ExxonMobil Corp., citing fears Pioneer's leaders may have hidden news about Exxon's finances that threatened the deal's value to Pioneer shareholders. Eight months after the merger closed, the books-and-records lawsuit—in which ExxonMobil is not named as a defendant—goes to trial. The pension fund seeks internal files from the Texas-based energy exploration and production company to investigate allegations that its executives concealed a looming impairment charge at Exxon worth \$2.4 billion to \$2.6 billion. Pioneer says it's produced hundreds of pages of board meeting minutes, related materials, and other corporate records, yet the pension fund "presses for more," according to a brief. The pension fund seeks former Pioneer CEO Scott Sheffield's text messages and emails related to the merger, according to their pre-trial brief.

Court action: Senior Magistrate Judge Selena E. Molina will preside over a half-day trial in Wilmington, Del.

Exxon's \$60 Billion Pioneer Buyout Draws Pension Fund Lawsuit

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AIG, Chubb Must Cover Harman Settlement in Samsung Deal Suit (1)

By Ben Miller

- Insurers issued D&O policies covering Harman in tie-up
- Class action payout falls under policies, Delaware judge says

Harman International Industries Inc.'s insurers—units of American International Group Inc., Chubb Ltd., and W. R. Berkley Corp.—are on the hook for the car technology company's \$28 million shareholder settlement over its acquisition by Samsung Electronics Co., a Delaware state court ruled.

The proposed class action underlying the insurance dispute alleged that Harman filed a misleading proxy statement ahead of the Samsung deal, and the directors and officers policies Harman purchased provided a combined \$40 million in coverage that should apply to the 2022 agreement settling those claims, Judge Paul R. Wallace of the Delaware Superior Court said in a Friday order.

The insurers each denied coverage based on a "Bump-Up Provision" in their policies excluding any judgment or settlement amount that represents an increase in consideration following an acquisition.

Even though the Samsung-Harman deal was an acquisition, the underlying securities suit didn't focus on inadequate deal price as a viable remedy, so the exclusion doesn't apply, the judge said in his opinion granting Harman's motion for summary judgment and denying the insurers' motion.

"This is a monumental win for policyholders, which vindicates their entitlement to D&O coverage for settlements of lawsuits arising from M&A transactions," said Orrie Levy, a partner at Cohen Ziffer Frenchman & McKenna who represents Harman.

The relief sought in the proposed class action was the difference between the price Harman shareholders received and Harman's true value at the time of the acquisition, but the settlement itself doesn't represent an increase in consideration for the tie-up, Wallace said. The parties settled to avoid further pricey litigation and associated risks, and the \$28 million figure represented an estimate of defense costs had the case proceeded, he said.

AIG, Chubb, and Berkley didn't immediately respond to requests for comment.

Harman is also represented by Potter Anderson & Corroon LLP.

Heyman Enerio Gattuso & Hirzel LLP and Alston & Bird LLP represent the AIG unit. Smith Katzenstein & Jenkins LLP represents the Chubb and Berkley units. Chubb is also represented by London Fischer LLP, and Berkley is also represented by Wiley Rein LLP.

The case is Harman Int'l Indus. Inc. v. Ill. Nat'l Ins. Co. , Del. Super. Ct., No. N22C-05-098, 1/3/25 .

(Adds comment from Harman's counsel in fifth paragraph.)

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Arguing Class Actions: Manifestation Redux

 [law.com/nationallawjournal/2025/01/06/arguing-class-actions-manifestation-redux](https://www.law.com/nationallawjournal/2025/01/06/arguing-class-actions-manifestation-redux)

Adam J. Levitt

Adam J. Levitt, founding partner of DiCello Levitt. Courtesy photo

Commentary

Arguing Class Actions is a monthly column for the National Law Journal.

January 06, 2025 at 07:00 AM

🕒 7 minute read

The advent of the new year seems an appropriate time to revisit the hot-button issue of “manifestation” in product defect cases. In some cases, a defective product fails to perform as intended from day one. In others, the defect remains latent, unknown to the consumer, until it “manifests,” sometimes resulting in severe physical injury. No matter whether the defect is latent or not, one expects that reasonable consumers would not be willing to pay the same price for a defective product compared to a non-defective product. As I have argued previously in this space, this economic injury should, at the very least, establish Article III standing in federal court. Significantly, the weight of recent authority on this point is in accord. See, e.g., *Riddell v. General Motors LLC*, 2024 WL 2077559 (E.D. Mo. May 9, 2024) (holding that Article III standing was satisfied for each class member given evidence of a class-wide vehicle defect).

Even after clearing Article III’s constitutional hurdle, however, class plaintiffs alleging a product defect frequently face the same kinds of manifestation arguments under *state law*. Thus, federal courts are placed in the unenviable position of determining, under *Erie*, whether the product defect claims of each state at issue—up to all 50 in the most sprawling multidistrict litigations—include a requirement that the defect manifest in some fashion. The differences among the states’ laws in this area should be minimal: breach of warranty claims generally arise under the same Uniform Commercial Code provisions, fraud claims all stem from the same source in common law, and the states’ respective consumer protection statutes are mainly based on a relatively small number of pattern statutes addressing unfair and deceptive trade practices. Nevertheless, courts typically tackle the manifestation question on a state-by-state basis.

For example, *In re General Motors LLC Ignition Switch Litigation* featured a defect in the vehicles’ ignition switch that, after years of normal operation, could suddenly switch off, causing moving stalls or, worse, disabling the airbag at the most inopportune moments. 339 F. Supp. 3d 262, 274 (S.D.N.Y. 2018). The court attempted to streamline consideration of GM’s manifestation arguments by addressing the validity of the plaintiffs’ claims in eight

states, followed by another set of eight states. Even with the benefit of these bellwether legal rulings, the parties could not agree on how manifestation affected the claims in 27 remaining jurisdictions. After considering the parties' "lengthy" briefing with respect to the remaining states, the court concluded that manifestation was not required in any of them, holding that: "There is no legal or logical ground to bar Plaintiffs' recovery if they can prove that they suffered economic loss. If Plaintiffs paid x for their cars and can prove that their cars are now worth x minus y as the result of the alleged defects, it is arbitrary to prevent them from recovering the difference between x and y simply because the defect did not manifest itself in property damage or personal injury. In the Court's view, the courts that have adopted a manifestation requirement often do so *as a proxy for proof of actual defect*."

Id. at 276 (citation omitted and emphasis added). In another airbag defect multidistrict litigation, *In re Takata Airbag Products Liability Litigation*, the court similarly criticized the illogic behind imposing a manifestation requirement for a well-pleaded defect: "If Takata had installed grenades in its airbags that may or may not explode on impact, a court would not require an explosion to demonstrate manifestation of a defect." 193 F. Supp. 3d 1324, 1335 (S.D. Fla. 2016).

The *GM Ignition* court's observation that the manifestation rule may simply be operating as a proxy for whether there is a defect at all goes a long way toward harmonizing state-law manifestation requirements that may otherwise seem at odds. The Eighth Circuit's decision in *Briehl v. General Motors*, 172 F.3d 623 (8th Cir. 1999), often cited in support of a manifestation rule, is one such case where the court may have been skeptical that the subject brakes were actually defective. *Id.* at 626 ("The Plaintiffs do not allege that the [brake system] is incapable of stopping the vehicles or that [the brake system] has violated any national safety standards."), quoted in *GM Ignition*, 339 F. Supp. 3d at 276. In another seemingly pro-manifestation Eighth Circuit case, *O'Neil v. Simplicity*, 574 F.3d 501 (8th Cir. 2009), the U.S. Consumer Product Safety Commission's recall of the affected cribs suggested that the problems resulted from improperly installing the drop-side of the crib upside down, rather than a defect present in every crib. In at least one recent decision, a district court in the Eighth Circuit adopted this understanding of *Briehl* and *O'Neil* in certifying a class of owners of vehicles with the same piston ring defect. Even though GM argued that not all of these owners had suffered from the excessive oil consumption resulting from that defect, the court held that the defect had been substantiated to a class-wide extent, noting that "plaintiff has evidence from defendant's own records that the class vehicles all suffer from the same piston ring defect." *Riddell*, 2024 WL 2077559.

Another category of cases that are frequently cited in support of applying a manifestation rule, but are really better understood as cases in which the defect was not actually present class-wide, are food contamination cases. In *Wallace v. ConAgra Foods*, 747 F.3d 1025 (8th Cir. 2014), the plaintiffs' allegations that the "kosher" hot dogs they purchased may not have been kosher at all were

insufficient to sustain their economic injury claims. While this decision is often included in the Eighth Circuit's line of manifestation cases, it is better understood not as a manifestation case at all, but, rather, as a failure by the plaintiffs "to show that any of the particular packages of Hebrew National beef they personally purchased contained non-kosher beef." The Seventh Circuit's recent decision not to allow claims for economic injury in *In re Recalled Abbott Infant Formula Products Liability Litigation* similarly does not reflect a manifestation requirement, but, rather, a case in which the plaintiffs could not establish that the formula they purchased was actually contaminated. 97 F.4th 525, 529 (7th Cir. 2024) (noting that the plaintiffs "do not allege that any of the products they purchased were contaminated"). The court was careful to distinguish that holding from the one reached in *In re Aqua Dots Products Liability Litigation*, 654 F.3d 748 (7th Cir. 2011), which allowed claims for economic injury without manifestation of physical injury because "every unit of toy contained the toxic adhesive." *Infant Formula*, 97 F.4th at 529–30 (citing *Aqua Dots*, 654 F.3d at 749).

In each of these cases, one finds that the same principle generally holds: "A universal defect inherent in a product—such as a design defect or a fundamental flaw—renders each product valueless to each plaintiff," *Abbott Infant Formula*, 97 F.4th at 530. To the extent that courts require a manifestation of that defect to sustain a claim, that outcome is often best explained through an underlying skepticism about the defect itself rather than state-specific differences in the law on manifestation. Keeping this in mind may aid courts and practitioners in simplifying the legal terrain in multi-state product defect class actions involving latent, yet serious, defects.

Adam J. Levitt is a founding partner of DiCello Levitt, where he heads the firm's class action and public client practice groups. He can be reached at alevitt@dicellolevitt.com.

Thank you to DiCello Levitt partner John Tangren for contributing to this column.

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What's a consumer's privacy worth? About \$20.

 [reuters.com/legal/litigation/column-whats-consumers-privacy-worth-about-20-2025-01-06](https://www.reuters.com/legal/litigation/column-whats-consumers-privacy-worth-about-20-2025-01-06)

Jenna Greene

An attendee holds two iPhones 16 as Apple holds an event at the Steve Jobs Theater on its campus in Cupertino, California, U.S. September 9, 2024. REUTERS/Manuel Orbegozo/File Photo Purchase Licensing Rights , opens new tab

Jan 6 (Reuters) - Twenty bucks might get you a pizza or half a tank of gas or a night at the movies.

It might also be the price of your privacy.

Under the terms of a proposed class action settlement , opens new tab with Apple, people who allegedly had their private conversations recorded without consent by the company's voice-activated Siri assistant stand to receive up to \$20 per device.

Paltry as it may sound, the payout is in line with at least eight other data privacy cases – a reflection of the wider challenges plaintiffs face in winning damages for amorphous privacy-related harms, legal experts tell me.

As my Reuters colleague Jonathan Stempel reported, Apple on Dec. 31 agreed to pay \$95 million to settle claims that Siri is routinely triggered by “accidental activations.”

The assistant typically reacts when people use “hot words” such as “Hey, Siri.” But the plaintiffs claimed Siri-enabled Apple devices including phones, watches and home speakers sometimes recorded conversations uninvited, and that Apple disclosed the recordings to third parties without consent.

For example, two lead plaintiffs said that after they discussed Olive Garden, Easton baseball bats and Pit Viper sunglasses, they began receiving targeted online ads for the brands. Another allegedly talked to his doctor near a Siri-enabled device and then received advertising tailored to what he thought was a confidential medical condition.

Was Siri inadvertently spying?

Without seeing evidence laid out at trial, it's hard to know, though when Senior U.S. District Judge Jeffrey White in Oakland, California, refused to dismiss the case , opens new tab in 2021, he wrote that the “allegations plausibly show that Plaintiffs’ private communications were intercepted.”

An Apple spokesperson declined comment on the case. In court papers , opens new tab, the company, which is represented by DLA Piper and Morrison & Foerster, denied wrongdoing and said the plaintiffs’ claims were “predicated on conjecture.”

Apple also said Siri recordings are associated with a random identifier -- a long string of letters and numbers -- not a person's Apple ID, name or email address, and are used "only for the purpose of improving Siri," not for marketing.

Plaintiffs' lawyers from Lowey Dannenberg and Scott + Scott did not respond to requests for comment. In their motion seeking approval for the settlement, they said they plan to ask for up to \$28.5 million in legal fees for their five years of work, plus \$1.1 million in expenses.

While the lawyers in their motion said they have "always believed" in the strength of their case and that Apple would be held liable if they went to trial, they also noted that data privacy "is a developing area of law posing inherent risks" and it was possible they would recover nothing.

The settlement ensures that class members (estimated to be in the tens of millions, though only 3% to 5% are expected to fill out a form to claim payment) don't walk away empty-handed.

They can get a pizza.

Look. I know it's easy to armchair quarterback a settlement. And here, the plaintiffs' lawyers offered a chart , opens new tab comparing their deal to eight "comparable case outcomes" to justify the terms.

For example, a class action alleging Oracle America improperly captured, compiled and sold people's online and offline data to third parties without obtaining their consent won final approval in November, settling for \$115 million. The estimated payment per class member is \$25.

In 2022, Meta's Facebook finalized a \$90 million settlement that challenged its use of cookies to track users even after they logged off the platform. Average recovery per class member was \$39.21.

That same year, class action plaintiffs won final approval of a \$92 million settlement in a suit alleging TikTok improperly harvested users' private data, with an estimated payment of \$27.19 per class member nationwide. (A subclass of Illinois residents got \$163.13 apiece.) To privacy law expert Danielle Citron, a professor at the University of Virginia School of Law, the low individual payments reflect the difficulty of "trying to fit a 20th century model of harm onto a 21st century landscape."

In the Siri case, White rejected plaintiffs' claims of economic injury, ruling that they failed to show they relied on misrepresentations by Apple in purchasing their devices, though he allowed claims to proceed under the Wiretap Act and the California Invasion of Privacy Act.

"Privacy harms are intangible," Citron said and much harder to quantify than, say, a broken bone or lost income. But that doesn't mean the damages aren't real, affecting a person's sense of autonomy, trust and freedom of self-expression, she said. "We undervalue and

under-appreciate privacy harms and violations.”

Quantifying damages for privacy breaches is inherently complex, agreed Daryl Lim, a professor at Penn State Dickinson Law.

“Our market-based framework treats privacy preferences as individual consumer choices -- like selecting between products -- rather than recognizing them as fundamental rights,” he said via email.

As a result, deep-pocketed companies like Apple may not worry too much about legal exposure, treating lawsuit payouts for privacy breaches like "a rounding error on their balance sheets," Lin said.

While \$95 million isn't chicken feed, it's roughly nine hours of profit for Apple, whose net income , opens new tab was \$93.74 billion in its latest fiscal year, my Reuters colleague Stempel pointed out.

Still, class actions can have value beyond compensation for individual plaintiffs. Here, Apple also agreed to permanently delete Siri audio recordings it collected prior to October 2019 and to publish a webpage explaining how users can opt in to the “Improve Siri” program.

I have a suggestion: Hey Siri. Don't spy on me.

Reporting by Jenna Greene

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

Jenna Greene
Thomson Reuters

Jenna Greene writes about legal business and culture, taking a broad look at trends in the profession, faces behind the cases, and quirky courtroom dramas. A longtime chronicler of the legal industry and high-profile litigation, she lives in Northern California. Reach Greene at jenna.greene@thomsonreuters.com

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Apple to pay \$95M for claimed Siri spying on customers

DJ [dailyjournal.com/articles/382745-apple-to-pay-95m-for-claimed-siri-spying-on-customers](https://www.dailyjournal.com/articles/382745-apple-to-pay-95m-for-claimed-siri-spying-on-customers)

Apple Inc. agreed to a \$95 million settlement with an estimated "tens of millions" of customers who accused the company of using devices equipped with Siri, Apple's AI voice controlled virtual assistant, to record, store, and distribute their confidential communications to third parties without their knowledge or consent.

The settlement class could total "tens of millions" of Siri users, according to an unopposed motion for preliminary approval filed by the plaintiffs' legal team on Dec. 31. *Lopez et al v. Apple Inc.*, 4:19-cv-04577 (N.D. Cal. filed Aug. 7, 2019).

In the terms of the settlement Apple denied wrongdoing, stating, "Apple specifically denies each of Plaintiffs' contentions and claims, and continues to deny that Plaintiffs' claims and allegations would be suitable for class action status. This Agreement shall not be construed in any fashion as an admission of liability or wrongdoing by Apple."

The lawsuit claims that Apple misled consumers by telling them that the technology would only begin listening to users if they manually pressed a button on the device or used a "hot word," a vocal activation command, such as "Hey, Siri."

The original complaint was filed in the wake of a July 2019 article in the Guardian about Apple's alleged practices. The second amended complaint summarized the article.

"As reported by The Guardian, Apple collected audio recordings of Siri users in numerous instances where a hot word is never spoken and used these recordings for its own commercial and financial benefit, namely to improve the quality of Siri voice assistant dictation," the filing stated. "Worse, Apple disclosed these recordings to third-party subcontractors and/or affiliates without Siri Devices users' knowledge or consent. Each such recording and disclosure constitutes an egregious breach of social norms and is a violation of federal and state law."

The plaintiffs' claimed that Apple used the recordings to "improve Siri's reliability" and "profited handsomely from this invasion of privacy."

The plaintiffs' legal team was led by: Mark N. Todzo and Patrick Carey of Lexington Law Group' Christian Levis of Lowey Dannenberg PC in White Plains, New York; Eric Green Comite of Scott+Scott Attorneys at Law LLP in New York City; and E. Kirk Wood of Wood Law Firm in Birmingham, Alabama.

Apple's legal team was led by: Isabelle Louise Ord of DLA Piper LLP in San Francisco and Alexandria Armida Amezcua of Morrison & Foerster LLP in San Francisco.

'Legal Eagle' lawyer/YouTuber sues PayPal for commissions

DJ [dailyjournal.com/articles/382742](https://www.dailyjournal.com/articles/382742)

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The attorney behind the popular YouTube channel "Legal Eagle" said that his clients, a group of fellow YouTubers suing PayPal Inc., "are getting absolutely screwed" and he accused the company of stealing commissions from creators through their affiliate marketing for Honey, a subsidiary of PayPal.

Honey has denied wrongdoing.

Devin James Stone of Eagle Team LLP in Washington D.C., claimed that PayPal's alleged diversion of commissions from YouTubers to its subsidiary, Honey, was "the biggest scam in YouTube history" in a Jan. 2 video. In that posting, he announced the filing of a putative class action in which he is one of the lead attorneys. *Wendover Productions LLC et al. v. PayPal, Inc.*, 5:24-cv-09470 (N.D. Cal. filed Dec. 29, 2024).

The following attorneys are Stone's co-counsel in the case: John P. Kristensen of Kristensen Law Group in Santa Barbara; and Josh Sanford, Jarrett Ellzey, Leigh S. Montgomery, Tommy Kherkher of EKSM LLP in Houston.

Honey is a browser extension that purports to scrape the internet for coupon codes right before a user purchases a product online from a large number of websites across the internet. Honey was purchased by Mountain View-based PayPal in January 2020 for \$4 billion.

A similar putative class action was filed on Dec. 30 in the Northern District of California by attorneys from Girard Sharp LLP in San Francisco and Milberg Coleman Bryson Phillips Grossman PLLC in Chicago. *Silva et al. v. PayPal Holdings, Inc. et al.*, 5:24-cv-09510 (N.D. Cal. filed Dec. 30, 2024).

Both lawsuits claim that PayPal designed Honey's software to reroute credit to PayPal when a user clicks on an affiliate link and provides PayPal the commissions the YouTube creators should have earned.

In an email Friday, Honey's media relations office denied wrongdoing and defended the company's business practices related to "last-click attribution." The marketing practice credits an affiliate marketer for sales when a prospective customer clicks a link or uses a promotional code the affiliate marketer provides.

"We dispute the allegations in the lawsuits and will defend against them vigorously. Honey is free to use and provides millions of shoppers with additional savings on their purchases whenever possible. Honey helps merchants reduce cart abandonment and comparison shopping while increasing sales conversion. Honey follows industry rules and practices, including last-click attribution, which is widely used across major brands."

In his announcement posted to the Legal Eagle YouTube channel, which has 3.48 million subscribers, Stone called the alleged scheme "insidious" and detailed how he claims Honey ruined YouTube creators' future sponsorships.

"Think about how insidious this all was. Honey spent tens of millions of dollars, maybe even hundreds of millions of dollars, sponsoring some of the most beloved and successful creators on the plane," Stone said. "Honey allegedly seeded those audiences with their extension and that extension probably stayed on their audiences' browsers like a sleeping leach waiting for the viewer to conduct a transaction. Thus, forever after, the creator's future sponsorships and future affiliate relationships and advertisements were devalued now that creator's audience was infected."

Stone's announcement dovetailed with the filing of an amended complaint on the same day that added, as lead plaintiffs, the companies behind three YouTube pages including The Charismatic Voice, owned by opera singer Elizabeth Zharoff, which has 1.83 million subscribers.

The following companies are also plaintiffs in the matter: Wendover Productions LLC, owned by Sam Denby, has its own YouTube channel that posts videos about world topics and has 4.71 million subscribers; Businessing LLC, the production owned by Ali Spagnola whose personal YouTube page has 2.25 million subscribers; Gear Live Media LLC, a production company, owned by Andru Edwards whose personal YouTube channel has 423,000 subscribers and posts videos discussing the latest trends in technology; Clearvision Media Inc., a production company founded by Christopher Sanchez which has 1,940 YouTube subscribers and posts entrepreneurial related content.

#382742

Wisdom Howell

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TikTok knew its livestreams exploit children, Utah lawsuit claims

 [reuters.com/sustainability/boards-policy-regulation/tiktok-knew-its-livestreams-exploit-children-utah-lawsuit-claims-2025-01-03](https://www.reuters.com/sustainability/boards-policy-regulation/tiktok-knew-its-livestreams-exploit-children-utah-lawsuit-claims-2025-01-03)

Jonathan Stempel

TikTok logo is placed on the U.S. and Chinese flags in this illustration taken, April 25, 2024. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights [↗](#), opens new tab

- Internal probes uncovered problems, Utah says
- TikTok says it acted proactively to protect users
- App faces Jan. 19 US ban, Supreme Court to hear arguments

Jan 3 (Reuters) - TikTok has long known its video livestreams encourage sexual conduct and exploit children yet turned a blind eye because it "profited significantly" from them, according to newly unsealed material in a lawsuit by the state of Utah.

The accusations were made public on Friday, ahead of a scheduled Jan. 19 ban on TikTok in the United States unless its China-based owner, ByteDance, sells the popular social media app.

President-elect Donald Trump has asked the U.S. Supreme Court to put that ban on hold. TikTok, for its part, has said it prioritizes safe livestreaming.

Utah's original lawsuit accusing TikTok of exploiting children was filed last June [↗](#), opens new tab by the state's Division of Consumer Protection, with state Attorney General Sean Reyes saying the TikTok Live streaming feature created a "virtual strip club" by connecting victims to adult predators in real time.

Citing internal TikTok employee communications and compliance reports, Friday's largely unredacted complaint said TikTok learned of the threats Live posed through a series of internal reviews into the feature.

It said a probe known as Project Meramec uncovered in early 2022 how hundreds of thousands of 13-to-15-year-olds bypassed Live's minimum-age restrictions.

It said many children were then allegedly "groomed" by adults to perform sexual acts, sometimes involving nudity, in exchange for virtual gifts.

The complaint also said a probe launched in 2021, Project Jupiter, found that criminals used Live to launder money, sell drugs and fund terrorism including by Islamic State.

In addition, an internal December 2023 study "documented what TikTok admits is 'the cruelty' of maintaining Live with its current risks for minors on the app," the complaint said.

USER SAFETY

TikTok had fought the disclosures, citing confidentiality concerns and its interest in "preventing potential bad actors from getting a roadmap" to misuse the app.

A Utah state judge, Coral Sanchez, ordered the release of much of the previously redacted material on Dec. 19.

"This lawsuit ignores the number of proactive measures that TikTok has voluntarily implemented to support community safety and well-being," a TikTok spokesperson said on Friday.

"Instead, the complaint cherry-picks misleading quotes and outdated documents and presents them out of context, which distorts our commitment to the safety of our community," the spokesperson added.

In October, a bipartisan group of 13 U.S. states and Washington, D.C., separately sued TikTok for allegedly exploiting children and addicting them to the app.

"Social media is too often the tool for exploiting America's young people," Reyes said in a statement on Friday.

"Thanks to Judge Sanchez's ruling, more of TikTok's shocking conduct will now be public through this unredacted complaint," he added. "(The) full extent of its culpability can be demonstrated at trial."

President Joe Biden signed a law authorizing the TikTok ban last April, addressing concern TikTok could gather intelligence on American users and share it with the Chinese government.

The Supreme Court will hear arguments on whether to put the ban on hold on Jan. 10. It is expected to rule quickly.

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Reporting by Jonathan Stempel in New York; Additional reporting by Mike Scarcella Editing by Matthew Lewis

Dena Sharp Will Take Over Girard Sharp in Firm's First Leadership Transition

 [law.com/therecorder/2025/01/06/dena-sharp-will-take-over-girard-sharp-in-firms-first-leadership-transition](https://www.law.com/therecorder/2025/01/06/dena-sharp-will-take-over-girard-sharp-in-firms-first-leadership-transition)

Amanda Bronstad

After 30 years at the helm, Daniel Girard is stepping down as managing partner of San Francisco-based Girard Sharp and handing the reigns over to partner Dena Sharp.

The transition, announced on Jan. 6, is the first for the firm, which Girard founded in 1995. Sharp, who joined the firm in 2006, handles significant pharmaceutical and antitrust class actions, such as the Google digital advertising antitrust litigation, and has been appointed to leadership roles in several multidistrict litigation dockets, including those over Juul electronic cigarettes and Philips recalled CPAP machines.

Girard and Sharp spoke with Law.com about the leadership shift at the firm, which, including the two of them, has 22 attorneys.

Law.com: Why did you decide to make this leadership change now?

Girard: At the beginning of 2025, I will be transitioning the role of managing partner to Dena. I will continue with the firm in an "of counsel" capacity and serve as a senior adviser. I'll be working on selected matters, mostly bringing existing clients to conclusion but helping out as new matters arise. I have been working with Dena now for just about 20 years. She has succeeded at everything she has taken on. She has shown her leadership qualities both internally and in organizations, contributing to bar activities and nonprofit work. She has also demonstrated her leadership ability abundantly in her casework. We think this is the right transition now. She is ready to do this, and this will help us continue to serve our clients and the courts we appear in, in the same way we have in the past. So, we are excited about this.

Law.com: How long has this transition been in the works?

Girard: This is really a conversation we have been having gradually, probably over the last five years. It is something we have contemplated and built towards carefully and incrementally. We have certainly informed ourselves and spoken with advisers about how best to transition leadership in a firm the size of ours and in our practice areas. But there wasn't a playbook we could follow. This was a function of gradually getting Dena's assistance on specific issues, discussing some of the challenges that come up day to day, and planning for the transition.

Law.com: What changes do you see under the new leadership?

Sharp: Running a successful law firm at the level Dan has is certainly no small feat. I am honored and excited to continue to build on that foundation that Dan has cultivated. In terms of the question about what is ahead, we do not have any concrete plans in terms of structure or title changes. Of course, we are always open to opportunities that will allow us to be the best possible advocate for a client and best serve the court. We are fortunate to have, in my view, a stellar team who will continue to rise to the occasion and continue to deliver the exceptional and innovative results the firm has been developing for years.

Law.com: In the Juul case, U.S. District Judge William Orrick criticized all the 62 plaintiffs' firms, including yours, for lacking any Black or Latino lawyers. How do you plan to encourage more diversity at Girard Sharp?

Girard: We are always on the lookout for anyone reading, who has an interest. We'd love to hear from them, particularly if there's someone who comes from a background that is first-generation diverse.

Law.com: Dena, you are co-lead counsel in several big cases, like Juul and Google advertising. How do you plan to balance your time as managing partner and as a lawyer on these cases?

Sharp: Importantly, many of those cases are winding up and close to complete, including Juul. Cases have life cycles, and as do periods of work and business in the law firm, so I plan to continue working very actively in the matters I am on. The way we will balance that is the way Dan has done, and I have learned from him: To draw upon resources of the talented bench at the firm.

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Latest

Trending

The Trends Quinn Emanuel Partners Are Expecting in 2025

 [law.com/therecorder/2025/01/03/the-trends-quinn-emanuel-partners-are-expecting-in-2025](https://www.law.com/therecorder/2025/01/03/the-trends-quinn-emanuel-partners-are-expecting-in-2025)

ALM Staff

This new year is a pivotal moment for corporations as industry leaders will have to navigate the significant shifts anticipated in the new presidential administration. Four critical areas of focus include antitrust enforcement, mergers and acquisitions, artificial intelligence and copyright and major changes to the crypto industry, according to partners at the leading corporate litigation firm Quinn Emanuel Urquhart & Sullivan.

The insights shared by these attorneys offer valuable guidance for industry leaders as they adapt to shifts in the legal and regulatory landscape.

Adam Wolfson—Antitrust & Intellectual Property

Adam Wolfson, Quinn Emanuel Urquhart & Sullivan (Photo: Courtesy Photo).

The Department of Justice (DOJ) is unlikely to substantially change its enforcement activity this year, as President-elect Donald Trump's pick to lead the antitrust division of the agency, Gail Slater, is strongly committed to its mission and seems aligned with both the cases she is poised to take on and the outgoing administration's general approach.

However, the same cannot be said for the Federal Trade Commission (FTC) that is likely to see significant changes to its enforcement philosophy. Andrew Ferguson, Trump's pick for that agency, is likely to substantially pare back its approach to mergers and acquisitions and enforcement, reversing some of outgoing Commissioner Lina Khan's more aggressive stances and policies. The trend towards more monopolization and abuse of market power cases, as opposed to cartel cases, is expected to continue. This is largely due to a continuing perception across political lines that many problems in today's market stem from concentrated market power.

In 2024, antitrust cases targeting Big Tech companies were a focus of the outgoing administration. In the coming year, such cases are likely to continue to be concentrated on platforms, including social media and e-commerce. As these platforms are attempting to find ways to position themselves in order to stifle competition against competing platforms and complementary products that interoperate with them.

Courtney Whang—M&A, Private Equity & Energy Litigation

Courtney Whang of Quinn Emanuel Urquhart & Sullivan. Courtesy photo

Very little is known about the actual policies that will be implemented as a result of the incoming administration. If regulatory frameworks become more lax, e.g., less strict antitrust scrutiny, an increase in large-scale mergers and acquisitions may occur. In general, the market appears to be expecting less regulation across the banking, crypto and technology sectors—all which could increase deal activity in this space.

However, this assumes that the cost of capital does not go up. The movement (or lack thereof) of interest rates remains uncertain, as policymakers weigh economic growth, inflation trends, and broader fiscal dynamics. While rates have stabilized in recent months, volatility remains a distinct possibility, particularly as central banks recalibrate their strategies in response to global economic conditions. Generally, in periods where the cost of capital remains high or unpredictable, we tend to see increased reliance on alternative financing sources such as private credit and private equity. These options provide greater flexibility for dealmakers navigating uncertain borrowing environments.

Despite uncertainty about what policies the incoming administration will or will not actually implement, it seems the market is expecting an increase in deal activity in 2025.

Brian Mack—Artificial Intelligence & Copyright

Brian E. Mack of Quinn Emanuel Urquhart & Sullivan. Courtesy photo

The rapid expansion of artificial intelligence (AI) has prompted a surge in litigation against AI and tech companies, with key cases like Alter v. OpenAI Inc. and The New York Times Company v. Microsoft Corporation highlighting concerns around copyright and consumer privacy. Central to some of these disputes is the legality of data scraping, where public (but potentially copyrighted) data is used for AI training—a key trend likely to continue into 2025 and beyond.

In such disputes, there are two main factors that plaintiffs must consider—the “fair use” doctrine and the ability to demonstrate cognizable injury. Plaintiffs need to fully vet any “fair use” defense of defendants before bringing suit, which permits the unlicensed use of copyright-protected works in certain circumstances. This was seen in Authors Guild v. Google, Inc., where Google’s use of works to create book excerpts was seen as completely “transforming” the copyright-protected materials they had drawn from, and therefore qualified as “fair use.” In addition to considering the “fair use” doctrine, plaintiffs must also demonstrate cognizable injury. This may be particularly challenging in cases involving only the removal or alteration of copyright management information (CMI), as it is often difficult to articulate the injury caused and determine an appropriate compensation methodology.

Another area that has been gaining prominence is the interplay between patent and trade secret laws. As AI innovation accelerates, companies are adopting hybrid strategies—this involves pursuing patents to protect some aspects of an AI innovation (like the core models) and using trade secrets to protect other aspects that are more abstract and not directed to patent-eligible subject matter. We expect there to be a rise in the number of AI patent filings for core AI inventions and trade secret-based misappropriation claims in the new year.

Katherine Lemire—Crypto & Cybersecurity

Katherine Lemire of Quinn Emanuel Urquhart & Sullivan. Courtesy photo

Under the new administration, crypto enforcement initiatives at the Securities Exchange Commission (SEC) and the Commodity Futures Trading Commission (CFTC) are likely to be loosened. With Paul Atkins's nomination as SEC Chair, the agency is likely to shift its stance toward more pro-crypto policies, potentially paving the way for a continued surge in the crypto market that has already been observed following Trump's election victory in November.

Representatives from the SEC and CFTC have also signaled a new era of collaboration, emphasizing plans to harmonize their regulatory approaches. We can expect this trend to continue as Republican lawmakers attempt to streamline crypto rules, such as clarifying which federal agency has primary enforcement power over the industry—the likely result is that the CFTC will be the chief agency regulator over the SEC.

To counterbalance federal initiatives, states including California and New York are likely to react with tighter crypto regulatory regimes in favor of consumer protection. Some key concerns that these states may address include the regulation of virtual currency exchanges and crypto licensing laws. The resulting patchwork of federal and state rules could shape a complex regulatory landscape for the crypto industry in the coming years.

Massachusetts court orders health insurers to pay \$165M for deceptive practices

 legalnewsline.com/stories/667428981-massachusetts-court-orders-health-insurers-to-pay-165m-for-deceptive-practices

January 6, 2025

Massachusetts Attorney General Andrea Joy Campbell | Twitter Website

Attorney General Andrea Joy Campbell has announced a significant court order from Suffolk Superior Court against three UnitedHealth insurance companies, HealthMarkets, Inc., and its subsidiaries. The ruling mandates these entities to pay over \$50 million in restitution to Massachusetts consumers and more than \$115 million in civil penalties to the Commonwealth for misleading practices. These companies are owned by UnitedHealth Group.

The court's decision marks a notable imposition of civil penalties under the Massachusetts Consumer Protection Act. The defendants were found to have targeted vulnerable consumers with deceptive sales tactics. The judgment follows a complaint filed by the Attorney General's Office in 2020, which accused the companies of violating consumer protection laws and a prior consent judgment.

AG Campbell stated, "For years, the defendants preyed on financially vulnerable individuals, deceiving them into buying products they didn't need or couldn't afford. This order holds the companies accountable and will provide meaningful restitution to consumers across the Commonwealth."

In April 2022, the court held all three defendants liable for violating both the consent judgment and state consumer protection laws. The ruling highlighted that sales agents misrepresented themselves as objective while falsely claiming to represent all insurance carriers.

The December 31, 2024 ruling detailed findings of widespread misrepresentations by bundling major medical and supplemental insurance policies. As a result, over \$50 million is to be refunded to affected consumers alongside more than \$115 million in civil penalties for various violations.

Further proceedings will address costs of investigation, attorney's fees, and additional injunctive relief against these companies.

This case was managed by Assistant Attorneys General Emiliano Mazlen and Michael Wong, Deputy Division Chief Ethan Marks, Division Chief Sandra Wolitzky of the AG's Health Care Division, State Trial Counsel James Sweeney, with support from Paralegals Gaëlle

Bouaziz and Sandra Charalel and Mediation Unit Director Lisa Fenichel of the AG's Health Care Division. Anthony Crespi, Edward Cherubin, and Division Chief Marlee Greer from the AG's Civil Investigations Division also contributed.

ORGANIZATIONS IN THIS STORY

Massachusetts Attorney General Andrea Joy Campbell

SEC Democratic Seats at Risk as Crypto Groups Scuttle Biden Pick

By Ben Miller

Deep Dive

- Senate committee ditched vote for commissioner to stay at SEC
- Pro-crypto groups ran advertising campaign against Crenshaw

A key US financial regulator is bracing for an unprecedented political shift under the incoming Trump administration after the cryptocurrency industry successfully lobbied against President Joe Biden's attempt to renew a Democratic commissioner's term.

Crypto heavyweights including the Blockchain Association, DeFi Education Fund, and Cedar Innovation Foundation made a concerted bid to block the Senate's confirmation of Caroline Crenshaw at the Securities and Exchange Commission, citing her support for the Biden administration's crypto regulatory and enforcement efforts.

The SEC is now poised to move ahead without any Democratic commissioners owing partly to the crypto groups' anti-Crenshaw push, which outgoing Senate Banking Committee Chairman Sherrod Brown (D-Ohio) described as a "disgusting smear campaign" after the panel scrapped a vote on her nomination last month.

President-elect Donald Trump's pick for SEC chair, Republican and former commissioner Paul Atkins, is expected to helm the agency with a decidedly lighter touch on crypto, climate disclosures, and other issues—a change that would be eased by an all-GOP commission. Trump could simply name Atkins to replace Crenshaw, whose term expired last year.

The "reality of a bipartisan SEC" is at stake without a vote to confirm Crenshaw, more than 40 labor and civil society groups warned last month, citing the Trump administration's potential to break from tradition that involves the opposition party selecting candidates for two commissioner seats.

"If that occurs, we face the possibility that those seats will be vacant meaning, because of five-year terms, the SEC may be controlled by Trump appointees past the next presidential election," the pro-Crenshaw advocacy groups said in their letter to the Senate.

The statutory language that dictates the SEC's makeup says no more than three of the five members leading the commission can be from the same party, but it doesn't specify a party for the two remaining candidates.

"Can you theoretically have three Republicans and two independents? That's not the norm, but for someone to say that President Trump is a norm-breaker is not going out on a limb," said David Zaslowsky, a partner at Baker McKenzie who has worked on cases involving blockchain technology.

The SEC didn't respond to a request for comment.

Crypto Campaign

The DeFi Education Fund and Blockchain Association stood against Crenshaw's nomination based on her vocal dissent to the approval of an exchange-traded fund tied to Bitcoin. A federal appeals court had previously ruled that the SEC's initial rejection of the product was arbitrary and capricious.

"Commissioner Crenshaw, in her dissenting statement on the approval of the spot BTC ETP, rejected the findings of the DC Circuit Court and continued to defend the SEC's 'unlawful' position," the pro-crypto groups said in a letter to Senate Banking Committee leaders. "The Senate should reject the failed policies of the past instead of advancing a nomination that will potentially stifle the growth and integration of blockchain-based innovations in our economy."

Both industry groups are plaintiffs in federal litigation against the SEC over its handling of digital assets.

The Cedar Innovation Foundation's digital advertising campaign framed Crenshaw as "even more extreme than Gensler," urging lawmakers last month to vote against her renomination.

The Senate Banking Committee ultimately canceled its vote that had been slated for Dec. 18, leaving the renomination question unanswered as the legislative session drew to a close.

"Why not give President Trump an opportunity to put pro-common-sense people on the SEC and not lock in someone who isn't just adversarial to the industry, but adversarial to the rule of law?" Sen. Tim Scott (R-S.C.), who is set to take over as Banking Committee chairman, said at the Blockchain Association's policy summit last month.

Block the Vote

The Banking Committee's choice to abandon its vote on Crenshaw leaves all three Democratic commissioners likely headed to an off-ramp, with Chair Gary Gensler and Commissioner Jaime Lizárraga having announced their intentions to step down by Inauguration Day on Jan. 20. Even if the panel had voted in favor of Crenshaw, her odds of confirmation by the full Senate weren't guaranteed.

"I didn't hear Senators Elizabeth Warren or Chuck Schumer pushing hard for this nomination," Dina Ellis Rockkind, counsel at Paul Hastings LLP, said last month.

It's possible Schumer, the outgoing Senate Majority Leader, didn't want someone "who the industry thinks is anti-crypto from day one," said Ellis Rochkind, who advises clients on crypto and blockchain technologies.

That's a notable turnaround since 2020, when Trump in his first term nominated Crenshaw to serve as a Democratic commissioner and the Senate confirmed her by voice vote.

Democrats led by Sen. Elizabeth Warren (D-Mass.), set to be ranking member on the Banking Committee, could make an effort in the new Congress to complicate the confirmation process for Atkins.

It's also possible the Senate will ultimately vote on Trump's pick for SEC chair packaged with a yet-to-be-named Democratic nominee for commissioner, according to Ellis Rochkind.

"They just didn't care for this particular Democrat and what she had done in her term on the Commission," Zaslow said. "It should be that the SEC does what Congress legislates, so that you have an SEC that is not anti-crypto working with a Congress that is not anti-crypto to come up with reasonable regulation of the crypto industry."

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Securities Law

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Matt Levine's Money Stuff: MBA Class Project Got a Bit Too Real

By Matt Levine
Opinion

Successful MBA class project

I have never been to business school, but I gather that a certain amount of the curriculum involves pretending to do business stuff. You get a class project that is like “come up with a good plan to develop this golf resort, build a financial model, create a PowerPoint deck and do a presentation in class describing and arguing for your vision.” Sometimes the project will be a purely invented hypothetical situation, but more often, for realism, it will be based on a real case, some real business situation that actually happened. To keep things relevant, the case might be from quite recent history. To be *really* relevant, and to make it a bit more challenging to find the answers, the case might be an ongoing situation: “Here is an actual golf resort that is actually in the early stages of being developed; what’s your plan to do it?”

And then you form a team with your classmates and pretend to develop the golf resort. And you come up with a plan and build a financial model. And maybe they are good, and you think “huh, this is a great opportunity; if we actually developed this golf resort, we could make a lot of money.” And then you finish the project and do the presentation and get an A- and consider a career in golf resort development. Perhaps when you graduate you even get a job at the company that developed the golf resort you pretended to develop.

Or. Or. Or? What if you stopped pretending? What if the opportunity is too good? What if you and your project team do such a good job pretending to develop the golf resort that you just go ahead and develop the golf resort? What if, in the course of pretending to develop the golf resort, you build a financial model showing that the opportunity is extremely lucrative? What if you create a really compelling vision for how to develop the golf resort? What if you contact people who actually work in the golf-resort-development industry for their advice on your class presentation, and they are so impressed with your ideas that they want in on the deal? What if you go and raise actual financing to actually develop the golf resort?

What if your plan and financing and contacts are so compelling that you are able to *jump the original deal*? What if you call up the people who own the land on which the golf resort is going to be developed and say “look, I know that you are already working with people to develop this golf resort. But we have done a class project on developing this golf resort, and we think our ideas are so good that you should work with us rather than the original people.” What if you’re right? What if the people who own the land break their deal with the original people and bring you in to develop the golf resort?

Well then you get an A+ in my class, man. That is putting your business education to work. Here’s the syllabus for the fall 2021 edition of Indiana University Kelley School of Business Course X596, Integrative Case Experience: The Business of Sport:

You have come a long way in your Kelley experience. You are now completing the final core curriculum sequence. To complete this significant milestone, you will need to demonstrate integrative knowledge of the previous eight core classes using a capstone experience. The purpose of this experience and the focus of this course is to allow you to integrate your learnings from across some/ all disciplines, work effectively with a team, and create an executive-level recommendation to an entity facing real-world challenges. It also serves as an opportunity for reflection and celebration.

There's a choice of three capstone projects; the first is:

Exclusive Golf Community/ Resort in Puerto Rico Recommendation

The opportunity to develop an exclusive golfing community in Puerto Rico has largely been untapped until recently. The management team at Roosevelt Reserve Development Company has put under contract 1,550 acres of waterfront property and have contracted with Jack Nicklaus [the world-renowned golf designer] to design the first 18 holes. You have the opportunity to shape what this resort will look like – what business model it will adopt including branding, product mix and pricing and how it will differentiate itself to become a world-renowned venue, including suggesting the designer for the second course.

Sixty percent of the grade is based on the client presentation. "A successful deliverable will take evidence from the case, plus your own research, and integrate your team's learnings across the [Kelley] core curriculum to identify and present a recommendation that is actionable (e.g., could be done) and takes into account the organizational realities of the client." Presumably if your team gave the Roosevelt Reserve developers a really good plan to develop the golf resort, you'd get an A.

But for an A+++, plus money, your team could instead do this:

Discovery Land Company ... works to develop exclusive golf course communities. ... Discovery Land engages in similar activities to the Roosevelt Reserve project, and touts itself as a U.S. based developer of world-renowned properties. ...

The Student Defendants shared the idea of Roosevelt Reserves with executives at Discovery Land.

The Student Defendants made the following admissions in their recorded presentation:

- a. We "explore[d] a union with Discovery Land companies;" and
- b. They were "speaking with the Discovery team;" and
- c. They "knew what Discovery would pay in fees so they had to go deep with them to get a 'quote;'" and
- d. We had "conversations with key leaders at Discovery Land company." ...

Discovery Land never contacted Plaintiffs [that is, the Roosevelt Reserve developers] to buy their idea or partner with them, instead they began a campaign to steal the project. ...

Beginning with undermining the Plaintiffs' relationship with the [Puerto Rican Local Redevelopment Authority, which apparently controls the land] and continuing through the business relationships Plaintiffs had developed with the golf course designers, investors, developers, and others, Discovery Land systematically interfered with and ultimately stole Plaintiffs entire business model.

That is from a wild lawsuit filed last month by the companies that were developing Roosevelt Reserve. "Being proudly associated with Indiana University," says the complaint, "the owners of Roosevelt Reserve agreed to allow Indiana University to create a class at the prestigious MBA program at the Kelley School of Business in Bloomington related to the project." Oops! I don't know if they were just doing that out of the goodness of their hearts, or if they were hoping that the students' final presentations would actually be actionable enough that they could use their advice in developing the golf resort. But apparently the students' ideas were too actionable.

Also apparently the students calculated the damages?

In the class, the profits for the plaintiffs' business plan were determined to exceed \$1 or \$2 billion, according to a press release.

"It is rare to file a lawsuit where the defendants have already determined the value of the damages to the plaintiffs," the plaintiffs' attorney Paul Jefferson said in the release. "But that is what the Kelley School of Business did here. We look forward to a fair resolution of this case."

Yes look if you are in class pretending to develop a golf resort and you calculate that the profits from doing so would be \$2 billion, you might as well try to do it for real?

Narrow banking

I ended 2024 with [a column](#) about how the rise of private credit is moving the US toward a "narrow banking" model. In a narrow banking model, banks take deposits and invest them only in safe assets (most classically short-term US government debt, meaning reserves at the Federal Reserve or perhaps Treasury bills). Meanwhile loans are made, not by banks, but by loan funds raised expressly for that purpose. Savers with bank deposits would know that their deposits were safe; investors in loan funds would know that their funds were at risk.

We talked mostly about the lending side of this: Private credit really has raised these sorts of at-risk loan funds from investors with long time horizons. On the depository banking side, banks obviously still own risky assets, and in fact, for bank-stability and monetary-policy reasons, [the Fed has objected](#) to a proposal for a bank that would keep all its money at the Fed.

That said, that column did not discuss one point that it probably should have, and that several readers emailed me about. That point is: Private credit funds do not *just* get their money from long-term equity investors. They also, often, borrow money from banks. So a private credit fund might raise \$1 billion from investors and borrow \$1 billion from banks to make \$2 billion of loans. We have [discussed](#) this [topic](#) several times before, and there are reports from the Fed and the Bank for International Settlements about the links between banks and private credit.

So this is not quite a story of “loan funds are replacing banks as lenders.” Rather, it is more like “loan funds are making banks *more senior* as lenders”: Instead of lending money to a diversified portfolio of risky businesses, banks increasingly lend money to *other lenders* who make those loans. The private credit funds have a senior claim on the underlying businesses; the banks then have a senior claim on the private credit funds’ assets. The banks get paid back in full if the private credit funds get paid back in part.

The banks, in this hybrid model, don’t put their depositors’ money in risk-free assets like Fed reserves. But they put their money in assets that are somewhat more risk-free than traditional corporate or consumer loans, in senior tranches of pools of corporate or consumer loans.

In 2023, at Bloomberg Opinion, Tyler Cowen [wrote about the shift toward narrow banking](#) . He noted:

The narrow banking model has long been plagued by two major problems. First, there have never been enough safe assets to satisfy the demands of depositors. Second, excessive investment in government securities tends to crowd out private investment. The rise of narrow banking can in part be explained by the mitigation of both these issues.

That is: The problem with narrow banking is on the *deposit* side, where narrow banks take deposits and invest them only in safe short-term government debt. Cowen argued that the increase in US government debt mitigated that problem: There are more Treasury bills, so narrow banking (in the form of, for instance, money market funds) is easier to do.

But you can take a looser view of narrow-ish banking, and of risk-free-ish assets. There is a traditional method for [manufacturing risk-free-ish assets](#) . If you don’t have enough Treasury bills, you take some pool of risky cash flows, you slice them up, and the senior tranche of the pool is less risky than the overall pool. Not every mortgage will get paid back, but the AAA tranche of a pool of mortgage-backed securities usually will. Obviously sometimes this goes poorly!

MicroStrategy strategies

Man, MicroStrategy is such a well-oiled machine. The basic process is:

1. MicroStrategy Inc. is a pot of Bitcoin.

- 2. Its stock trades at a premium to the value of the Bitcoin in the pot.
- 3. Therefore, it sells more stock to buy more Bitcoin.
- 4. Somehow the premium does not collapse.

Amazing work if you can get it. There is, one assumes, some limit to this process – I have [called it](#) a “perpetual motion machine,” but I think I am joking – but MicroStrategy hasn’t found it yet, [after diligent looking](#) . It [keeps going](#) !

The second-order process is:

1. Some retail investors, not satisfied with MicroStrategy stock, want *levered* MicroStrategy stock: They want to put in \$100 and get the returns on \$200 worth of MicroStrategy stock. (Which mostly goes up.)

- 2. To cater to those retail investors, there are [exchange-traded funds](#) that offer 2x exposure to MicroStrategy.
- 3. The [design of these levered ETFs](#) – which offer 2x the daily returns of MicroStrategy stock and rebalance every day – means that they buy more MicroStrategy stock whenever the stock goes up, and sell stock whenever it goes down.
- 4. This makes the stock more volatile: Whenever it goes up, it goes up a lot; whenever it goes down, it goes down a lot.
- 5. There is a ton of money in these levered ETFs, and MicroStrategy is pretty volatile to begin with, so its stock volatility is astronomically high: Its annualized daily volatility for 2024 was about 110%. (Compare 13% for the S&P 500 Index, 64% for Tesla Inc. and about 41% for Bitcoin.)
- 6. [Convertible arbitrage investors love volatility](#) , because they are doing roughly the opposite trade from the ETFs: They buy the convertible, hedge by selling stock short, buy back stock when the stock goes down and sell stock when the stock goes up. The more volatile the stock is, the more opportunity they have to sell high and buy low.
- 7. Therefore, MicroStrategy *also* sells tons of convertible bonds to buy more Bitcoin.

Good good good. There is a problem with that, though, which is that there's not *that* much money in convertible arbitrage strategies, and MicroStrategy is an increasingly big chunk of the convertible market. Eventually it will run out of convert arbs to sell to.

The solution to that problem is, maybe, also an ETF:

Strive Asset Management submitted a prospectus for a new bitcoin-based ETF that would invest in convertible bonds from companies using proceeds to purchase the cryptocurrency, according to a filing late Thursday with the Securities and Exchange Commission. ...

The fund aims to provide exposure to "Bitcoin Bonds," described as convertible securities issued by MicroStrategy or other companies planning to use proceeds for bitcoin purchases, according to the filing. These bonds pay low to no interest but may convert to company shares under certain conditions.

Here is the prospectus. "They don't appear to be running the arbitrage part of the strategy," notes Byrne Hobart, "just buying the convertible bonds," so the ETF is not particularly a bet on MicroStrategy volatility, except in the sense that "get stock exposure if the stock goes up and get your money back if the stock goes down" is always sort of a bet on volatility.

Meanwhile here's [another possible source of money](#) for MicroStrategy:

On Friday, the firm said it planned to raise up to \$2 billion through one or more offerings of perpetual preferred stock, which would be senior to its class A common stock, in the first quarter. The preferred stock offering is part of its plans to raise \$42 billion of capital through 2027 using at-the-market stock sales and convertible debt offerings. MicroStrategy has already surpassed two-thirds of its equity goals, and Saylor said in December that the company is expected to shift more toward fixed-income markets in the first quarter.

I have to say that perpetual preferred stock of a software company is not exactly a traditional product; there are not a ton of, like, mutual funds devoted to holding that sort of paper. But I guess a mezzanine claim on a giant pot of Bitcoin – junior to the convertibles, but senior to a giant pile of common stock – is a decent fixed-income investment? I don't know. I'm sure they'll find buyers. It's a big pot of Bitcoin and you can slice it pretty finely.

And here's yet [another place to put MicroStrategy stock](#) :

Now [MicroStrategy Chief Executive Officer Michael] Saylor is setting his sights on S&P 500 inclusion – even if Wall Street sees it as a long shot – emboldened by a change in accounting rules relating to digital assets, a change that could help it clear an earnings hurdle next year.

"I'm optimistic in 2025 when we adopt fair value accounting, when we end up with \$50 billion of assets on our balance sheet," Saylor told Bloomberg TV last week. "Under fair value, if Bitcoin goes up 20% a year, you're looking at \$10 billion a year of investment income," he added. "And I think that is the final thing people are looking for, for an inclusion in the S&P." ...

While the stock's market cap and trading volume easily cross the threshold, it has yet to meet the key earnings criteria from S&P: Positive income in the most recent quarter and during a stretch of four quarters.

That roadblock is set to be removed because of a new accounting rule that allows companies to hold digital assets on their balance sheet and record changes in their fair value in net income. Given Bitcoin's record-setting rally of late, Saylor sees huge gains on the horizon.

MicroStrategy does a lot of moderately complicated financial engineering, but this is its simplest and most important piece of financial engineering: It is economically a Bitcoin investment fund, but technically a regular public technology company. If MicroStrategy's pot of Bitcoins was an exchange-traded fund, or some other sort of investment fund, it would be harder for many investors to hold it. Institutional investment managers might not want to buy shares in a Bitcoin fund: Their job is to buy stocks, not to buy Bitcoin, and [not to buy someone else's funds](#) .

And the S&P 500 index is an index of big companies, not big investment funds. A pot of Bitcoin, no matter how big, is not eligible for the S&P 500. But a big pot of Bitcoin attached to a small technology company, sure, why not.

What is AGI?

Here is a rough description of how OpenAI's partnership with Microsoft Corp. works:

1. Microsoft has invested money in OpenAI and in exchange is entitled to some equity-like share of OpenAI's profits, up to some cap. The [exact share](#) varies: It's 0% of the first \$194 million, 75% of the next \$17.3 billion, and 49% of the rest of the profits up to the cap. The Information reported last month that Microsoft's cut of the profits was capped at \$93 billion.

- 2. Microsoft also has a commercial deal with OpenAI, giving Microsoft an exclusive license to OpenAI's products. But [this license ends](#) when OpenAI develops artificial general intelligence (AGI): That is "excluded from IP licenses and other commercial terms with Microsoft, which only apply to pre-AGI technology." Conceptually, Microsoft gets to commercialize and make money from OpenAI's nifty chatbots, but when OpenAI builds fully functional human-expert-grade intelligence, Microsoft gets cut out. At that point, OpenAI is developing artificial intelligence for the benefit of humanity, not to make profits for Microsoft.

There is a tension here: If OpenAI is a huge success, Microsoft wants its \$93 billion. But if OpenAI is too successful – if it builds a perfect superintelligence tomorrow – then the commercial deal ends, and Microsoft can't be sure whether or how OpenAI will commercialize that superintelligence. What if it just gives it away for the benefit of humanity, and there are no more profits?

There is a solution, one that I honestly never would have thought of but that is a real achievement of, like, financial engineering, and lawyerly drafting of definitions, and capitalism. "AGI" is a term that is thrown around a lot without anyone quite knowing what it means. "The board determines when we've attained AGI," says OpenAI, and "by AGI we mean a highly autonomous system that outperforms humans at most economically valuable work." But you can define it differently. The Information also reported:

Last year's agreement between Microsoft and OpenAI, which hasn't been disclosed, said AGI would be achieved only when OpenAI has developed systems that have the ability to generate the maximum total profits to which its earliest investors, including Microsoft, are entitled, according to documents OpenAI distributed to investors. Those profits total about \$100 billion, the documents showed.

How do you know when your robot has become sentient? Well, for certain limited purposes, it makes sense to conclude that your robot is sentient when it has made \$100 billion of profits for your investors.

Elsewhere last month: "Why OpenAI's Structure Must Evolve To Advance Our Mission."

The Vault

I just got a press release for a new thriller about the Depository Trust Co., and you'd better believe that if you write a thriller about DTC and send me the press release I'm going to mention it here. (It's called *The Vault*, by Stuart Z. Goldstein.) DTC is the clearinghouse that, among other things, owns pretty much all of the stocks and bonds in America: If you buy stock at your brokerage, what you actually get is an entry on the books of your broker saying that you own the stock, and what the broker actually has is an entry on the books of DTC saying that it owns the stock (for you), and DTC *actually* owns the stock. In the olden days that meant that DTC actually held the paper stock certificate in its vaults, though now it mostly means that DTC has an entry on the books of the company's transfer agent saying that it owns the stock.

"Little-known company that owns trillions of dollars of stocks and bonds on behalf of everyone else" is such an obviously good subject for a thriller that I assume there are already dozens of DTC thrillers. If you broke into that company, you could steal all the stocks! You'd be a trillionaire! Writes itself. I am not saying that this is literally true or that you should do it – probably if you tried to, like, fence stock certificates stolen from DTC, you'd have some problems – but it's fine for a thriller. The premise of this one is apparently that, when DTC's vaults flood during Hurricane Sandy ([true](#)), some disgruntled employees make off with "\$100 million in bearer bonds," sure, great, terrific.

Things happen

Fannie, Freddie Hit a 5-Year High on Plan for ' [Eventual Release](#) '. [Multistrategy Hedge Funds](#) Delivered Again in 2024. Centerview Partners Considers a Deal of Its Own After Record Year. Nippon Steel, US Steel [File Lawsuits](#) After Biden Blocks Deal. [Zero-Day Options](#) Are Most Popular on S&P 500 as Dominance Grows. Nazi Ties to Credit Suisse Ran Deeper Than Was Known, Hidden Files Reveal. Citadel Offers to Let Clients Take Profits But [Most Decline](#) . Citadel [Extends Non-Compete](#) to 21 Months to Retain Talent. Berkshire-Owned Lender [Sued by CFPB](#) Over 'Unaffordable' Loans. Bezos-Backed [Farm Startup](#) in Talks for More Than 90% Value Cut. Cliff Asness writes from 2035. Father, son plead guilty in \$100 million New Jersey deli stock scheme. ([Earlier](#) .) One Man's Attempt to Get a Perfect 850 Credit Score. Disney Agrees to Merge [Hulu](#) + Live into [Fubo](#) , Settles [Venu](#) Suit. The Wall Street Guy Who Moonlights As a Stripper.

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- 1. This is intuitively correct but not quite right. Really, they do derivatives trades – historically total return swaps, but frequently now listed options trades – that have approximately this profile. Still the description in the text captures their market impact. (Their swaps counterparties would do these rebalancing trades.)

- 2. MicroStrategy will tell you that it is a *levered* pot of Bitcoin, because it sells (convertible) debt to buy Bitcoin. I have objected to this description, because MicroStrategy's *premium* effectively delevers it: The equity value of MicroStrategy is more than 100% of the value of its Bitcoin holdings, so it's not particularly levered. But if you look at volatility rather than valuation, it sure looks like levered Bitcoin.
- 3. Also, in theory, the more convertibles MicroStrategy sells to arbs, the more the arbs' hedging will dampen its stock's volatility. I don't think we're all that near that limit, and my sense is that the vol-enhancing impact of the levered ETFs is bigger than the vol-dampening impact of the converts.
- 4. Nor will it dampen the volatility: It's just another pocket in which to put convertibles without otherwise affecting these dynamics.
- 5. For reasons that have never been all that clear to me, a DTC affiliate called Cede & Co. is the actual owner, on behalf of DTC. DTC itself is a subsidiary of the Depository Trust & Clearing Corp., DTCC.
- 6. Never mind book-entry stock ownership stolen from DTC.

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Private equity

Private equity to lobby Trump for access to savers' retirement funds

Industry hopes incoming administration will open long-restricted private investments to individual investors



Private equity firms are seeking to follow up on the deregulatory moves made by Trump's first-term administration © David Dee Delgado/Bloomberg

Antoine Gara in New York YESTERDAY



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The private equity industry is preparing to lobby the incoming Trump administration to give it access to broad pools of capital it has not historically been allowed to tap, including retirement savings, in a move that could unlock trillions for their firms.

The \$13tn industry is hoping the new White House will revive a deregulatory push from the final months of [Donald Trump](#)'s first presidency, which allowed private equity investments to be included in professionally managed funds.

Now, the industry is seeking to push past that first step, allowing tax-deferred defined contribution plans such as 401ks to back unlisted investments such as leveraged buyouts, low-rated private loans and illiquid property deals, industry executives told the Financial Times.

The executives said that the effort could give their higher-fee funds a chance to tap a class of investors with at least as much in assets as the sovereign wealth funds, pensions and endowments that have traditionally backed the world's largest groups such as Blackstone, Apollo Global and KKR.

[Private equity](#) and non-traded real estate funds have generally been confined to institutional investors or wealthy individuals because they often carry higher leverage, less liquidity and fewer disclosures than traditional mutual funds and exchange traded funds. They also generally carry higher fees and have performance metrics that can be harder to evaluate.

"We'll look for opportunities to allow the average investor, if they want to, to diversify their portfolio and have the same access that wealthy individuals do to a private fund," said one Washington lobbyist. "There are 4,000 publicly traded [US] companies. Most people are invested in the marketplace through those companies, but there are 25mn private companies out there."

Industry executives told the Financial Times the deregulatory push was akin to "doubling demand" for the private capital industry's various funds.

Marc Rowan, chief executive of Apollo, has called the trillions in assets held by US 401k plans an opportunity for his industry. He has raised concerns about concentration in index funds owned by retirement savers and questioned whether such investors must be confined to funds offering daily liquidity.

"I jokingly say sometimes, we levered the entire retirement of America to Nvidia's performance. It just doesn't seem smart. We're going to fix this and we are in the process of fixing it," Rowan said at an Apollo event this autumn. "In the US, we have between \$12tn and \$13tn in 401k plans. What are they invested in? They are invested in daily liquid index funds, mostly the S&P 500, for 50 years. Why? We don't know."

Wealthy individuals have flocked to private real estate and lending funds managed by Blackstone, Apollo, HPS and Owl Rock among others in search of higher yields and diversification into companies not available to public market investors. A record \$120bn flowed into such funds in 2024, according to private funds data specialist Robert A Stanger & Co.

However, some private equity industry executives worry retirement savers will not have the ability to discern between credible funds and fly-by-night entrants chasing lucrative fees. They recommend private investments should be directed by fiduciaries, rather than individuals selecting funds directly themselves.

The deregulatory window was opened by Eugene Scalia, son of the late Supreme Court Justice Antonin Scalia, during the late stages of the first Trump administration. Then acting as head of the labour department, Scalia's agency issued an Information Letter in June 2020 that allowed private equity investments to be a part of retirement-oriented holdings such as target date funds and balanced funds.

"Adding private equity investments to such professionally managed investment funds would increase the range of investment opportunities available to 401(k)-type plan options," the department said at the time.

The idea was supported by Jay Clayton, then chair of the Securities and Exchange Commission, who joined the board of Apollo after leaving office.

Lobbyists and private capital groups are now researching how they can advance Scalia's efforts into mass self-directed investments. Scalia, who joined law firm Gibson Dunn after Trump's first presidency, successfully challenged the Biden administration's efforts to increase disclosures and regulations for private market funds.

"We'll make the case for a pro-growth regulatory regime that supports small businesses and provides more opportunity to everyday investors," said Drew Maloney, head of the American Investment Council, the private capital industry's main lobbying group in Washington.

PE executives believe the incoming administration will be less adversarial to private dealmaking, which was a central target of President Joe Biden's antitrust authorities.

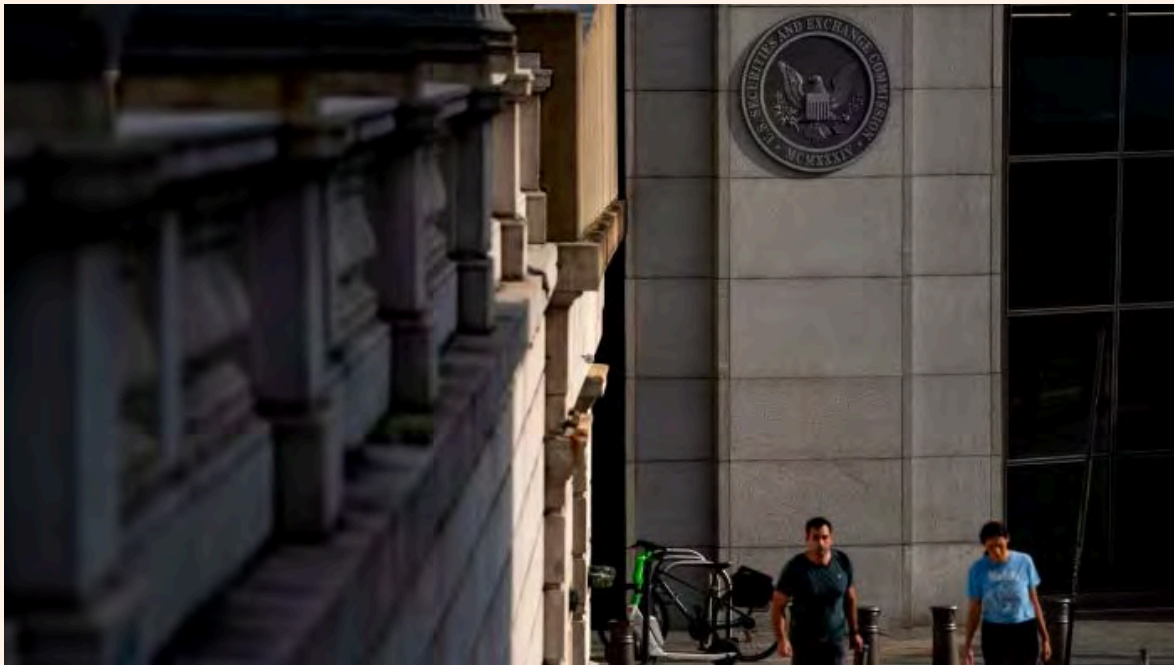
“We’ll hit the ground running to work with the Trump administration,” Maloney said.

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US financial regulation

Accounting firms try to block new US disclosure rules about auditors

Regulator has been accused of piling pressure on companies with a flurry of rulemaking



The Securities and Exchange Commission will soon be controlled by Republican commissioners who have opposed the accounting regulator's rulemaking process © Kent Nishimura/Bloomberg

Stephen Foley in New York YESTERDAY



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Accounting firms are trying to block new rules that would reveal how many hours are being worked by auditors of US public companies, and how much training and experience they have, saying the information risks being misinterpreted by investors.

The Public Company Accounting Oversight Board, which regulates the profession, approved the new disclosure requirements in November but they cannot go into force unless rubber stamped by the Securities and Exchange Commission, which has received a flurry of letters in opposition.

Shareholders are typically asked to ratify the appointment of a company's [auditor](#) each year and investor groups have long advocated for standardised information to compare firms and inform their vote, according to the PCAOB.

A company's auditor will have to disclose how much of the work is being done by senior partners versus more junior staff and how [many years of experience](#) the people in the team have, including experience auditing companies in that industry. The firm must also disclose the overall workload of senior professionals involved in a company's audit, along with how much annual training is being given, among the eight different metrics.

[Accounting firms](#) say the metrics tell investors little about whether an audit is being done well and are likely to be misunderstood without additional context.

"The value of the metrics is speculative and may in fact confuse investors and other stakeholders, rather than benefit them," Deloitte wrote in a letter to the SEC.

CohnReznick wrote: "No two firms are identical as are no two issuer audits."

Several accounting firms argued disclosing the metrics to the audit committee of a company's board would be better than making them public for shareholders because that is the committee that ultimately appoints the auditor.

The new disclosure rules are the latest PCAOB initiative to run into opposition from audit firms, which say the agency has become politicised and dismissive of their concerns under Joe Biden's administration.

SEC chair [Gary Gensler](#) has said he will step down when Donald Trump is inaugurated on January 20, after which the regulator will be controlled by Republican commissioners who have signalled similar [displeasure](#) with the PCAOB's rulemaking process.

Deloitte's letter to the SEC said the speed with which the PCAOB is pushing through new rules was piling new costs on to audit firms and causing "stress in the system", while the American Institute of CPAs, which represents the profession, said small and midsize firms would be tempted to stop auditing public companies all together.

The deadline for submitted comments on the new disclosure rules passed on Thursday but the SEC is yet to indicate when it will vote on whether to approve them.

Boardroom diversity stalls in the face of conservative backlash

 [reuters.com/business/boardroom-diversity-stalls-face-conservative-backlash-2025-01-06](https://www.reuters.com/business/boardroom-diversity-stalls-face-conservative-backlash-2025-01-06)

Isla Binnie

Item 1 of 3 People march outside the office of hedge fund billionaire Bill Ackman protesting his campaign against diversity, equity, and inclusion and attacks against former Harvard University President Claudine Gay in New York City, U.S., January 4, 2024.

REUTERS/Shannon Stapleton/File Photo

[1/3] People march outside the office of hedge fund billionaire Bill Ackman protesting his campaign against diversity, equity, and inclusion and attacks against former Harvard University President Claudine Gay in New York City, U.S., January 4, 2024.

REUTERS/Shannon Stapleton/File Photo [Purchase Licensing Rights](#) , opens new tab

- Lawsuits, other efforts derail boardroom diversity progress
- New Black directors in Russell 3000 fell to 12% in 2024
- Experts warn pushback could harm business interests and diversity efforts
- Anti-DEI trend could accelerate during Trump administration

NEW YORK, Jan 6 (Reuters) - In the aftermath of George Floyd's killing in 2020, investor Melody Hobson recalls frequent calls from directors at Fortune 500 companies for references to diverse candidates for boards. Now, she says, it's "very sporadic."

"During the George Floyd days there were dozens and dozens of them," said Hobson, the co-CEO of Ariel Investments who also serves on the boards of JPMorgan N> and Starbucks (SBUX.O) , opens new tab. "Those requests have dramatically dropped."

Over the past year, Reuters and other media have reported that a backlash against diversity, equity and inclusion (DEI) policies by some conservative activists has sapped corporate enthusiasm for them.

Interviews with corporate directors and advisers as well as a recent study on corporate boards paint a stark picture of how pronounced the fallout of that backlash has been. Among Russell 3000 companies, the number of new Black directors fell to 12% in 2024 from 26% two years ago, according to the study by business research group the Conference Board and data firm ESGAUCE. At the same time, the number of new white directors bounced back to 69%, up from historic lows of 52% in 2022.

Directors and board advisers said conservative backlash through litigation and other means had pushed DEI policies down the priority list for companies, often in subtle ways -- a trend that some experts said could accelerate under the incoming administration of Donald Trump.

"It is not a non-issue, it's just not THE issue," Hobson said, referring to how companies were now thinking about diversity on their boards. Over the long term, "we will continue to move in the right direction," she said.

One recruiter, for example, said many companies no longer made diverse candidate slates a top requirement in director searches.

"A couple of years ago more searches had diversity as number one or two criterion than have it there now," said Richard Fields, head of the board effectiveness practice at search firm Russell Reynolds.

DEI policies got a boost after Floyd's murder by a white police officer sparked national outcry and energized the Black Lives Matter movement.

Investors and their advisory firms used their shareholder power to push companies to include people of different backgrounds in senior roles, and companies hired more diverse board members.

The efforts led to more gender and racial diversity among directors of large U.S. companies than ever before. Some 12% of directors on S&P 500 boards are now Black.

While 14% of working age adults in the U.S. are Black, only 8% of the directors at Russell 3000 companies are Black, according to the Conference Board. The figure for the S&P 500 is 12%.

DIVERSE BOARD EQUALS 'BETTER BUSINESS'

The distribution still lags societal makeup. U.S. Census Bureau data show 14% of working age adults are Black.

The gap widens for a broader set of companies. Only 8% of the directors at Russell 3000 companies are Black, according to the Conference Board.

DEI proponents worry the pushback could hurt efforts to address longstanding inequities and underrepresentation of diverse communities to the detriment of business interests.

"It has been repeatedly shown that building a diverse board will ultimately ladder up to better business," said Lisa Davis, a managing director at advisory firm Teneo.

The decrease in diverse new hires to corporate boards has a significant correlation with the cultural shift, said Andrew Jones, head of ESG (environmental, social issues, and corporate governance) at the Conference Board.

"In 2020 there was initial momentum when the death of George Floyd was followed by social unrest and corporate DEI was at its height. Then there was a lot of legal and political scrutiny following the Supreme Court decision last year," Jones said.

That decision effectively prohibited policies long used to increase the number of under-represented minorities at American universities.

"I don't think its overt racism, although it does exist, but perhaps people feeling less of a need, maybe less pressure on this issue," Hobson said.

Reflecting on fewer requests for references to diverse board candidates, Hobson said: "I think they were responding to the marketplace with the outreach, and the marketplace is not as demanding on these issues right now."

Reporting by Isla Binnie; Editing by Paritosh Bansal and Bill Berkrot

Our Standards: The Thomson Reuters Trust Principles. [↗](#), opens new tab

Isla Binnie
Thomson Reuters

Isla Binnie reports on how company directors and executives manage stakeholder and shareholder interests, with a focus on compensation, corporate crises, dealmaking and succession. She also covers how politics, regulation, environmental issues and the broader economy affect boardroom discussions. Isla previously covered business, politics and general news in Spain and Italy. She trained with Reuters in London and covered emerging markets debt for the International Financing Review (IFR).

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Pensions industry

Should the UK really look to Canada's pension system as its model?

Chancellor Rachel Reeves wants to learn lessons from the 'Maple 8' — but they have their own problems

Mary McDougall in London YESTERDAY



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In her first overseas trip as UK chancellor, Rachel Reeves said she wanted pension funds to “learn lessons from the Canadian model” ahead of a roundtable with eight of the country’s largest retirement funds, the titans of the global pension industry.

Those lessons, she hoped, would inspire a gush of money into British infrastructure and fast-growing businesses.

But Britain is seeking to fast-track its way to a system that took three decades to develop — and which is coming under fresh domestic political pressure of its own.

[Canada](#)’s pension system has become the envy of the world since pioneering the so-called Maple model at the turn of the 1990s.

That model — which combined robust governance with independent managers; large and well-paid teams who select investments themselves; and a deep allocation to private markets — has helped create the second-largest pension system in the world, according to the OECD.

It also provides sustainable defined benefit pensions via both the state pension and supplementary schemes for Canadian public sector employees: for example, on top of the Canada Pension Plan, the average teacher in Ontario can retire in their late fifties with an annual income of C\$50,000 (\$35,000) if they are an Ontario Teachers’ plan member.

In contrast, the average annual pension paid out of the UK’s local government pension scheme in 2023 was about £5,400, while the full state pension is about £11,500 per year.

But there are questions over whether applying the three core components of the Maple model to the UK's local government pension scheme will lead to the same sort of success.

“Those three factors 30 years ago were extremely compelling,” said Rashay Jethalal, chief executive of CEM Benchmarking, a Toronto-based consultancy. But he added: “There’s a bit of a question over if you were to establish a model like the Canadians — would you do so in the same way today?”



Canada has been examining how to channel more Canadian pension assets to domestic targets, at a time when the country is trying to address poor business investment © Andrew Francis Wallace/Toronto Star/Getty Images

In 1990, Ontario Teachers' Pension Plan was facing a significant funding shortfall. With the state-managed fund delivering lacklustre returns, its trustees hired a former insurance executive to run it like a business instead.

He built a team of investment professionals, expanded into private markets — and has turned out returns in the past of about 20 per cent a year from its private equity holdings, according to current chief executive Jo Taylor.

That became a blueprint rolled out across the country's public sector funds, from the Canada Pension Plan Investment Board in 1997 to the Alberta Investment Management Corporation, the youngest of the Maple 8, in 2008.

All the Canadian public sector schemes offer defined benefit pensions, but have different approaches to suit the needs of their members and stakeholders.

CPPIB, the country's largest, helps fund Canada's state pension obligations, but the government also pays an old age security pension.

Pension plans in Quebec, British Columbia and Alberta are set up as asset managers running multiple funds, while teachers, healthcare workers and local government workers in Ontario have their pensions provided by separate companies.

Large Canadian funds have performed well

	AUM (Cad \$bn)	10-year annualised (%)	Canadian exposure (%)
CPPIB	675	9.2	12
PSPIB	265	8.3	21
CDPQ	452	7.4	27
AIMCO	169	7.3	42
BCImc	250	7.8	29
OTPP	248	7.6	35
HOOPP	113	8.4	55
OMERS	134	7.1	21

Annual reports and Hymans Robertson

Common to them, however, are substantial investments in private equity, real estate and infrastructure.

With international offices to invest in critical infrastructure spanning London's ports to Brazil's utilities and India's transport networks, Canada's pension funds are major players in global private markets. A high proportion of their holdings are international, partly because many critical infrastructure assets in Canada — such as airports — are publicly owned.

Infrastructure holdings have given Canadian funds access to assets that behave like bonds — helping them meet their pension obligations — but with better returns.

Canadian funds have high exposure to private markets

	Private equity % of portfolio	Real estate % of portfolio	Infrastructure % of portfolio
CPPIB	31	8	8
PSPIB	12	12	12
CDPQ	18	11	14
AIMCO	8	14	13
BCImc	13	4	12
OTPP	23	12	16
HOOPP	10	9.2	3
OMERS	19	14	22

Annual reports

Over the long term, their risk-adjusted performance has beaten rivals “on every measure”, according to researchers at CEM Benchmarking.

Their in-house model had also enabled them to access private market strategies for about half the cost of rival funds that did not manage the assets themselves, CEM Benchmarking said.

However, sprawling global private market portfolios and international offices have brought heightened investment, operational and governance risks.

Returns over the past two years have been weaker, as rapid rises in interest rates have hit investment valuations, particularly in commercial property.

The Ontario Municipal Employees' Retirement System and OTPP both delivered returns of less than 5 per cent for the 12 months to June, far below their long-run average of more than 7 per cent, after they have both suffered from a relatively high exposure to real estate.

Meanwhile, some private holdings have turned sour. In March last year, Omers issued a “full writedown” of its 31.7 per cent stake in British water company Thames Water, which it had valued at £700mn at the end of 2022.

In November, three former employees of Caisse de dépôt et placement du Québec’s India office were charged by US authorities for allegedly colluding with Adani Green Energy to pay bribes to Indian officials to win lucrative solar contracts to help plug an earnings gap in one of the pension funds portfolios, and then tried to cover it up.

“My impression is that [the Maple 8] were a little too bullish,” said Oliver Gottschalg, founder of Gottschalg Analytics, referring to the funds’ high level of private market exposure. “There are question marks as to how realistically they can be geared up to do that much.”

It is also a platform that has increasingly become a target for political interference. While some of the Maple 8 have high domestic exposure, such as the Healthcare of Ontario Pension Plan, which has more than half of its investments in Canada, only about 12 per cent of the Canada Pension Plan’s assets are invested at home.

In March last year, more than 90 Canadian corporate executives signed an open letter calling on the government to amend the rules governing Canadian pension funds and have them increase their domestic investment — claiming that the amount they allocated to Canadian equities had dwindled from 28 per cent in 2000 to 4 per cent by 2023.

While Reeves has pointed to the Canadian model to “fire up the UK economy” at the turn of the century, UK pension funds had even more allocated to domestic stocks, according to research by think-tank New Financial. The figure in 2000 was close to 50 per cent; by 2024 it had shrunk to 4 per cent.

Like the UK, Canada has been examining how to channel more Canadian pension assets to domestic targets, at a time when the country is trying to address weak productivity and poor business investment.

“The whole business model across the Maple 8 rests on the assumption that you can operate at an arms length from the government,” said Sebastian Betermier, associate professor of finance at McGill University. “We’ve seen evidence over the past year of increased politicisation, and that I’m concerned about.”



In 1990, Ontario Teachers' Pension Plan was facing a large funding shortfall. With the state-managed fund delivering lacklustre returns, its trustees hired a former insurance executive to run it like a business instead © Canadian Press/Shutterstock

The high-water mark for government intervention came in November, when the Albertan government abruptly sacked the entire pensions board of the Alberta Investment Management Corporation (Aimco).

Alberta said the decision — which led to former prime minister Stephen Harper being installed as chair — followed “significant increases” in costs. Operating costs at Aimco increased to 0.66 per cent of assets under management in 2023, from 0.63 per cent the previous year, broadly in line with Canada’s other large pension schemes.

Canadian pension experts said, however, that it was part of a wider agenda to reshape Aimco, depart from its green investment strategy and encourage more investment in domestic oil and gas to help boost the local economy.

“The official line is that costs are out of line but the argument didn’t make sense . . . it’s very political and really seems more about the Albertan government objecting to Aimco’s green agenda,” said Alexander Beath, who consults on Canadian pensions.

Events at Aimco have raised questions over whether the managers of public sector [pension](#) schemes can ever really operate independently of government.

“This is a signal to the rest of Canada and the rest of the world and it’s a scary one,” said a former Aimco employee.

The firings also have the potential to make it difficult for the pension fund to hire quality professionals back into the organisation, a challenge that could undermine one of the pillars of success for the sector in Canada.

John Graham, CPP’s chief executive, earned C\$5.38mn in 2023. In contrast, the highest salary paid at Border to Coast — one of the UK’s largest so-called pools, which manages more than £50bn on behalf of local authority pension fund assets — was £489,000.

Ontario Teachers’ chief executive Taylor said the Canadian model had served Canadian pensioners well but cautioned it might be difficult to replicate in the UK today.

“We spent 35 years building a really good investment business around the world that knows how to invest in private companies, and that to me is a huge asset for us, versus the debate you have in the UK where you’d have to build that,” he said.

Michel Leduc, senior managing director at CPP, added: “The job has absolutely become more difficult.

“It’s more unpredictable and more uncertain . . . you wouldn’t want to be creating the platform today to deal with the future.”

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Bank of New York Mellon Corp

BNY to name new head of large UK pension manager

Executive known as the 'Godfather of the LDI market' will retire



Under the leadership of Abdallah Nauphal, Insight's assets under management grew more than 12-fold © FT montage/Bloomberg

Stephen Gandel in New York YESTERDAY



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BNY is changing the leadership of a large UK pension fund unit as the US bank seeks to become a bigger player in the global investment management and wealth industry.

[Abdallah Nauphal](#), the longtime chief executive of BNY-owned Insight Investments who is known as the “Godfather” of liability-driven investment products — which seek to match income and assets with future obligations — would retire later this year, the company said. Nauphal, 64, is being replaced by Raman Srivastava, 49, who is joining from Canadian Insurance firm Great-West Lifeco, where he was the global chief investment officer.

Insight, which has \$900bn under management, is one of the largest players in the [LDI industry](#), which serves defined pension schemes, and along with other firms came under significant stress during the UK's government bond market turmoil in 2022 that began with then-prime minister Liz Truss's disastrous "mini" Budget.

The change comes as [BNY](#) is seeking to better integrate its investment management units, which have long been run separately and of which Insight is the largest, with the rest of the bank. Last year, the bank combined its private bank and investment management businesses under a new leader, Jose Minaya, who joined BNY in September from asset manager Nuveen.

Hanneke Smits, who has been the head of BNY's investment management division, left at the end of 2024.

Minaya says BNY's investment division, which has \$2tn in assets under management, has grown to its present size with very little cross selling between its seven assets management units, the private bank and the larger firm.

"The reason I am here is to help the collective grow faster," said Minaya. "We can provide a basket of services that is much more valuable as a whole."

[Nauphal](#), who fled Lebanon as a teenager in 1978, joined Insight in 2003 as its chief investment officer, and became its top executive four years later. Insight, which had about \$95bn under management at the time, was bought by BNY in 2009.

Under Nauphal, Insight's assets under management grew nearly 10-fold, as the firm championed the idea that pension funds could lower their perceived deficits and smooth the volatility of their returns by putting their assets in a portfolio of hedged higher yielding long-term bonds.

But LDI strategies, which rely on the complicated hedges to counter interest rate moves, have come under fire since 2022, with critics saying the investment approach increases risk and adds to market volatility.

Nauphal told a House of Commons committee in 2022 that his firm maintained "a more conservative buffer" than rivals. In fact, Insight [temporarily altered](#) the way it valued its holdings, something the firm has said was appropriate but that rivals have said has brewed distrust in LDI products.

Insight's assets under management fell nearly 30 per cent in 2022, though they have regained about half of that drop since.

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In a Six-Week Span, this Dark Pool with a Curious Past Traded 3.7 Billion Shares

 wallstreetonparade.com/2025/01/in-a-six-week-span-this-dark-pool-with-a-curious-past-traded-3-7-billion-shares

By Pam Martens and Russ Martens: January 6, 2025 ~

There is a precise date as to when the American public became overtly aware that the stock market structure had become outrageously rigged. That date is March 30, 2014 when famed author and former Wall Street veteran, Michael Lewis, went on *60 Minutes* to proclaim: “The United States stock market, the most iconic market in global capitalism, is rigged.”

When asked to explain just who it is that’s rigging the stock market, Lewis explained that it’s a “combination of these stock exchanges, the big Wall Street banks and high-frequency traders.”

That *60 Minutes* program occurred during President Obama’s administration. Not only was nothing materially done to stop the rigging during Obama’s eight years in office, but the rigging has grown in both size and complexity since then as hedge funds and Dark Pools take over large segments of stock market structure.

Dark Pools are effectively stock exchanges that trade in the dark with limited oversight from the Securities and Exchange Commission (SEC). The most active Dark Pools are primarily owned by domestic and foreign megabanks like UBS, Goldman Sachs, JPMorgan Chase, Morgan Stanley, Citigroup and so forth. Bizarrely, these megabanks are allowed by the SEC to trade shares of their own bank stock in their own Dark Pools, as well as the shares of the other megabanks. (See *Wall Street Banks Are Trading in Their Own Company’s Stock: How Is This Legal?*)

On June 2, 2014 (two months after Michael Lewis blew the whistle on *60 Minutes*) Wall Street’s self-regulator, FINRA, decided to engage in a charade of transparency by publishing three-week old Dark Pool data, lumped together for an entire week at a time. That practice has continued since 2014.

Wall Street On Parade periodically takes a look at FINRA Dark Pool data, to see if anything new jumps out. What jumped out at us recently is that the second largest Dark Pool by share volume over at least the past six months is not a megabank. Its name is IntelligentCross and it has a noteworthy history.



Roman Ginis, Founder and CEO, Imperative Execution Inc.

IntelligentCross is owned by Imperative Execution Inc., whose founder and CEO is Roman Ginis. Prior to founding the Dark Pool in 2016, Ginis was a quantitative trader for the multi-quant unit of SAC Capital, the hedge fund owned, operated and named after Steven A. Cohen. Ginis worked for Cohen for seven years, from 2009 to 2016. His unit was re-branded as Cubist Systematic Strategies in 2014.

According to a 2018 article in the Wall Street Journal, the venture-capital arm of Cohen's firm provided investment funds to help launch the IntelligentCross Dark Pool.

Cohen's SAC Capital changed its name – for good reason – in 2014 to Point72 Asset Management. The name change was part of a re-branding effort after SAC Capital became synonymous with insider trading. Eight employees of SAC Capital were convicted on criminal charges of insider trading. On November 4, 2013, SAC Capital pleaded guilty to criminal charges brought by the U.S. Department of Justice and agreed to pay \$1.8 billion in fines and forfeitures.

Cohen was not criminally charged.

According to the FINRA data, for the six weeks running from November 11 through December 16, 2024 (the most recent Dark Pool data made available by FINRA), IntelligentCross traded the following number of shares:

12/16/24 740,933,347

12/09/24 636,475,217

12/02/24 626,026,343

11/25/24 404,506,996

11/18/24 628,462,065

11/11/24 690,228,833

In each week, the share volume of IntelligentCross is second only to the Dark Pool owned by the giant international trading firm, UBS, and ahead of the Dark Pool owned by the giant international trading firm of Goldman Sachs.



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PBMs 'Wasting' Time in Opioid MDL Discovery Spat: Judge

By **Yeji Jesse Lee**

Law360 (January 3, 2025, 7:12 PM EST) -- An Ohio federal judge overseeing multidistrict opioid litigation on Friday denied pharmacy benefit managers a stay to appeal a discovery order and said he believed the PBMs were "wasting" the court's time.

U.S. District Judge Dan Aaron Polster said **in a Friday order** that the PBMs' request for emergency intervention by the Sixth Circuit on an "everyday discovery matter borders on frivolous."

"The court believes the PBMs are wasting this court's and the Sixth Circuit's time with a mandamus petition regarding the discoverability of current and former employees' work background regarding compensation, discipline and commendations, job history, and so on," Judge Polster said in the order.

The judge added that the court had long allowed redaction of the personal information that the PBMs are arguing would be revealed in a handover.

In November, Express Scripts **argued that** 14 documents detailing internal investigations and audits are privileged because they contain legal advice on compliance issues. The objection came shortly after a special master, David R. Cohen, concluded that the documents in question constitute business advice — not legal advice — and are subject to production requirements. The court ultimately overruled the PBMs' objection and affirmed Cohen's decision.

A motion filed Dec. 31 by defendants Express Scripts Inc., ESI Mail Pharmacy Services Inc. and OptumRx Inc., requested a stay until the PBMs' forthcoming mandamus petition had been resolved. The PBMs said they intended to seek a writ of mandamus to vacate the privilege order and personnel files order in the coming days.

While Judge Polster denied the PBMs' motion to stay the personnel files order on Friday, he granted the motion to stay the privilege order until Jan. 14, saying the short delay should give the Sixth Circuit enough time to consider a motion to stay.

"The PBMs' motion to stay the Court's Privilege Order is not frivolous, but the motion remains unconvincing," Judge Polster said, adding that as recently as 2023, the Sixth Circuit confirmed that the standard the court has used repeatedly is the correct one. "The PBMs are unlikely to show the Court employed an incorrect legal standard, and unlikely to show the Court abused its discretion as it undertook a careful document-by-document privilege analysis."

The Friday order is **part of multidistrict litigation** by the city of Rochester, New York, and Lincoln County, Missouri, that involves cases against pharmacies, drugmakers, insurers, PBMs and other healthcare entities over their alleged roles in the opioid epidemic.

The PBMs in the litigation are accused of colluding with manufacturers to increase the accessibility and sales volume of branded opioid drugs.

Representatives for the governments and PBMs did not immediately respond to requests for comment on Friday.

The governments are represented by Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC and Peter H. Weinberger of Spangenberg

Shibley & Liber.

Express Scripts Inc. and ESI Mail Pharmacy Services Inc is presented by Jonathan G. Cooper, Christopher G. Michel, and Michael J. Lyle of Quinn Emanuel Urquhart & Sullivan LLP.

OptumRx Inc. is represented by Grace Assaye and Brian D. Boone of Alston & Bird LLP.

SuperValu, Inc., Advantage Logistics, Advantage Logistics Midwest, and Advantage Logistics USA West LLC are represented by Trevor K. Scheetz, Matthew H. Rice, Joseph M. Vanek, Greg Shinall, and David P. Germaine of Sperling Kenny Nachwalter LLC.

The multidistrict litigation is In re: National Prescription Opiate Litigation, case number 1:17-md-02804, in the U.S. District Court for the Northern District of Ohio.

--Additional reporting by Gianna Ferrarin and Hailey Konnath. Editing by Peter Rozovsky.

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Semiconductor Co. Beats 2nd Suit Over Failed \$8B Merger

By **Emilie Ruscoe**

Law360 (January 3, 2025, 11:16 PM EST) -- Semiconductor company MaxLinear Inc. has beaten another suit over its failed \$8 billion merger plans with a Taiwan-based company after a California federal jurist found that the investment funds that brought the action didn't have standing to sue since they were investors in the acquisition target, not MaxLinear.

In a Thursday order in San Diego federal court, U.S. District Judge Cathy Ann Bencivengo found that even under recently expanded limits on who can bring claims under fraud provisions of federal securities law, plaintiffs HBK Master Fund LP and HBK Merger Strategies Master Fund LP, which had held shares of MaxLinear acquisition target Silicon Motion Technology Corp. as opposed to holding shares in MaxLinear, hadn't shown the court they are an appropriate party to bring such claims.

The Thursday order cites a 2024 Ninth Circuit decision, [In re CCIV / Lucid Motors Securities Litigation](#), in which the appeals court found that "a plaintiff has standing under [the fraud provision, Section 10(b) of the Securities Exchange Act] if the plaintiff purchased or sold the securities about which the alleged misrepresentations were made."

Applying the Ninth Circuit's so-called purchaser-seller rule to the funds' complaint, Judge Bencivengo said, "the dispositive issue for standing is whether the pleaded misrepresentations were made about [Silicon Motion]. The court finds they were not."

According to Judge Bencivengo, the complaint references alleged misstatements that were not about Silicon Motion securities. Instead, the court said, the funds' suit points to allegedly misleading statements made by MaxLinear representatives, including named MaxLinear executives Kishore Seendripu and Steven Litchfield, about MaxLinear's evaluation of, and commitment to, its proposed acquisition of Silicon Motion.

"The bottom line is that there is no allegation in the complaint that anyone made any representations about [Silicon Motion] securities," the judge said Thursday. "The Ninth Circuit has set a bright-line rule that the 'security' at issue must be one about which the alleged misrepresentations were made."

Judge Bencivengo gave the plaintiffs until Jan. 17 to file an amended complaint.

In the June suit, the fund plaintiffs claimed that the defendants had schemed to "avoid a merger they no longer wanted to effectuate while leaving shareholders of the target company — Silicon Motion — holding the bag."

"MaxLinear's scheme was a straightforward attempt to lay as much of the loss of MaxLinear's change of heart as it could on the shareholders of Silicon Motion while MaxLinear attempted to give itself the strongest leverage possible to avoid specific performance and contest the contractual termination fee it had agreed to," the funds claimed.

According to the funds, U.S.-based MaxLinear and Taiwan-based Silicon Motion announced a \$3.8 billion cash and stock deal for the former to buy the latter in May 2022, which would require regulatory approval. The company that would result from combination of the businesses would be worth \$8 billion, the companies said.

"Analysts covering Silicon Motion were focused on the receipt of regulatory approvals, and not

MaxLinear's cold feet, as a risk to the deal," the suit states, noting that the U.S. company hoped to avoid payment of a \$160 million acquisition termination fee it had earlier agreed to.

The HBK Funds litigation "largely mirrors" a proposed investor class action that MaxLinear beat on a motion to dismiss last year, Judge Bencivengo noted Thursday. The plaintiffs in that matter have filed an amended complaint, and the currently is presently weighing a motion to dismiss, court records show.

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

MaxLinear Inc., Kishore Seendripu and Steven Litchfield are represented by Jordan Eth, Christin Hill and Hanna M. Lauritzen of Morrison Foerster LLP.

HBK Master Fund LP and HBK Merger Strategies Master Fund LP are represented by Lawrence M. Rolnick, Marc B. Kramer, Steven M. Hecht and Michael J. Hampson of Rolnick Kramer Sadighi LLP and Scott L. Metzger and John C. Wynne of Duckor Metzger & Wynne.

The case is HBK Master Fund LP et al. v. MaxLinear Inc. et al., case number 3:24-cv-01033, in the U.S. District Court for the Southern District of California.

--Editing by Jay Jackson Jr.

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Del. Court Rules Against Insurers In Harman 'Bump-Up' Case

By **Jeff Montgomery**

Law360 (January 3, 2025, 8:32 PM EST) -- In a closely watched ruling on director and officer insurer denials of mergers and acquisitions cost "bump-up" payouts, a Delaware judge sided on Friday with Harman International Industries' claims that insurance providers unjustifiably denied coverage for a \$28 million settlement of challenges to Harman's 2017 merger with Samsung Electronics America Inc.

According to Harman, the settlement ended a federal stockholder suit accusing the company of misleading investors about its \$8 billion merger with Samsung's American branch.

Harman insurers Illinois National Insurance Co., Federal Insurance Co. and Berkley Insurance Co., however, argued that the settlement reflected a contractually prohibited hike in the ultimate deal price. As a result, the insurance companies invoked a director and officer coverage term barring price "bump ups" related to post-deal increases or settlement of inadequate price claims that boost the original terms.

In a 30-page decision, Delaware Superior Court Judge Paul R. Wallace ruled Friday that the federal stockholder action that insurers focused on as being disqualifying involved Exchange Act disclosure and securities fraud allegations against Harman in the U.S. District Court for the District of Connecticut, with no claim involving "inconsiderate" deal price as a remedy.

"Without a cognizable request to remedy inadequate deal price, it hardly seems possible that a settlement of the action could represent an effective increase in deal price," Judge Wallace wrote regarding the Connecticut case, *Baum v. Harman International Industries Inc.* "So, for the exclusion to apply, inadequate deal price must be a viable remedy that was sought for at least one claim" in the stockholder litigation.

"On the record developed — which the insurers say is now adequate to resolve the issue — the court cannot find that any part" of the earlier settlement "represents an amount by which the transaction price or consideration is effectively increased," the judge wrote.

In a statement on Friday, Orrie A. Levy of Cohen Ziffer Frenchman & McKenna LLP, counsel to Harman, described the decision as "a big win for policyholders."

"In particular, the court recognized that damages representing an increase in deal consideration are not cognizable under Section 14(a)," of the Exchange Act, Levy said, "and that the terms of the settlement and other record evidence showed that the settlement represented the avoidance of the anticipated cost of defense, rather than an effective increase in deal consideration."

Judge Wallace observed that the parties didn't say what the stockholder settlement represented, but the insurers asserted that the 2017 suit sought "compensatory and/or rescissory damages," and pointed to that "as the basis to deny coverage under their bump-up exclusions."

Harman had estimated that its defense costs in the *Baum* action would have ranged from \$25 million to \$30 million, with the settlement coming in at \$28 million — "right in the middle of the litigation cost estimate," Judge Wallace wrote. He said separately: "Avoiding the cost of further litigation is a valid reason to settle and the court has no reason to believe this reasoning was pretextual."

The decision could prove important to litigation over similar bump-up disputes elsewhere, given Delaware's status as an important center for corporate litigation.

Judge Wallace wrote that there had been no evidence on the true value of the shares that changed hands in the \$112 per-share transaction.

"But if left to engage in such speculation, the [\$28 million] settlement amount seems grossly inadequate as compensation for an inadequate deal price," the judge wrote. "There were 69,883,605 shares of Harman common stock," with those who sued in federal court alleging that the true value was \$116 per share.

"Taking this claim as true, the difference in the shares' actual value versus the deal value (\$116 compared to \$112) would be \$279,534,420, which is significantly greater than the \$28 million settlement," Judge Wallace noted.

The insurers who sued, Judge Wallace wrote, claimed that the court in the Baum action concluded that "inadequate consideration was sufficient to give rise to liability."

But the Baum court found that the loss alleged in the federal case resulted from alleged false statements or material omissions, the judge said, adding, "To insurers, this nuance seems of no moment. To the court though, it informs just why its conclusion here isn't at odds with the Baum court's pleading-stage ruling."

Earlier in the case, Judge Wallace wrote that, for the bump-up provision to exclude any settlement entirely, the transaction must involve a full acquisition, details regarding Baum must relate only to allegations of inadequate consideration and all of the Baum action settlement must represent an effective increase in consideration.

"Beyond debate, any bump-up provision like that here will exclude a settlement, or a specific portion of it, if the settlement clearly declares that its purpose is to remedy inadequate consideration given in an acquisition," the judge wrote.

Counsel for the insurers declined to comment on Friday.

Harman is represented by Jennifer C. Wasson and Carla M. Jones of Potter Anderson & Corroon LLP, and Robin L. Cohen, Orrie A. Levy and Maria Brinkman of Cohen Ziffer Frenchman & McKenna LLP.

Illinois National Insurance Co. is represented by Kurt M. Heyman and Aaron M. Nelson of Heyman Enerio Gattuso & Hirzel LLP, and Alexander S. Lorenzo and Kelsey Kingsberry of Alston & Bird LLP.

Federal Insurance Co. is represented by Robert J. Katzenstein of Smith Katzenstein & Jenkins LLP and Daniel London of London Fischer LLP.

Berkley Insurance Co. is represented by Robert J. Katzenstein of Smith Katzenstein & Jenkins LLP and Cara T. Duffield of Wiley Rein LLP.

The case is Harman International Industries Inc. v. Illinois National Insurance Company, Federal Insurance Company and Berkley Insurance, case number N22C-05-098, in the Superior Court of the State of Delaware.

--Editing by Melissa Treolo.



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Food Delivery App Inks \$80M Deal To End SPAC Merger Suit

By **Sydney Price**

Law360 (January 3, 2025, 6:00 PM EST) -- Investors suing mobile food delivery and ride-hailing services operator Grab Holdings Ltd. have asked a New York federal judge to preliminarily approve an \$80 million deal to settle claims that several sections of a proxy statement Grab filed with a special purpose acquisition company were false and misleading.

The proposed \$80 million settlement represents a recovery between 8.9% and 13.4% of the maximum likely recoverable damages if the plaintiffs would have prevailed at trial, according to the **unopposed motion** for preliminary approval filed Thursday. This recovery exceeds the 1.8% median settlement value in 2023 for all securities class actions, according to the motion.

Co-lead counsel for the investors noted they intend to request up to approximately one-third of the settlement fund, or about \$26.6 million, in fees.

According to the settlement notice, the parties reached an agreement following two unsuccessful mediation sessions in July and October. In late October, the parties accepted a double-blind mediator's recommendation to resolve the claims, according to the motion.

The investors' suit claims that in 2021, Grab announced it would go public through a de-SPAC transaction with Altimeter Growth Corp. According to the investors, the Altimeter board said it had conducted due diligence on the Singaporean company by reviewing its operations and finances, and had made assurances the merger was in the best interests of Altimeter's shareholders. The merger was approved and closed in December 2021, according to the suit.

A few months later, Grab's stock price fell 37% when it announced it lost \$1.1 billion during that fourth quarter of 2021 and that revenue had declined 41% during the period due to preemptive investments to grow driver supply and increased consumer incentives, the investors alleged.

Prior to this, Grab had concealed from investors that it was already experiencing driver shortages, which was negatively affecting operations, and the company was already increasing incentives to combat the driver supply constraint, the suit alleged.

In March 2024, U.S. District Judge Jennifer L. Rochon allowed the investors to **proceed with claims** that the first four sections of the proxy statement Grab filed in 2021 with Altimeter were false and misleading.

According to her order, the first four sections of the proxy discussed Grab's use of incentives to attract drivers and consumers for its food delivery and ride-hailing services. The sections noted Grab might increase its incentives in the future and that if it did, it could negatively impact the company's profitability.

Judge Rochon said that in discussing these topics, Grab "put these issues in play" and triggered a duty to "tell the whole truth," which the investors allege didn't happen.

At the same time, Judge Rochon tossed the rest of the suit's allegations relating to other statements in the proxy statement and other allegedly false and misleading statements made in press releases and a conference call. According to the order, Judge Rochon found many of the challenged statements nonactionable.

According to Thursday's settlement motion, the parties proceeded to discovery after the March order was issued.

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

The investors are represented by Joshua B. Silverman, Omar Jafri, Brian P. O'Connell, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP, and Shannon L. Hopkins of Levi & Korsinsky LLP.

Grab and its executives are represented by Susan L. Saltzstein and Jeffrey S. Geier of Skadden Arps Slate Meagher & Flom LLP.

The Altimeter defendants are represented by David Hennes and Amy Jane Longo of Ropes & Gray LLP.

The case is In Re Grab Holding Ltd. Securities Litigation, case number 1:22-cv-02189, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Lakshna Mehta.

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Venable Faces DQ Bid In AmeriMark Shareholder Dispute

By **Katryna Perera**

Law360 (January 3, 2025, 5:24 PM EST) -- Attorneys from Venable LLP and Parsons Behle & Latimer PC have been hit with a disqualification bid in Utah federal court in a shareholder dispute involving AmeriMark Group AG, with the defendants arguing the lawyers are representing both the suing shareholder and the AmeriMark subsidiary at the heart of the dispute, causing a conflict of interest.

Defendants Rymark Inc. and Nicholas Thayne Markosian filed a disqualification **motion** on Thursday against the attorneys representing the suit's plaintiffs, Capana Swiss Advisors AG and AmeriMark Automotive AG.

According to the motion, the lawsuit boils down to a dispute over who controls AmeriMark Group and AmeriMark Automotive. Capana claims it has about 13 million shares in AmeriMark Group, or a 65% stake, but Markosian alleges in a countersuit that those 13 million shares were stolen from him and that he is, in fact, the largest shareholder in the company.

Now, Markosian and Rymark claim that the same attorneys are representing AmeriMark, Capana and several executives of both companies, causing a conflict of interest.

"In the ordinary course, AmeriMark would be agnostic as to the dispute between Capana and Mr. Markosian over the 13,000,000 shares. And the evidence of the theft is so overwhelming that AmeriMark would almost certainly be advised by independent counsel to credit Mr. Markosian's claims," the motion said.

"But in this litigation, AmeriMark is represented by the same attorneys representing Capana," the motion said. "Those attorneys are being paid by Capana, not AmeriMark. The upshot is that AmeriMark is essentially at the mercy of Capana and Capana's attorneys. It is not receiving independent or unbiased legal advice."

The defendants argued that Capana and its owner, Shaen Bernhardt, are the ones "calling the shots" in the suit and that Capana is paying AmeriMark Automotive's counsel fees because the AmeriMark companies have no money and are essentially empty shells.

They argued that such dual representation violates two Utah Rules of Professional Conduct. The first, Rule 1.7, prohibits concurrent conflicts of interest. The second, Rule 1.8(f), prohibits an attorney from receiving "compensation for representing a client from one other than a client" without the client's consent or when doing so will "interfere[] with the lawyer's independence of professional judgment," according to the motion.

Markosian and Rymark said that Venable and Parsons Behle could not have obtained informed consent from AmeriMark to receive legal fee payment from Capana because the control of AmeriMark is disputed.

And even if the firms did go through the process of obtaining consent and the consent were legitimate, it "would still not cleanse the financing arrangement here, since the conflict and payment terms threaten to 'interfere' with those firms' 'independence of professional judgment [and] with the client-lawyer relationship,'" the motion said.

"This is not meant as an insult to specific attorneys. It is simply an acknowledgment of the practical

realities present when a lawyer represents two entities with divergent interests and only one of the entities is paying," the motion said. "Attorneys who are being paid by Capana to represent AmeriMark just cannot be expected to see clearly when — for instance — incontrovertible evidence comes to light showing that Capana's stake in AmeriMark Group was stolen."

John Worden of Venable LLP told Law360 on Friday that he believes Rymark and Markosian filed the motion to disqualify simply to postpone the suit's trial date and that the defense counsel also represent multiple related parties and shareholders.

"This case has been pending for 18 months, and they brought this [motion] at the close of discovery and it is obviously just to postpone the trial date. They could have brought this months ago and instead sat on it through series of depositions," he said.

Counsel for Rymark and Markosian did not immediately respond to requests for comment.

According to the motion, Capana and AmeriMark Automotive sued last year, claiming Capana was the majority shareholder. Through discovery, Rymark and Markosian said they learned that Capana received 13 million shares of AmeriMark Group stock from a nonparty called Whitetree Capital, which claimed to have gotten the shares from Markosian.

However, discovery revealed that Markosian never transferred any shares to Whitetree, the defendants said.

"Instead, plaintiffs' own document productions showed beyond doubt that Miron Leshem — the original architect of the scheme at issue here — stole the 13,000,000 shares, gave them to Whitetree, and then forged documents to make it appear as if Whitetree had gotten the shares honestly. The forgeries are clumsy and obvious; plaintiffs have never disputed them," the motion said.

Rymark and Markosian informed plaintiffs' counsel of the alleged theft of the 13 million shares in January 2024 and then filed a third-party complaint requesting a declaratory judgment that Markosian is the rightful owner of the shares.

"Mr. Markosian has also sought to unwind AmeriMark Group entirely, since — as set forth in the third-party complaint — it was created as part of a fraudulent pump-and-dump scheme," the motion said. "But regardless, if the court grants Mr. Markosian's request for a declaratory judgment as to the stolen 13,000,000 shares, Mr. Markosian will control both AmeriMark Group and AmeriMark Automotive."

Capana and AmeriMark Automotive are represented by Erik A. Christiansen and Hannah J. Ector of Parsons Behle & Latimer and by John S. Worden and Sarah E. Diamond of Venable LLP.

Rymark and Markosian are represented by R. Jeremy Adamson, Chad S. Pehrson, Robert P. Harrington and Stephen Richards of Kunzler Bean & Adamson PC.

The case is Capana Swiss Advisors AG et al v. Rymark Inc. et al, case number 2:23-cv-00467, in the U.S. District Court for the District of Utah.

--Editing by Brian Baresch.



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Ala. Judge Won't Recuse In Talc Fight Due To Law Firm Work

By **Ryan Boysen**

Law360 (January 3, 2025, 3:39 PM EST) -- An Alabama federal judge will not recuse himself from a fight between two leading plaintiffs law firms in the multibillion-dollar litigation over Johnson & Johnson's tainted talcum powder, saying Friday that his previous representation of Beasley Allen Law Firm won't bias him against Smith Law Firm PLLC.

In a six-page **order**, U.S. District Judge R. Austin Huffaker Jr. shot down Smith Law's **recusal request**.

It's been more than five years since he represented Beasley Allen as a malpractice and disciplinary defense attorney at Rushton Stakely Johnston & Garrett PA, Judge Huffaker said, and he's not especially close with anyone at the firm. He was appointed in 2019 by U.S. President Donald Trump.

"Beasley Allen was just one of numerous other law firms and attorneys that I represented over the years," Judge Huffaker said. "That representation was occasional over the course of the years and constituted a small fraction of my overall client base and revenue generations on a year-to-year basis."

Judge Huffaker's ruling is the latest development in a **bitter rift** that's opened between two former partners in the massive multidistrict litigation against J&J. Plaintiffs in the MDL claim they developed cancer from asbestos-tainted talcum powder.

Beasley Allen sued Smith Law in Alabama federal court in September, claiming the firm has sold out its own clients for a quick payday by supporting a controversial \$9 billion settlement offer by J&J in order to pay off "litigation funding loans perhaps as high as \$240 million," according to its complaint.

Beasley Allen is suing Smith Law for breach of contract, among other things.

Smith Law hit back a few days later, suing Beasley Allen in Mississippi federal court for defamation over the "patently false" accusations in its complaint.

The two firms have been cooperating on the sprawling talcum litigation under a joint venture agreement since 2013, and together they represent roughly 11,000 plaintiffs. Both have been instrumental in driving the litigation forward over the years.

The proposed settlement has driven a wedge between them, however.

Beasley Allen claims it's owed more than \$1.2 million for payments Smith Law was supposed to be making regularly per the terms of that joint venture agreement.

J&J needs support from 75% of the roughly 100,000 individual talc claimants to move forward with the deal, and the pharmaceutical giant has reportedly been aggressively courting that support after two earlier proposed settlements withered on the vine.

Beasley Allen, meanwhile, has been leading the opposition to the proposed settlement, claiming it still doesn't provide enough compensation to claimants who allegedly contracted cancer from asbestos-tainted talcum powder. Beasley Allen and J&J have clashed repeatedly in court over the issue.

J&J first proposed the settlement in December, and Smith Law worked to sweeten the deal over the summer before backing it, according to its complaint.

The firm has said the deal would fund a talc personal injury trust to the tune of \$9.1 billion and, on top of that, would also see J&J pay potentially hundreds of millions or even billions in legal fees directly to law firms rather than having that money come out of the trust.

As part of that process, however, J&J plans to enshrine the settlement in a Chapter 11 bankruptcy plan for a subsidiary, which would be saddled with all the company's talc claims. That legal maneuver, known as the "Texas two-step," allows J&J to force all talc plaintiffs to abide by the deal, an outcome that's prized for its finality and is not possible outside the bankruptcy process.

Beasley Allen and others have accused J&J of seeking to abuse U.S. bankruptcy law by pursuing that route.

Smith Law, however, has said J&J's deal is more than acceptable for its long-suffering clients.

"What [Beasley Allen was] unable to achieve in years in the talcum powder litigation, [Smith Law] was able to negotiate in weeks," Smith Law said in its defamation complaint.

Neither party responded Friday to requests for comment.

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

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

Porter Malouf PA, which is named as a defendant alongside Smith Law, is represented by Bruce F. Rogers and Elizabeth N. Terenzi of Bainbridge Mims Rogers & Smith LLP.

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

--Editing by Adam LoBelia.



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Bank's Refund Doesn't End Proposed Class Action Over Fees

By **Julie Manganis**

Law360 (January 3, 2025, 5:10 PM EST) -- A bank's "apparent attempt" to "pick off" a plaintiff in a proposed class action by refunding overdraft fees that are the basis for the complaint "will not be permitted," a Massachusetts judge said in denying the bank's bid to dismiss the case.

Suffolk County Superior Court Justice Hélène Kazanjian, in a **decision** released Friday, said MountainOne Bank cannot buy its way out of litigation while still maintaining that it is not liable for any damages to customers as a result of its policy to impose nonsufficient funds fees for each resubmitted request for payment.

MountainOne Bank sought to have plaintiff Kimberly Wirtes' 2024 complaint tossed for lack of standing because, following the refund, she could not establish damages, and because, it contends, the bank's fee schedule detailed the policy.

Justice Kazanjian said the bank's unsolicited decision to refund Wirtes more than \$12,000 in fees after being put on notice of her intent to sue does not resolve the plaintiff's requests for declaratory and injunctive relief over the bank's policy, given that the bank still "expressly denies liability."

"Second, defendants' unsolicited refunds into Wirtes' account, an apparent attempt to 'pick off' the named plaintiff, do not defeat standing in a purported class action," Justice Kazanjian wrote.

"That the refund appeared prior to Wirtes' filing of the complaint ... likewise makes no difference where defendant's conduct was a strategic response to forthcoming litigation," Justice Kazanjian wrote. "Either way, the strategy — paying off the named plaintiff to evade a class action suit — is the same, and will not be permitted."

The judge also rejected the bank's argument that the fees were clearly described in its fee schedule, saying in a footnote the fact that an account holder would be charged a fee each time a payment was submitted "appears nowhere in the contract language attached to the complaint."

Messages seeking comment from counsel for Wirtes and MountainOne did not immediately receive responses on Friday.

Wirtes is represented by Patrick Sheehan of Whatley Kallas LLP.

MountainOne Bank is represented by Alyssa Anne Sussman of Goodwin Procter LLP.

The case is Wirtes v. MountainOne Bank, case number 2484CV01577, in the Suffolk County Superior Court of the Commonwealth of Massachusetts.

--Editing by Daniel King.

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Hertz Off The Hook For \$337M Bond In Claim Recalculation Tiff

By Clara Geoghegan

Law360 (January 3, 2025, 5:39 PM EST) -- A Delaware bankruptcy judge said Hertz Corp. doesn't need to post a \$337.4 million bond while she uses an appeals court decision on underpaid interest to recalculate a group of unsecured noteholders' claims, writing the request would alter Hertz's more than 3-year-old Chapter 11 plan and give the noteholders better treatment than other creditors.

U.S. Bankruptcy Judge Mary F. Walrath's Thursday opinion comes as trustees for the unsecured noteholders and Hertz are preparing to argue their diverging views on how the court should interpret a Third Circuit decision that the car rental company underpaid noteholders for interest and other fees under its plan before making distributions to shareholders, who are last in line for repayment.

The appeals court sent the case back to Judge Walrath to figure out exactly how much money Hertz owes the noteholders, and both parties have requested an evidentiary hearing in the case, according to the opinion.

Judge Walrath denied the noteholders' request for an order that would require Hertz to post a \$337.4 million bond pending a final calculation of their claim, writing that while bankruptcy courts have broad power to issue equitable relief, the requested order would give them better treatment than other creditors and wasn't required by Hertz's Chapter 11 plan or the Bankruptcy Code.

"While the indenture trustees contend that they are not seeking to be paid any more than other similarly situated creditors, the court concludes that they are seeking better treatment than other similarly situated creditors," Judge Walrath wrote. "They are seeking a bond to secure the full payment of their claims when finally allowed. Other similarly situated creditors holding disputed claims did not receive any similar assurance or security."

Hertz entered bankruptcy in 2020, saying the pandemic had tanked its business virtually overnight. But by the time **it confirmed a Chapter 11 plan in June 2021**, public health restrictions on travel had loosened, giving new life to its business and allowing it to fully repay creditors with over \$1 billion left for shareholders, who are last in line and rarely see any recoveries coming out of a bankruptcy.

The bankruptcy plan included early repayment of two series of notes that were set to mature in 2026 and 2028. Hertz, under its plan, paid \$2.7 billion to the noteholders covering the principal, pre-bankruptcy interest and post-bankruptcy interest calculated at the federal judgment rate, which added up to around \$3 million.

Wells Fargo, an indentured trustee on the notes, argued the noteholders' claims in the case were higher and Hertz should have used a contractual interest rate rather than the federal judgment rate to calculate post-petition interest. It also argued the company owed early repayment and other fees under the note agreements and, in total, the noteholders should get at least an extra \$223 million in make-whole payments.

Judge Walrath in 2022 rejected Wells Fargo's arguments. She **ruled the make-whole payments** were based on unmatured interest, which is disallowed under the U.S. Bankruptcy Code.

A split panel of the Third Circuit **in September reversed Judge Walrath's decision**. The majority found Hertz's plan had violated bankruptcy's absolute priority order rule since shareholders, who can

only receive distributions once other higher-ranked creditors are fully paid, received over \$1 billion.

The shareholder recovery, the appeals court ruled, was partially funded by the noteholders who weren't given the full amount of money they were entitled to based on the notes' contractual interest rate and other fees. The Third Circuit remanded to Judge Walrath to figure out exactly how much money the noteholders should be paid based on its ruling.

At a status conference in early December, attorneys for Wells Fargo and Bank of America NA, another indentured trustee for the notes, asked Judge Walrath to order that Hertz post a bond that would then be released once the court makes a final decision on the adjusted claim total, according to Thursday's opinion.

The trustees pointed out that Hertz had said it planned to appeal the Third Circuit's decision to the U.S. Supreme Court. In letters briefing the court, the trustees added that Hertz's poor reported financial results in 2024 and recent credit downgrading showed the \$337.4 million bond was needed to protect their claims in case Hertz runs into financial trouble down the road.

Hertz urged the court to deny the request. The company said its bankruptcy plan didn't provide a bond or other protections for the noteholders' disputed claims and that posting the sum would give the noteholders better treatment than other unsecured creditors.

Judge Walrath sided with Hertz and denied the request.

"While the court has the equitable power to enter orders to effectuate express provisions of the code or to fill in gaps in the code, it has no equitable power to change any provision of the code," Judge Walrath wrote in Thursday's opinion.

She added that disputes over the noteholders' claims were around before Hertz's Chapter 11 plan was confirmed, but the plan didn't build in a reserve or another form of protection for the disputed claims.

"The court cannot modify the plan at this late date to give the noteholders what they were unable to obtain by agreement or by order of the court at the time of confirmation of that plan," she added.

A spokesperson for Hertz and counsel for the indentured trustees did not immediately respond to request for comment on Friday.

Hertz is represented by Jason N. Zakia of White & Case LLP.

Wells Fargo is represented by Mark T. Stancil of Willkie Farr & Gallagher LLP.

U.S. Bank NA is represented by Richard C. Pedone of Nixon Peabody LLP.

The adversary proceeding is Wells Fargo Bank NA v. Hertz Corp. et al., case number 1:21-ap-50995, in the U.S. Bankruptcy Court for the District of Delaware.

The appellate case is In re: The Hertz Corporation et al., Reorganized Debtors, case number 23-1169, in the U.S. Court of Appeals for the Third Circuit.

The underlying bankruptcy case is In re: Hertz Corp. et al., case number 1:20-bk-11218, in the U.S. Bankruptcy Court for the District of Delaware.

--Additional reporting by Vince Sullivan. Editing by Philip Shea.



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Outcome Execs Say Ill. Judge Should End Restitution Process

By **Lauraann Wood**

Law360 (January 3, 2025, 6:49 PM EST) -- Outcome Health's former executives say the Illinois federal judge working to calculate how much they should repay investors following their fraud conviction should end the "largely academic" exercise because prosecutors haven't shown financial loss, and other repayment avenues remain open.

U.S. District Judge Thomas Durkin has given the government six months to supplement its showing that investors such as Goldman Sachs and Capital G should receive hundreds of millions of dollars in restitution from a nearly billion-dollar fraud for which former Outcome CEO Rishi Shah, co-founder Shradha Agarwal and former financial chief Brad Purdy **were convicted** in 2023, according to their Thursday **motion**.

After all this time, however, prosecutors still cannot prove any alleged victim is owed any more money in the case, and the only valuation documents Goldman Sachs provided to that end "have produced more questions than they have answered," the former executives told Judge Durkin.

Probing such "back-of-the-envelope" calculations any further will require more testimony court resources, and at the end of the day leave the court with three competing valuations from the government, they said.

That burden will unduly prolong sentencing proceedings, which should lead Judge Durkin to call off any further restitution proceedings, the executives argued. No Outcome valuation the government has provided can help, either, because none consider the company's value before restructuring in 2018, the former executives said.

"The federal restitution statutes do not require this court to search endlessly for support for the government's claim for restitution," their motion said.

A jury convicted Shah, Agarwal and Purdy of several fraud charges, finding they grew the health advertising business by lying about its inventory and value while silencing employees who raised concerns.

Judge Durkin sentenced Shah to **more than seven years** in prison and gave Agarwal three years in a halfway house over Bureau of Prisons **policy concerns**. Purdy received more than two years in prison for the scheme, and former sales chief Ashik Desai, who **quickly admitted** his role and testified against his co-defendants, received **seven months** in prison. The judge has also said he anticipated entering a **"massive" restitution order** for the institutional investors.

But the institutional investors' 2018 settlement with Shah and Agarwal is part of the reason the government can't demonstrate financial harm for restitution, the defendants told Judge Durkin on Thursday. That deal allowed the investors to use \$220 million in frozen cash to restructure their investment, retain company control and keep it operational, which has made them whole with regard to any fraud, they argued.

Even if those investors have somehow not been fully compensated, the government is still holding on to nearly \$100 million in forfeited assets it could use to fill those gaps, the former executives argued.

"Notably, the government can exercise that sovereign prerogative even if this court does not enter

any restitution order whatsoever," they told Judge Durkin.

Judge Durkin gave the government two weeks to respond to the former executives' argument, according to court records.

Outcome's business involved placing televisions and tablets displaying educational health content in doctors' offices and then selling its clients advertising space on those devices. The company determined which devices aired clients' ads by conducting a "list-match" that identified the overlaps between a client's list of preferred offices and the offices in its advertising network.

The government claimed at trial that Shah, Agarwal and Purdy committed a **"fraud of epic proportions"** by lying about several aspects of Outcome's business — including the offices in its network, available tablet and television inventory, and the value of its advertising — while still billing clients in full. Aiming to become the next Google or Facebook, the three had fostered a **"fake it till you make it"** culture at Outcome since its early days and disclosed advertising or financial shortfalls only when people outside the company grew suspicious about its operations, prosecutors claimed.

Counsel for Shah declined to comment.

Representatives for the government and counsel for Agarwal and Purdy didn't immediately respond to requests for comment.

Shah is represented by Richard E. Finneran of Bryan Cave Leighton Paisner LLP.

Agarwal is represented by Pat Blegen of Blegen & Associates.

Purdy is represented by Theodore Poulos of Cotsirilos Tighe Streicker Poulos & Campbell Ltd.

The government is represented by Corey Rubenstein, Jason Yonan and William Hogan Jr. of the U.S. Attorney's Office for the Northern District of Illinois, and Kyle Hankey of the U.S. Department of Justice's Criminal Division.

The case is U.S. v. Desai et al., case number 1:19-cr-00864, in the U.S. District Court for the Northern District of Illinois.

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