

Securities Suit Follows After Antitrust Ruling Bars Firms' Merger Plans

[dandodiary.com/2025/01/articles/securities-litigation/securities-suit-follows-after-antitrust-ruling-bars-firms-merger-plans](https://www.dandodiary.com/2025/01/articles/securities-litigation/securities-suit-follows-after-antitrust-ruling-bars-firms-merger-plans)

January 9, 2025

The D&O Diary

Securities Suit Follows
After Antitrust Ruling
Bars Firms' Merger Plans



By Kevin LaCroix on January 9, 2025

Posted in Securities Litigation

CAPRI

In prior posts, I have noted the phenomenon of securities class action lawsuit filings following in the wake of antitrust enforcement actions (most recently here). A new securities lawsuit filed just before year-end presents an interesting new variation on this sequence. The new lawsuit, filed against both Capri Holdings Limited and Tapestry, Inc., two high-fashion firms, and certain of their executives, relates back to an enforcement action the FTC filed against the firms to block their plans to merge. As discussed below, the lawsuit involves several interesting features. A copy of the plaintiff's December 23, 2024, complaint can be found here.

Background

Capri, a high fashion firm, owns several fashion brands, including Michael Kors. Tapestry, also a fashion firm, owns its own brands including Coach and Kate Spade. In July 2023, following months-long negotiations between the two firm's senior management, Capri's board approved Tapestry's proposed acquisition of the company at an acquisition price of \$57 per share. In August 2023, the two companies jointly announced their entry into a Merger Agreement. On October 25, 2023, Capri announced that its shareholders have voted to approve the merger.

Though the merger would combine three competitors (Michael Kors, Coach, and Kate Spade), the two companies, according to the subsequently filed securities lawsuit complaint, "repeatedly stated in public filings and press releases that, because their brands purportedly 'face pressures from both lower- and higher-priced products,' the acquisition would not stifle competition, and that they expected to obtain antitrust approval."

Despite the assurances about regulatory approvals, on April 22, 2024, the FTC brought an action to enjoin the merger. The FTC alleged that the merger, if allowed, would "eliminate direct head-to-head competition" between the three fashion name plates. The FTC

specifically alleged that the three name plates all compete within the “accessible luxury handbag market,” and that Tapestry’s acquisition of the Michael Kors nameplate would give it a “dominant share of that market,” thereby creating an anticompetitive effect.

In an October 24, 2024, after a seven-day hearing, the court in the antitrust action granted the FTC’s motion for a preliminary injunction and blocked the Capri acquisition. Among other things, the court said that the companies’ representations about the merger’s competitive effects were “not ... credible,” citing internal documents that, according to the subsequent securities lawsuit complaint, demonstrated “that defendants had private views and economic understandings during the Class Period that were at odds with their public statements.”

According to the securities suit complaint, the court in the antitrust action cited “hundreds of pages of internal documents revealing that defendants secretly understood that their three brands (i.e., Kate Spade, Coach, and Michael Kors) were close competitors within a well-defined ‘accessible luxury handbag market,’ and that the Capri acquisition would hurt competition” – and indeed that cornering that market was a “key internal rationale for the deal.” The securities complaint alleges that the “true nature” of the regulatory risk associated with the proposed transaction “was known only to defendants as they continually misled investors regarding those adverse facts and the actual likelihood that the Capri Acquisition would be consummated.” According to the securities complaint, following the court’s ruling, the per share price of Capri’s common stock fell almost 50%.

The Lawsuit

On December 23, 2024, a plaintiff shareholder filed a securities class in the United States District Court for the District of Delaware against Capri and certain of its directors and offices, and against Tapestry and certain of its directors and officers. The complaint purports to be filed on behalf of a class of investors who purchased securities of Capri between August 10, 2023 (the date the proposed transaction was announced) and October 24, 2024 (the date of the court’s order in the FTC lawsuit).

The complaint alleges that during the class period, the defendants “misrepresented and failed to disclose adverse facts about Capri’s business, operations, market dynamics, and the prospects for approval of the Capri Acquisition, which were known to defendants to or recklessly disregarded by them,” including:

- (a) that the accessible luxury handbag market is a distinct and well-defined market within the overall handbag market and understood as such by the Individual Defendants, as well as by other Capri and Tapestry executives;
- (b) that Capri and Tapestry maintained analogous production facilities and supply chains for the accessible luxury handbags that were distinct from production facilities and supply chains used to manufacture luxury or mass market handbags, confirming that the accessible luxury

handbag market is distinct from the mass market and luxury handbag markets;

(c) that Capri and Tapestry internally considered Coach and Michael Kors to be each other's closest and most direct competitors;

(d) that, conversely, Capri and Tapestry did not internally consider their handbag brands to be in direct competition with luxury handbags or mass market handbags;

(e) that a primary internal rationale for the Capri Acquisition was to consolidate prevalent brands within the accessible luxury handbag market so as to reduce competition, increase prices, improve profit margins, and reduce consumer choice with that market; and

(f) that, as a result of (a)-(e) above, the risk of adverse regulatory actions and/or the Capri Acquisition being blocked was materially higher than represented by defendants.

The complaint alleges that the defendants violated Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The complaint seeks to recover damages on behalf of the class.

Discussion

Follow-on securities litigation in the wake of an antitrust enforcement action is an established phenomenon. In numerous prior posts, I have discussed specific situations in which companies caught up in antitrust enforcement actions can become the target of follow-on securities litigation.

For example, as discussed here, numerous companies in the poultry production industry were hit with follow-on securities lawsuits, after a number of companies in the industry were targeted with private antitrust litigation alleging that companies in the industry had engaged in price-fixing.

Similarly, as discussed here, a number of generic drug companies were hit with securities suits after news that the federal antitrust authorities were pursuing criminal antitrust charges against certain companies in the industry on price-fixing charges.

In addition, plaintiffs' lawyers initiated a number of securities suits against auto parts companies (refer, for example, here) following news that the DOJ and the EU were investigating companies in the auto parts industry for possible collusion and price-fixing.

More recently, in November 2024, and as discussed here, plaintiffs' lawyers filed a securities class action lawsuit against the card processing company Visa after the DOJ launched an antitrust enforcement action against the company alleging that the company had attempted to monopolize the debit payment market.

And now Capri and Tapestry have both been sued in a securities class action lawsuit following on the FTC's action intended to try to block their proposed merger.

But while this latest lawsuit follows in the same category of securities suits filed following antitrust enforcement actions, this new suit presents a variant on the pattern. In the prior cases, the companies involved were alleged in the enforcement actions to have violated the antitrust laws through their operations and/or market conduct. Capri and Tapestry, by contrast are not alleged to have violated the antitrust laws through their operations; rather, the alleged antitrust violation was the attempt to merge in a way that the FTC alleged would undermine competition. The context of the proposed merger represents a difference from the prior securities suits that have followed in the wake of antitrust enforcement actions.

There is another interesting feature of this case and that is that even though the suit is only filed on behalf of a proposed class of Capri shareholders, the defendants named in the complaint include not just Capri and its executives, but also include Tapestry and certain of its executives.

This interesting variation potentially raises an interesting D&O insurance coverage question. The issue is whether the claim against Tapestry and its executives represents a "Securities Claim" within the meaning of Tapestry's D&O insurance policy. The answer to this potential question of course depends of the wording of Tapestry's policy. However, it is worth noting that in many public company D&O insurance policies, the definition of Securities Claim is tied to actions involving the securities *of the Company* – that is, of the named insured company. The claims against Tapestry and its executives arguably do not involve or relate to the securities of Tapestry; the claims relate to the securities of Capri. Whether or not the claims against Tapestry and executives qualify as a "Securities Claim" matters, because there would typically be coverage under the policy for Tapestry as a corporate entity only to the extent the claims against it are "Securities Claims" within the meaning of the policy.

As I said, this issue will depend on the specific wording of Tapestry's policy, and depending on the wording, it may not come up at all. I note the issue here more as a general matter, to illustrate how this issue potentially might come up in this kind of context involving two corporate defendants.

This issue about the potential coverage for the corporate entity points to another issue that these kind of antitrust enforcement actions raise. And that is, as the preceding paragraph suggests, there is coverage under the typical public company D&O insurance policy only for securities claims. The relevance of this observation here is that most antitrust enforcement actions target only the corporate entity — but antitrust enforcement actions against the corporate entity would not trigger the D&O insurance policies' entity coverage. A follow-on securities claim against a publicly traded company typically would trigger the company's

D&O insurance policy's entity coverage. In other words, the follow-on suit transforms a matter that would not trigger the policy into something that does trigger the policy. The follow-on suits accordingly are a phenomenon that should be of concern to D&O insurers.

Humacyte Execs Sued Over Alleged Insider Trading, FDA Delay (1)

By Gillian R. Brassil

- **COURT:** M.D.N.C.
- **TRACK DOCKET:** [No. 1:25-cv-00005](#) (Bloomberg Law subscription)

Humacyte, Inc. executives and board members failed to root out manufacturing compliance issues, delaying Food and Drug Administration permission to distribute its lab-grown blood vessel implant and exposing the biotechnology company to a proposed investor class action, a shareholder's derivative complaint said.

Several directors benefited from insider trading with transactions in the millions while the stock price was artificially inflated, alleges shareholder Nathan Silva in his complaint filed Tuesday in the US District Court for the Middle District of North Carolina. "Additionally, Ayabudge LLC, an entity controlled by Board member Brady W. Dougan, who is married to CEO and President Laura Niklason, disposed of millions of shares, netting millions more in proceeds," Silva said.

Among other purported violations, Silva said executives flouted the Securities Exchange Act of 1934 between April 29 and Oct. 17 by not having the company disclose to investors manufacturing compliance issues, wrongly heightening the stock price until the FDA released its reason for delaying its approval of Humacyte's acellular tissue engineered vessel.

Silva seeks to recover for the company damages from the corporate officers.

In December 2023, Humacyte filed a biologics license application—the mirror to a new drug application for products derived from living organisms—with the FDA to use its implant to treat extremity vascular trauma. The FDA granted a priority review with an expected completion date in August, the complaint said.

The day before that date arrived, Humacyte announced the FDA needed more time to complete its review, Silva said: The next trading day, share prices slid almost 16.4% to close at \$6.62 on Aug. 12.

Then in October, the FDA released a form saying that the April inspection of Humacyte's Durham, NC, facility found several violations including "no microbial quality assurance," "no microbial testing," and poor "quality oversight," Silva said. The stock price fell almost 16.4% to close at \$4.86 per share that day, he said—the most in a day since the August decline, according to data compiled by Bloomberg.

And executives caused Humacyte to sell its own artificially-inflated shares, Silva alleged. He pointed to an October press release where the company said it agreed to sell about \$30.0 million worth of common stock and warrants in a registered direct offering; he claimed another agreement to sell about \$15 million worth of stock closed two days before the October stock drop.

A proposed class action before the same district judge raises the same investor concerns on the FDA delay announcements.

The FDA granted its approval in December for the treatment, named SYMVESS, according to the company.

"The company believes the allegations in the shareholder litigation are without merit and intends to defend the claims asserted against it vigorously," a Humacyte spokesperson said in an email to Bloomberg Law. "SYMVESS is a milestone for regenerative medicine and will revolutionize vascular trauma care for patients across the country. We're excited for the upcoming commercial launch and the promise that SYMVESS will bring to civilian and military populations for use in arterial replacement and repair."

Ward Black Law, Rigrodsky Law, PA, and Grabar Law Office represent Silva. They didn't respond to an email seeking comment.

The case is *Silva v. Sebelius*, M.D.N.C., No. 1:25-cv-00005, complaint filed 1/7/25.

(Updates story originally published Jan. 8 to add Humacyte comment to 11th paragraph.)

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

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

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Class Action

Jan. 9, 2025, 8:21AM PST

Argent Trust's \$5.9 Million Symbria Stock Suit Pact Moves Ahead

By Jacklyn Wille

Participants in Symbria Inc.'s employee stock ownership plan who say they were wrongly forced to overpay for stock in their company received initial approval for a \$5.9 million class settlement with Argent Trust Co.

The deal is slated to provide nearly 1,000 participants in Symbria's stock plan with average gross payments of about \$5,900, according to a settlement motion filed in December. Judge Sunil R. Harjani of the US District Court for the Northern District of Illinois granted preliminary approval to the agreement in a Wednesday docket entry.

- The 2021 lawsuit challenges Argent's role in a transaction in which the plan took on debt to purchase all of Symbria's outstanding stock for \$66.5 million—a purchase price plaintiff Carolyn Placht said was significantly inflated
- The court ruled last year that Placht and the class proved their underlying claims for prohibited transactions under the Employee Retirement Income Security Act, and that a trial was needed to determine whether Argent could escape liability by relying on one of the statute's exemptions

Bailey & Glasser LLP represents the class. Foley & Lardner LLP, O'Melveny & Myers LLP, and Tomlinson & Shapiro PC represent Argent.

The case is Placht v. Argent Tr. Co. , N.D. Ill., No. 1:21-cv-05783, docket entry 1/8/25 .

To contact the reporter on this story: Jacklyn Wille in Washington at jwille@bloomberglaw.com

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

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Skechers Executives' Jet Use Outpaced Peers' Perks, Lawyer Says

By Jennifer Kay

- Judge said executive pay plan authorized personal plane use
- Investor argues neighborhood link compromised director

Personal flights aboard Skechers USA Inc.'s two corporate jets by three of the footwear company's top executives far exceeded similar perks offered to senior leaders of much bigger companies even before the Covid-19 pandemic triggered a spike in private aircraft usage, an attorney argued Wednesday before Delaware's highest court.

A Skechers shareholder wants to reverse a Feb. 2, 2024, Delaware Chancery Court opinion that rejected claims its board failed to police excessive personal use of its two planes by CEO Robert Greenberg, COO David Weinberg, and Michael Greenberg, Skechers' president and the CEO's son.

That opinion was contradicted by a subsequent \$1.25 million settlement Skechers reached with the US Securities and Exchange Commission to resolve claims the company failed to disclose payments benefiting its executives and their immediate family members, the investor's attorney, Melinda Nicholson of Kahn Swick & Foti said.

In 2019, she said, aircraft perks for Robert Greenberg were valued at \$265,000; \$1.1 million for Michael Greenberg; and \$357,000 for Weinberg. By contrast, similar perks that year were valued at a total of \$100,000 for three Alphabet Inc. executives, and \$148,000 for three Johnson & Johnson executives, she said.

During the pandemic, personal use of Skechers' two Bombardier jets exceeded 50% of their total flight time, which harmed the company by making it ineligible for certain tax deductions, Nicholson told the Delaware Supreme Court's full five-member panel.

Skechers' compensation committee gave concerns about the aircrafts' use the attention it deserved, hiring an outside consultant to analyze the perks, John Gildersleeve of Munger Tolles & Olson, representing the defendants, told the court.

Shared Property

Nicholson focused on Robert Greenberg's relationship with the chair of the compensation committee, Richard Siskind, asking the justices to see the men's links to a tony Florida neighborhood as evidence that Siskind's independence as a director had been compromised.

Robert Greenberg purchased a home in Florida from Siskind in 1998. The two have "remained neighbors ever since, with piers from their watercraft facing each other," while they also served on the compensation committees at each other's company, Nicholson said.

Justice Karen L. Valihura noted the investor's complaint failed to allege "any friendship or social interaction between the two."

It's the longstanding nature of their connection, their "choosing to be neighbors," that "does show a close relationship, whether or not we used the magical word 'friend,'" Nicholson replied. The complaint also details how Siskind's independence was undermined by Greenberg's dominating status as the controlling stockholder, founder, board chair and CEO, she said

Even if the men owned homes in the same neighborhood at the same time, that doesn't make Siskind beholden to Greenberg, Gildersleeve said, echoing Valihura's remark about the lack of social interactions detailed by the investor.

"There's nothing about weddings. There's nothing about having lunch together every other month. There's just nothing at all," he said.

Skechers is represented by Potter Anderson & Corroon LLP and Sheppard Mullin Richter & Hampton LLP. Robert Greenberg, Michael Greenberg, and Weinberg are represented by Morris, Nichols, Arsht & Tunnell LLP and O'Melveny & Myers LLP. Other current and former board members are represented by Abrams & Bayliss LLP and Munger, Tolles & Olson LLP. The investor leading the case, Michael Conte, is also represented by McCollom D'Emilio Smith Uebler LLC and Newman Ferrara LLP.

The case is Conte v. Greenberg, Del., No. 76,2024, oral arguments 1/8/25 .

— with assistance from Jef Feeley

To contact the reporter on this story: Jennifer Kay in Philadelphia at jkay@bloomberglaw.com

To contact the editor responsible for this story: Stephanie Gleason at sgleason@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Judge approves Tesla directors' deal to end excess pay case

 [reuters.com/legal/judge-approves-tesla-directors-deal-end-excess-pay-case-2025-01-08](https://www.reuters.com/legal/judge-approves-tesla-directors-deal-end-excess-pay-case-2025-01-08)

Tom Hals



Item 1 of 2 Rupert Murdoch's son James Murdoch arrives for the hearing on the contentious matter of succession of Rupert Murdoch's global television and publishing empire, in Reno, Nevada, U.S. September 23, 2024. REUTERS/Fred Greaves/File Photo

[1/2]Rupert Murdoch's son James Murdoch arrives for the hearing on the contentious matter of succession of Rupert Murdoch's global television and publishing empire, in Reno, Nevada, U.S. September 23, 2024. REUTERS/Fred Greaves/File Photo Purchase Licensing 

WILMINGTON, Del., Jan 8 (Reuters) - Tesla directors including Chair Robyn Denholm and James Murdoch got court approval on Wednesday for a settlement worth up to \$919 million that requires they return compensation to the carmaker to resolve allegations they overpaid themselves.

The settlement requires Tesla board members including Denholm and Murdoch to return roughly \$277 million in cash, \$459 million in stock options and to forgo stock options for 2021-23 worth \$184 million. The settlement was not covered by insurance, according to a court filing by the shareholder who brought the case.

Chancellor Kathaleen McCormick, the judge overseeing the case, read her ruling approving the settlement at a telephonic hearing on Wednesday, according to an attorney for the plaintiffs and a shareholder who objected to the deal.

"We're very pleased with the chancellor's ruling," Andrew Dupre, an attorney for the shareholders, told Reuters.

The plaintiff's legal team said last year the settlement was the second-largest ever in Delaware's Court of Chancery, the go-to forum for shareholder litigation.

The directors did not admit wrongdoing.

McCormick also awarded \$176 million in fees and costs to the three law firms that brought the case on a contingency basis.

Tesla had asked McCormick to cap the fee at \$64 million.

The fee is the fourth-largest in the history of shareholder litigation in Delaware.

The company and its attorney did not immediately respond to a request for comment.

The settlement resolves a 2020 lawsuit by the Police and Fire Retirement System of the City of Detroit which challenged director compensation from 2017 to 2020 as excessive.

The Tesla directors received stock options that became worth hundreds of millions of dollars as the value of Tesla stock surged 10 times over that period.

By comparison, the average total compensation for directors at S&P 500 companies is \$327,096 in 2024, according to SpencerStuart, a consulting group that conducts executive searches.

Musk did not receive compensation for his role as a Tesla board member.

However, a Tesla shareholder filed a separate lawsuit in 2018 challenging Musk's \$56 billion pay for serving as Tesla's CEO. Last year, the same judge ordered Musk's pay package be rescinded because Musk controlled the pay negotiations. One of the factors the judge considered was the amount of wealth that directors owed to Musk or Tesla.

Denholm, for example, testified in that case that her board tenure at Tesla netted her around \$280 million, which she described as "life-changing wealth."

The other directors named in the lawsuit included Musk's brother Kimbal, Brad Buss, Ira Ehrenpreis, Antonio Gracias, Stephen Jurvetson, Linda Johnson Rice, Kathleen Wilson-Thompson, Hiromichi Mizuno and the co-founder of Oracle Corp, Lawrence

Ellison. Forbes lists Ellison as one of the richest people in the world with a fortune estimated at \$206 billion.

The settlement does not spell out how much each director has to return, just a collective amount.

The settlement also included governance changes such as requiring shareholder approval for director compensation.

Del. Court: Bump Up Exclusion Doesn't Bar Coverage for Post-Merger Suit Settlement

[dandodiary.com/2025/01/articles/d-o-insurance/del-court-bump-up-exclusion-doesnt-bar-coverage-for-post-merger-suit-settlement](https://www.dandodiary.com/2025/01/articles/d-o-insurance/del-court-bump-up-exclusion-doesnt-bar-coverage-for-post-merger-suit-settlement)

January 8, 2025

The D&O Diary

Del. Court: Bump Up Exclusion
Doesn't Bar Coverage for Post-
Merger Suit Settlement



By Kevin LaCroix on January 8, 2025

Posted in D & O Insurance



One of the recurring D&O insurance coverage issues is whether or not the so-called “bump-up” exclusion precludes coverage for amounts paid in settlement of post-merger litigation. The outcome of these disputes is often a reflection of several situation-specific factors, including the specific policy language involved, the nature of the underlying transaction, the claims alleged in the underlying litigation, the features of the settlement, and the applicable law. All of these factors came into play in a recent Delaware Superior Court decision in which the court held that the primary policy’s bump-up exclusion does not preclude coverage for the settlement of the lawsuit relating to the 2017 merger of Harman International Industries and Samsung’s American division. The court’s January 3, 2025 opinion, as amended in a January 7, 2025 corrected opinion, can be found [here](#).

Background

In November 2016, Harman and Samsung Electronics America, Inc. announced that they had entered into an Agreement and Plan of Merger. The transaction was completed in March 2017, as a subsidiary of Samsung, Silk Delaware, created for the transaction, “merged with and into Harman,” though a “reverse triangular merger.” Both companies survived, with Harman “a wholly owned subsidiary of Samsung,” and with the outstanding stock of Harman cancelled and converted in a right to receive cash.

In July 2017, Judith Baum filed an amended class complaint against Harman and others alleging that the defendants had violated Sections 14(a) and 20 of the Securities Exchange Act of 1934. The suit alleged that Harman had issued a misleading proxy statement in order to “secure shareholder support for the undervalued Acquisition.” Among other things, Baum alleged that Harman’s value was “far greater than the \$112.00 per share that shareholders received.” Baum alleged that as a result of the defendants’ wrongdoing, the putative class

“suffered damage and actual economic loss (i.e., the difference between the price Harman shareholders received and Harman’s true value at the time of the Acquisition).” The Baum action ultimately settled for \$28 million.

At relevant times, Harman maintained a \$40 million program of D&O insurance, consisting of a layer of primary insurance and two layers of excess insurance. Harman submitted the Baum lawsuit to its insurers as a claim. The primary insurer accepted the claim and acknowledged its obligation to fund the company’s defense but reserved its rights to deny coverage with respect to any settlement or judgment of the claim. The primary insurer ultimately denied coverage for the settlement in reliance on the policy’s bump-up exclusion. . The excess insurers adopted the primary insurer’s coverage position. Harman sued the insurers in Delaware Superior Court seeking coverage for the settlement amount. The parties filed cross-motions for summary judgment in the coverage lawsuit.

The Relevant Policy Language

The primary policy’s definition of “Loss” provides in pertinent part that:

In the event of a Claim alleging that the price or consideration paid or proposed to be paid for the acquisition or completion of the acquisition of all or substantially all the ownership interest in or assets of an entity is inadequate, Loss with respect to such Claim shall not include any amount of any judgment or settlement representing the amount by which such price or consideration is effectively increased; provided, however, that this paragraph shall not apply to Defense Costs or to any Non-Indemnifiable Loss in connection therewith.

The Court’s Opinion

In his January 3, 2025, opinion, as amended in the updated January 7, 2025, opinion, Judge Paul R. Wallace granted Harman’s motion for summary judgement and denied the insurers’ motion for summary judgment. Judge Wallace held that the bump-up exclusion does not preclude coverage for the \$28 million settlement of the underlying action.

Harman had argued that the insurers cannot satisfy their burden to establish that all of the elements of the exclusion apply. Specifically, Harman argued that the insurers cannot show that the underlying transaction was an “acquisition of all or substantially all of an entity’s assets or ownership”; that the Baum action settlement was “related only to the allegation of inadequate consideration”; and that the Baum action settlement “represented an effective increase in consideration.”

The court first found that the underlying transaction was an “acquisition” within the meaning of the exclusion. The reverse triangular merger form the parties had used in the transaction, the court said, was “was an acquisition that used a merger as a means to complete Samsung’s acquisition of all or substantially all the ownership interest of Harman.” Judge

Wallace also found that based in its characteristics, as well as its legal form, the transaction was an “acquisition” for purposes of analyzing the potential applicability of the bump-up exclusion.

As for whether the Baum action settlement represented an effective increase in the deal price, Judge Wallace focused on the allegations of the plaintiff in the underlying action that the defendants had violated the Exchange Act. Judge Wallace said that a “cured inadequate deal price” isn’t a remedy for Sections 14 and 20 claims; as only violations of Sections 14 and 20 were alleged, “there is no claim plead where inconsiderate deal price is a viable remedy.” So, Judge Wallace rhetorically asked, “how could the settlement amount now be deemed to be comprised in any part of a sum reflecting an increase in deal price or consideration?”

Finally, Judge Wallace found that the insurers had not carried their burden of showing that any amount of the settlement pertained to curing an inadequate deal price. Judge Wallace quoted deposition testimony that at the time of settlement, the defendants’ estimated costs to defend the action were between \$25 and \$30 million – the \$28 million settlement amount, Judge Wallace noted, is in the middle of that cost of defense estimate. Judge Wallace also found that the \$28 million settlement amount was “grossly inadequate” if it were intended to represent the inadequate deal price, as the Baum action complaint had claimed the deal price was short over \$279 million. Judge Wallace also found that the composition of the settlement class was inconsistent with the proposition that the settlement amount was intended to compensate for inadequate deal value.

Discussion

As I have noted in numerous post on this site, most recently here, the potential application of the bump-up exclusion to preclude coverage for the settlement of a merger objection lawsuit is a frequently recurring and often hotly contested D&O insurance coverage issue. And as I noted at the outset of this post, the outcome of these disputes is a reflection of numerous case-specific factors, including the wording of the applicable exclusion, the structure of the underlying deal, and even of the law of the jurisdiction applicable to the insurance contract.

One particular recurring disputed issues is whether the specific transaction involved is an “acquisition” or otherwise is the type of transaction to which the exclusion was intended to apply. In that respect, Judge Wallace’s opinion is interesting, as he seemed to adopt a broad interpretation of what might constitute an “acquisition”; in particular, his conclusion that the reverse triangular merger is, in form and in its characteristics, the kind of “acquisition” to which the exclusion applies is interesting. This part of the opinion probably gladdened the hearts of many insurer-side coverage advocates.

The rest of Judge Wallace’s opinion was undoubtedly less satisfactory to the insurers.

I suspect the insurers are probably still in a state of disbelief that the settlement of a lawsuit in which the plaintiff expressly alleged that the defendants' alleged wrongdoing caused the plaintiff class to receive inadequate consideration is — because recovery of inadequate consideration is not a recognized remedy for the specific legal theories asserted — not a claim for the recovery of inadequate consideration. The insurers are undoubtedly saying out loud to anyone that will listen, "But that is what the plaintiff sought! That was the harm the plaintiff alleged! Those are the damages they were after!"

The final part of the opinion, in which Judge Wallace found that the defendants had not established that any portion of the settlement represented compensation for inadequate consideration, is probably also disappointing to the insurers, although the record does seem to suggest that the settlement of the underlying case was a cost of defense type settlement. The testimony, at least as interpreted by Judge Wallace, showed that the settlement amount was consistent with the estimated costs of defense but inconsistent with the plaintiff's inadequate consideration theory.

I can easily imagine that part of the insurers' reaction is: here we go again with the Delaware courts. As I have frequently observed on this blog, and as numerous others have also observed, Delaware's courts have a well-deserved reputation for being policyholder favorable. The insurers may be forgiven if they conclude that this is just one more example of Delaware courts policyholder favoritism. Long-time readers may recall that back in 2021, Judge Wallace had previously held (among many other things) that the bump-up exclusion did not apply to preclude coverage of a Section 14(a) merger objection lawsuit in the Northrup Grumman case, as discussed here; in my discussion of that prior ruling, I had commented that the best way to understand the outcome of that case is to appreciate that Delaware is an actively policyholder-favorable forum.

From my perspective, there is more to think about here than just whether policyholders are likely to win insurance coverage disputes in Delaware. I think it is more important to ask the question of the bump-up exclusion as it is currently typically worded is functioning as intended, from the perspective of either party. The insurers may well feel that it is not functioning as intended when it is held not to apply to the settlement of a claim in which the plaintiff expressly sought to recover inadequate acquisition consideration. From a policyholder perspective, I have long questioned whether it should apply when the underlying transaction involves the acquisition of the insured company (so-called "sell side" transactions), rather than the insured company's acquisition of another company (so-called "buy side" transactions).

In prior posts, I have suggested that it may be time for the industry as an industry to re-examine the bump up exclusion. The current wording leads to too many insurance coverage disputes, and it often produces results that may leave either insurers or insureds

disappointed and frustrated. In my view, everyone would benefit if, as an industry, we were to step back and ask: what is the purpose of the bump-up exclusion and how should it operate in light of the larger purposes of the D&O insurance policy?

These issues are not going away. The Fourth Circuit is currently considering the appeal of the bump up issues in the WTW case, as discussed here, and we can be sure that at some point this year, we will be talking about these issues again in the context of that case. Set a watch on it, we will be talking about these issues again in a few months' time when the Fourth Circuit issues its opinion in the WTW case.

There is also a lot of speculation that M&A activity will be ramping back up under the incoming Trump administration. If that proves to be the case, it seems likely that along with the M&A transactions, there will be merger litigation, and along with it, renewed battles about the preclusive effect of the bump up exclusion. All the more reason for the D&O insurance industry to reexamine what the bump up exclusion is for, how it should be worded, and how it should fit in with the rest of the D&O Insurance policy.

Special thanks to a loyal reader for sending me a copy of Judge Wallace's opinion.

SeaWorld Retirement Fee Class Action Settles for \$1.25 Million

By Jacklyn Wille

- Employees estimated their total damages at \$10.8 million
- Deal contemplates attorneys' fees of 35% settlement value

SeaWorld Parks & Entertainment Inc. employees negotiated a \$1.25 million class settlement in their lawsuit challenging the fees and investment options in the company's retirement plan.

The proposed deal, announced Tuesday, would benefit about 40,000 people covered by SeaWorld's retirement plan since August 2015. The workers estimated their total damages in the case to be about \$10.8 million, they said in a settlement motion submitted for the approval of Judge Robert S. Huie of the US District Court for the Southern District of California.

The three-year-old lawsuit says the theme park operator violated the Employee Retirement Income Security Act by failing to offer the lowest cost share classes of certain 401(k) plan investments, overpaying service providers through revenue sharing arrangements, and failing to use the competitive bidding process to reduce the plan's recordkeeping fees. Huie has twice ruled that the case was viable, and last year he certified the dispute as a class action with subclasses tied to different recordkeepers the plan used during the relevant time period.

Hundreds of lawsuits challenging retirement plan fees have been filed in federal courts over the past few years, with recent settlements including those negotiated by Kimberly-Clark Corp. for \$2.25 million, Allegiant Travel Co. for \$1.7 million, Univar Solutions USA Inc. for \$1.1 million, and Clean Harbors Environmental Services Inc. for \$395,000, among others.

The SeaWorld workers are represented by Christina Humphrey Law PC, Tower Legal Group PC, and Paul J. Sharman of Alpharetta, Ga., which stand to receive up to 35% of the settlement value as attorneys' fees if the deal is approved.

Groom Law Group and Foundation Law Group LLP represent SeaWorld.

The case is Coppel v. SeaWorld Parks & Ent., Inc. , S.D. Cal., No. 3:21-cv-01430, settlement motion 1/7/25 .

Kroger to pay \$110 million to resolve Kentucky lawsuit over opioid epidemic

[reuters.com/legal/kroger-pay-110-million-resolve-kentucky-lawsuit-over-opioid-epidemic-2025-01-09](https://www.reuters.com/legal/kroger-pay-110-million-resolve-kentucky-lawsuit-over-opioid-epidemic-2025-01-09)

Nate Raymond

The outside of a near by Kroger grocery store is seen in Nashville, Tennessee, U.S. August 17, 2024. REUTERS/Kevin Wurm/File Photo Purchase Licensing Rights [↗](#), opens new tab

- Kentucky received more than it would have in broader settlement
- Kroger denies wrongdoing, calls claims of lacking safeguards false
- Opioid epidemic led to 727,000 U.S. deaths from 1999 to 2022

Jan 9 (Reuters) - Kroger has agreed to pay \$110 million to resolve a lawsuit by the state of Kentucky alleging the supermarket chain's pharmacies helped fuel a deadly opioid epidemic by flooding its communities with hundreds of millions of doses of addictive painkillers.

The settlement [↗](#), opens new tab was announced on Thursday by Kentucky Attorney General Russell Coleman, whose state had opted to not participate in a broader \$1.4-billion deal Kroger (KR.N) [↗](#), opens new tab finalized last year that resolved similar claims by 30 states as well as counties, municipalities and Native American tribes.

In a lawsuit filed in state court in February, Coleman had alleged that Kroger's more than 100 Kentucky pharmacies had been responsible for over 11% of all opioid pills dispensed in the state from 2006 to 2019, or about 444 million opioid doses.

The lawsuit [↗](#), opens new tab alleged Kroger should have known based on the suspiciously high numbers and other red flags that the drugs were being diverted for illicit purposes, and should have taken measures to stop shipments and refuse to fill suspicious prescriptions.

Instead, Kroger continued to ship massive quantities of opioids throughout the state, failed to report suspicious orders to authorities and continued to dispense addictive drugs at "alarming" rates in Kentucky, which was hard-hit by the drug-addiction epidemic, according to the lawsuit.

"This massive grocery chain that asked for our trust and our business allowed the fire of addiction to spread across the commonwealth, leaving pain and leaving so much brokenness in its aftermath," Coleman said at a press conference.

The Cincinnati-based supermarket chain, whose \$25-billion proposed merger with rival Albertsons (ACI.N) [↗](#), opens new tab was terminated after courts blocked the deal last month, said in a statement it hoped the settlement funds would be used to combat opioid abuse in Kentucky.

The company did not admit wrongdoing as part of the settlement and Kroger called the claims that it did not have internal training or guardrails around filling prescriptions for opioids "patently false."

According to the settlement agreement, Kentucky received a substantial premium above what it would have received had it joined the earlier broader settlement with Kroger. Had it done so, Kentucky would have recovered \$66.6 million.

Drug manufacturers, distributors, pharmacy operators and others have agreed to pay about \$50 billion to resolve lawsuits and investigations by states and local governments over their roles in the drug-overdose epidemic.

Nearly 727,000 people in the U.S. died from opioid overdoses from 1999 to 2022, according to the U.S. Centers for Disease Control and Prevention.

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

'The Tobacco Industry of This Decade': Slew of Class Actions Accuse DraftKings of Creating Addicts

 [law.com/nationallawjournal/2025/01/08/the-tobacco-industry-of-this-decade-slew-of-class-actions-accuse-draftkings-of-creating-addicts](https://www.law.com/nationallawjournal/2025/01/08/the-tobacco-industry-of-this-decade-slew-of-class-actions-accuse-draftkings-of-creating-addicts)

Charles Toutant

What You Need to Know

- DraftKings is hit with class actions in Illinois, Kentucky and New Jersey that claim its marketing practices are deceptive.
- A promotion where accounts of users who lose a bet made with their own funds are replenished with an expiring "Bonus Bet" brings particular criticism.

DraftKings, a sports betting app, has been hit with a crop of suits claiming it is carefully designed to turn its users into gambling addicts.

Class action lawsuits filed in courts in Illinois, Kentucky and New Jersey on Tuesday claim DraftKings is leveraging misleading promotions and addicted users to earn revenue.

"DraftKings' business model has long involved pushing the boundaries of the law, misleading consumers, and luring naïve gamblers into developing addictions," claimed one suit, filed by Loevy & Loevy of Chicago.

DraftKings did not respond to a request for comment about the lawsuits.

'Marks'

The online gambling industry has started off slow but got a boost during the COVID pandemic and has expanded rapidly since then, the suits state.

New Jersey was the first state to legalize and regulate online casino gambling in 2013, and in 2023 the total U.S. revenue for sportsbooks was \$10.92 billion, according to the suits.

The plaintiffs claim DraftKings advertises an all-upside gambling experience by falsely promising new users that they will get free money that they can wager without any risk, the suits state.

But in reality, DraftKings has allegedly created an all-upside opportunity for itself—its contracts require new users to deposit and gamble almost exclusively with their own money, which they almost always lose, the suits state.

DraftKings also allegedly requires users who have an initial win to make worse and worse bets until their funds are exhausted, the suits claim.

"DraftKings uses these tactics to identify and cultivate the people it wants on its platform: those who are susceptible to these sorts of advertisements and most likely to lose a lot of money sports betting. In other words, marks," the suits state.

Alleged Tactics

The suits reference one particular tactic that DraftKings allegedly uses to convince new users to sign on by convincing them that their first bet would pose no financial risk to them.

The company's Risk-Free Bet, or No Sweat First Bet, requires that a customer deposit funds and make a bet with their own money.

If the customer loses the bet, their accounts are replenished with an expiring "Bonus Bet" rather than the amount the user originally wagered, the suits state.

Receiving "Bonus Bets" when the original bet loses does not make the original bet risk-free as advertised, the suits claim.

Bonus Bets cannot be exchanged for cash, but must be both wagered and won before they have any cash value, the suits claim.

In addition, wagers made with Bonus Bets are allegedly not paid out with wagers made with U.S. dollars. A winning \$100 bet made with U.S. Dollars at even odds recovers the \$100 stake plus \$100 winnings, less the sportsbook's cut of roughly 9%, the suits said, for a payment of \$191. However, a winning bet made with a \$100 Bonus Bet converts to \$100, which results in a payment of \$91 after the sportsbook takes its cut, the suit said.

Such offers are allegedly effective at persuading new users to open betting accounts that they might not otherwise have opened, and to wager amounts they may not otherwise have risked, the suits claim.

'Too Easily Accessible'

That's what happened to the named plaintiffs, including Wyatt Robinson, who is a plaintiff in the Kentucky case, that suit claims.

Robinson, 19, signed up for DraftKings in 2023 after seeing a commercial for the platform with comedian Kevin Hart, the suit said. Since then, he has bet and lost a considerable amount of money on DraftKings, the suit claims.

Robinson was "surprised and frustrated" when all he allegedly received was an expiring Bonus Bet when he first lost a bet placed pursuant to a no-risk promotion, the suit claimed.

Robinson allegedly remembers feeling aggrieved after making a deposit to take advantage of DraftKings' sign-up deposit match promotion and finding out he had not received the cash value of his deposit matched as DraftKings had led him to believe he would, the suit claimed.

"DraftKings intentionally targets young men who are most vulnerable to develop gambling addictions and designs its interface to prevent them from understanding the terms of offers advertised to them," the suits claimed. "Both the current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-V) and the World Health Organization treat addiction to gambling in the same diagnostic category as addiction to heroin, cocaine, and tobacco."

"Sports betting apps are the tobacco industry of this decade: harmful, deceptively marketed, and too easily accessible to young people," said Michael Kanovitz of Loevy & Loevy. "Rather than acting responsibly to address these problems, DraftKings is taking full advantage of them to pad its bottom line. Its so-called risk-free bets are a fraud designed to lure inexperienced and susceptible consumers with an illusion that their money is safe. It is not. Most people who fall prey to the ads never see their money back, and far too many chase their losses and suffer tragic results. DraftKings knows this up front and is making a business out of that suffering. This is a national problem and we are bringing litigation to address it."

The suits are in the District of New Jersey, the Western District of Kentucky and Cook County, Illinois Circuit Court. The company has not entered appearances in those cases. The suits bring claims for intentional representation, negligence, unjust enrichment, conversion and violation of various state consumer protection laws.

NOT FOR REPRINT

© 2025 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

Latest

Trending

Apple clarifies Siri privacy stance after \$95 million class action settlement

 [reuters.com/technology/apple-clarifies-siri-privacy-stance-after-95-mln-class-action-settlement-2025-01-09](https://www.reuters.com/technology/apple-clarifies-siri-privacy-stance-after-95-mln-class-action-settlement-2025-01-09)

Reuters

Apple: we never sold recordings made by Siri

Jan 8 (Reuters) - Apple (AAPL.O) , opens new tab clarified on Wednesday that it has never sold the data collected by its Siri voice assistant or used it to create marketing profiles, just days after settling a case in which it faced such accusations.

The iPhone maker last week paid \$95 million to settle a class action lawsuit in which plaintiffs alleged it routinely recorded their private conversations after they activated Siri unintentionally, and disclosed these conversations to third parties such as advertisers.

Voice assistants typically react when people use "hot words" such as "Hey, Siri."

The company denied those claims and did not admit to them in its settlement last week, in which tens of millions of Apple customers may receive up to \$20 per Siri-enabled device, such as iPhones and Apple Watches.

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

"Apple has never used Siri data to build marketing profiles, never made it available for advertising, and never sold it to anyone for any purpose," Apple said on Wednesday.

Apple issued the statement after social media users and commentators interpreted the settlement as confirmation that the allegations were true.

In its statement, the Cupertino, California-based company said that certain features require real-time input from Apple servers and it is only in such cases that Siri uses as little data as possible to deliver an accurate result.

"Apple does not retain audio recordings of Siri interactions unless users explicitly opt in to help improve Siri, and even then, the recordings are used solely for that purpose," Apple said, adding that it will continue developing technologies to make Siri even more private.

A similar lawsuit on behalf of users of Google's (GOOGL.O) , opens new tab Voice Assistant is pending in the San Jose, California federal court. The plaintiffs are represented by the same law firms as in the Apple case.

Reporting by Stephen Nellis and Kanjyik Ghosh; Editing by Sherry Jacob-Phillips

Federal judge won't dismiss Google privacy suit over misleading data collection practices on Androids

[courthousenews.com/federal-judge-wont-dismiss-google-privacy-suit-over-misleading-data-collection-practices-on-androids](https://www.courthousenews.com/federal-judge-wont-dismiss-google-privacy-suit-over-misleading-data-collection-practices-on-androids)

Michael Gennaro

FILE - Audience members gather at Made By Google for new product announcements at Google on Aug. 13, 2024, in Mountain View, Calif. (AP Photo/Juliana Yamada, File)

SAN FRANCISCO (CN) — A federal judge rejected Google's motion to toss a lawsuit from a class of plaintiffs who claim that the tech giant collected their data on Android devices without permission.

The class plaintiffs sued in 2020. At issue in the case is the Web and App Activity toggle in an Android device's settings. Turning the toggle off prevents future web and app activity being saved to a user's Google account.

The plaintiffs claim that Google invaded their privacy when it continued to collect their data even though they turned the Web and Activity toggle off on their Android devices, and that the toggle gives users the false impression that they can "opt out" of sharing all data with Google and third-party developers.

At a motion for summary judgment hearing before U.S. Chief District Judge Richard Seeborg in July, Google said the suit was meaningless because it only collects pooled, anonymized data to help app developers understand how consumers use their apps, not personalized, identifiable data, and that Google disclosed that to users that it did so.

Seeborg, a Barack Obama appointee, called Google's argument "unconvincing" and denied summary judgment to Google, writing in a 20-page ruling issued late Tuesday night that the class complaint has plausibly claimed that Google's practices go beyond basic record keeping, that reasonable users would be confused and that there are questions regarding damages and losses that preclude summary judgment.

"From the perspective of a reasonable user, it is unclear plaintiffs were consenting to the data collection at issue," Seeborg wrote, adding that it was also not a foregone conclusion that the data collected by Google was not personalized, identifiable data, as Google had argued.

To back up his point, Seeborg pointed to internal Google communications between 2017 and 2020 where Google employees raised concerns that the purpose of the Web and Activity toggle was confusing to users.

“The concerns raised by Google employees are relevant, however, at the very least for tending to show that the WAA disclosures are subject to multiple interpretations. What is more, the remarks and Google’s internal statements reflect a conscious decision to keep the WAA disclosures vague, which could suggest that Google acted in a highly offensive manner, thereby satisfying the intent element of the tort claim,” Seeborg wrote.

Though Google maintains the explanation and purpose of the toggle is straightforward, Seeborg says the Android users' California Comprehensive Computer Data Access and Fraud Act claims survive at this point because it is disputed at this point if Google knew or should have known that the plaintiffs revoked permission for Google to use any of their data when they turned the Web and Activity toggle off, Seeborg said.

Seeborg wrote, “As explained above, evidence produced by Google during discovery, including deposition testimony by Google employees, indicates that the description of WAA was ambiguous. Although Google disputes the applicability of that evidence, a reasonable juror could be convinced by either party’s argument regarding the WAA setting and Google’s [privacy policy].”

Google contended that even if it did not obtain direct permission to collect data from users, third-party app developers obtained permission as a condition of Google Analytics, allowing Google to collect the data because it was acting as a vendor to those third-party apps and permission granted by users to a technology company extends to vendors who process such data.

“Even assuming Google acted as a vendor, no court has endorsed the position that when one technology company acts as a vendor for another, consent for the purposes of CDAFA analysis is coextensive with the party that obtained it,” Seeborg wrote.

Neither counsel for the class plaintiffs or Google and its counsel immediately responded to requests for comment.

Categories / Consumers, Technology

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

Google must face mobile phone privacy class action, possible trial

[reuters.com/legal/google-must-face-mobile-phone-privacy-class-action-possible-trial-2025-01-08](https://www.reuters.com/legal/google-must-face-mobile-phone-privacy-class-action-possible-trial-2025-01-08)

Jonathan Stempel

The logo of Google LLC is shown on a building in San Diego, California, U.S., October 9, 2024. REUTERS/Mike Blake/File Photo Purchase Licensing Rights [↗](#), opens new tab

- Browsing histories allegedly intercepted without consent
- Google calls claims patently false, cites privacy controls
- August trial scheduled

Jan 8 (Reuters) - Google failed to persuade a federal judge to dismiss a privacy class action claiming it collected personal data from people's cellphones after they switched off a button to stop the tracking, paving the way for a possible August trial.

Chief Judge Richard Seeborg of the federal court in San Francisco rejected arguments that the search engine company adequately disclosed how its Web & App Activity settings worked, and that users consented to the tracking.

Google had also argued that its basic record-keeping "doesn't hurt anyone."

Users of Android and non-Android mobile devices accused Google of invading their privacy and violating a California law against unauthorized fraudulent computer access by intercepting and saving their personal browsing histories without consent.

In a 20-page decision on Tuesday, Seeborg said reasonable users could view Google's conduct as "highly offensive," because the company collected data despite fielding concerns from several employees and knowing its disclosures were ambiguous.

He cited internal communications suggesting that Google, a unit of Alphabet (GOOGL.O) [↗](#), opens new tab, was intentionally vague in distinguishing between data collected inside and outside Google accounts because users might find the truth "alarming."

On the other hand, Seeborg said the Google employees might simply have been suggesting ways to improve the Mountain View, California-based company's products and services.

"Whether Google or plaintiffs' interpretation prevails is a triable issue of fact," he wrote.

Google said in a statement on Wednesday: "Privacy controls have long been built into our service and the allegations here are a deliberate attempt to mischaracterize the way our products work. We will continue to make our case in court against these patently false claims."

Lawyers for the plaintiffs did not immediately respond to requests for comment.

A jury trial is scheduled for Aug. 18. The lawsuit began in July 2020.

Last August, the federal appeals court in San Francisco revived a lawsuit accusing Google of tracking Chrome browser users after they chose not to synchronize their browsers with their Google accounts.

Four months earlier, Google agreed to destroy billions of data records to settle a lawsuit claiming it tracked people who thought they were browsing privately, including on Chrome browsers set to "Incognito" mode.

Law firms representing the plaintiffs in that case valued that settlement at more than \$5 billion. The same firms represent the plaintiffs in the current case.

The case is Rodriguez et al v Google LLC, U.S. District Court, Northern District of California, No. 20-04688.

Reporting by Jonathan Stempel in New York; Editing by Rod Nickel

TikTok Hit With California Class Action for Allegedly Mining Children's Data Without Parental Consent

[law.com/nationallawjournal/2025/01/09/tiktok-hit-with-california-class-action-for-allegedly-mining-childrens-data-without-parental-consent-](https://www.law.com/nationallawjournal/2025/01/09/tiktok-hit-with-california-class-action-for-allegedly-mining-childrens-data-without-parental-consent/)

Kat Black

What You Need to Know

- TikTok and its parent company, ByteDance, were hit with a class action alleging they violated federal privacy law by collecting the data of children aged 13 and under for targeted advertising without their parents' consent.
- The complaint alleges that TikTok violated the Children's Online Privacy Protection Act of 1998, which requires that websites directed to children under 13 obtain verifiable consent from their parents before collecting their personal data.
- The plaintiffs contend that TikTok is operating in defiance of a permanent injunction and civil penalty issued by the U.S. government in 2019.

TikTok and its parent company, ByteDance, were hit with a class action on Tuesday in California federal court for allegedly breaching federal privacy law by siphoning minors' data without their parents' consent, joining a string of similar cases filed in multiple states.

Milberg Coleman Bryson Phillips Grossman, which could not immediately be reached for comment, filed the complaint in the U.S. District Court for the Central District of California. Counsel has not yet appeared for the defendants.

The plaintiffs alleged that TikTok, a short video social media platform owned by Beijing, China-based ByteDance, mines the user accounts of children under the age of 13 for personally identifiable information and shares it with third parties for the purpose of customizing targeted advertisements on the minors' "For You" pages, which provide tailored content feeds powered by mined data points.

Furthermore, they contended that TikTok deliberately encourages minors to create TikTok accounts without their parents' permission and neglects to address parents' requests to delete their accounts or information in violation of the Children's Online Privacy Protection Act of 1998, which requires that websites directed to children under 13 obtain verifiable consent from their parents before collecting their personal data.

This action was surfaced by Law.com Radar.

Law.com Radar

According to the suit, TikTok's online privacy protocols for minors operate in flagrant defiance of a permanent injunction and civil penalty against the company, then known as Musical.ly Inc., issued by the United States government to enforce its compliance with COPPA on March 27, 2019.

The claim states that TikTok informed the FTC in 2020 that, as of May 2019, it had disabled all U.S. accounts that did not go through the required "age gate" and that it had deleted children's data as mandated by the 2019 consent order by May 2020.

On Aug. 2, 2024, the Federal Trade Commission and the U.S. Department of Justice sued TikTok for continuing to retain children's personal information such as email addresses, even in its restricted so-called "Kids Mode," without verifiable parental consent from 2019 to the present. The complaint was filed shortly after the U.S. Senate passed two bills to protect the privacy of minors online—the Kids Online Safety Act and an expanded version of COPPA, the Children and Teens' Online Privacy Protection Act—on July 30, 2024.

The FTC alleged in a news release that "(a)s of 2020, TikTok had a policy of maintaining accounts of children that it knew were under 13 unless the child made an explicit admission of age and other rigid conditions were met." The DOJ and the FTC seek civil penalties of about \$51,744 for per COPPA violation starting from Jan. 10, 2024.

The FTC has previously collected hefty COPPA settlements from other Big Tech giants, including Google and YouTube, which were ordered to pay \$170 million to New York in 2019, and Microsoft and Amazon, which paid civil penalties of \$20 million and \$25 million, respectively, to settle children's online privacy violations in 2023.

On Dec. 5, 2024, a plaintiff in one of the class actions against TikTok filed a motion to consolidate the cases in multidistrict litigation in the Northern District of California before Judge Yvonne Gonzalez Rogers.

ByteDance, which has been accused of diverting American data to the Chinese government, is currently staring down the barrel of a Jan. 19 deadline set by President Joe Biden to divest the TikTok app or face a ban in the United States for national security reasons. The Supreme Court will hear oral arguments on Friday, Jan. 10 to consider whether the proposed ban violates First Amendment rights.

The plaintiff class, which is estimated to include more than 100 members, is seeking in excess of \$5 million in damages.

TikTok did not immediately respond to a request for comment on Tuesday.

Native Americans sue social media giants over youth mental health crisis

DJ [dailyjournal.com/articles/382787](https://www.dailyjournal.com/articles/382787)

Shutterstock

The latest challenge to social media's mental health crisis was filed by a group of Native Americans on Tuesday who claimed the structure of five of the nation's largest platforms have been a historically destructive influence on tribal youth mental health struggles.

The federal lawsuit - filed by DiCello Levitt LLP partner Brian O. O'Mara on behalf The White Mountain Apache Tribe - goes after Meta Platforms Inc. and what the plaintiff group claims are the company's biggest social media platforms: Facebook, Instagram, Snapchat, TikTok and YouTube.

"Social media products have been a significant contributor to the current mental health crisis facing young Indigenous peoples worldwide. Defendants, who are all so-called 'social media companies,' recognize that Native Americans are already vulnerable populations - especially teens and adolescents, and have designed products to exploit and profit from those vulnerabilities," the lawsuit stated. *The White Mountain Apache Tribe v. Meta Platforms Inc. et al.*, 4:25-CV-00249 (N.D. Cal., filed Jan. 7, 2025).

O'Mara is joined by other attorneys at DiCello Levitt and Fields Han Cunniff PLLC. A spokesperson for Meta did not respond to an email with questions about Tuesday's lawsuit.

However, attorneys defending Meta from similar allegations in other liability lawsuits have said that - while acknowledging the youth mental health crisis as a serious issue - allegations that a platform's design is the root cause of the harm cannot be linked back to the companies directly because of factors such as third-party contact.

According to the tribe's lawsuit, published educational studies on the topic have found that social media has been a significant contributor to the crisis, including an increased suicide rate.

The lawsuit claims Meta's social media platforms are deliberately designed to maximize profit at the expense of tribal children by employing manipulative features such as skewed algorithms and addictive engagement mechanics.

"Users are provided with unpredictable rewards - such as likes, comments, or new content - that trigger dopamine releases in the brain, fostering a habit-farming loop. This intermittent reinforcement keeps users coming back for more, as they seek the pleasure derived from these unpredictable stimuli," the lawsuit stated.

Social media companies are the targets of an onslaught of lawsuits and regulatory challenges that accuse them of systematically addicting children and adolescents. Most notably, several states, school districts and individual plaintiffs are collectively suing the companies - including Meta - in the Northern District of California on claims the platforms are defective and encourage destructive behavior. *In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation*, 22-MD-03047 (N.D. Cal., filed Oct. 6, 2022).

#382787

Devon Belcher

Daily Journal Staff Writer

devon_belcher@dailyjournal.com

Persuasive: Facebook Successfully Questions MDL Guardrails

 [law.com/therecorder/2025/01/08/persuasive-facebook-successfully-questions-mdl-guardrails](https://www.law.com/therecorder/2025/01/08/persuasive-facebook-successfully-questions-mdl-guardrails)

Adolfo Pesquera

What You Need to Know

- Facebook raised an issue of lack of oversight of multidistrict litigation panels by the Texas Supreme Court.
- As a result, the high court made its first review of an MDL panel decision and removed Facebook as an MDL defendant in a sex trafficking case.
- Facebook raised the plaintiff's "novel theory" that Facebook allegedly knowingly participating in a sex trafficking scheme.

Meta Platforms Inc. convinced the Texas Supreme Court to remove a sex trafficking lawsuit from the state's multidistrict litigation court system, where the social media platform Facebook was named a defendant.

Counsel for Meta, Hunton Andrews Kurth, noted in its petition that the Supreme court had never exercised its exclusive jurisdiction to review multidistrict litigation panel decisions.

"As a result, it has neither approved nor rejected the standards the MDL panel adopted in scores of written opinions before 2016, and the panel has almost stopped explaining its decisions since that date," according to in Meta's brief on merits.

Novel Theory

Since 2016, the MDL panel issued 61 opinions on transfers— and only seven are more descriptive than three sentences, noted Hunton attorney Kelly Sandill. Sandill argued the case before the supreme court.

Meta emphasized the "novel theory in this case—that a social media company is liable for alleged knowing participation in sex trafficking ... can't be lumped together with different claims based on Salesforce's different services with no explanation by any court."

Justice Jane Bland authored the court's opinion on Meta's petition for writ of mandamus for *In re Jane Doe Cases*.

Bland concluded the case involving Facebook as a defendant did not meet the commonality requirements necessary to include it in the MDL that Jane Doe defendants brought to sue Salesforce Inc.

"Accordingly, we conditionally grant relief and direct the MDL panel to remand the tag-along case to its original trial court," Bland wrote.

In 2022, the state's high court foiled an effort by Salesforce to avoid going to trial, allowing victims to proceed with their cases in Harris County district court.

The case involving Facebook concerns a Jane Doe plaintiff. She alleges the trafficker groomed her through Facebook, and that the social media platform lacked sufficient guardrails for access to minors' accounts. She was convinced to meet the trafficker in person.

Within hours of their online conversation, the trafficker advertised Doe for prostitution on the social media website Backpage, which is unaffiliated with Facebook, according to the suit.

"As the result of the trafficker's activities, Doe was sexually assaulted by multiple perpetrators," the Bland opinion recounts. The assaults occurred at the Texas Pearl Hotel in Houston, which is also a named defendant.

The Difference

Three years after the lawsuit was filed in a Harris County district court, Texas Pearl filed a notice of transfer of tag-along case, adding it to a class of existing lawsuits brought against Salesforce, a provider of customer-relationship management software. Doe joined Texas Pearl's request.

The MDL cases against various hotels and Salesforce generally allege that Salesforce sold software to Backpage that facilitated the latter company's involvement in human trafficking. They also allege Salesforce failed to take steps to prevent use of its software for illegal purposes.

The MDL plaintiffs also allege the hotel defendants facilitated trafficking.

However, Bland noted that in none of the other cases are Facebook or Texas Pearl named as defendants.

The Jane Doe in the Facebook lawsuit is represented by Bracewell attorneys Warren W. Harris and Walter A. Simons. Doe contends in her brief that a common pattern of criminal conduct suffices to establish removal to the MDL. She alleged that as in the other cases, sex-trafficking victims were criminally exploited through Backpage at various hotels.

"Doe further contends that Backpage's website and industry standards designed to prevent sex trafficking will be common areas of discovery," the plaintiff asserted.

Bland acknowledged that evidence of industry standards and the activity of the unnamed third party, Backpage, might be relevant. However, she continued, "The application of this evidence to any fact question will be different because none of the criminal activity alleged in the MDL involves either Facebook or Texas Pearl."

At a general level, Bland found, the cases involve criminal exploitation of minors that took place in Texas hotels through the use of social media—but that's where the commonality ends.

"The MDL ... does not involve similar incidents of trafficking, premises, time periods, or fact witnesses," Bland found.

Doe pointed to discovery of industry policies on standard of care and observed each hotel defendant was involved in a sex-trafficking scheme that resulted in similar monetary benefits.

In response, Bland noted the standard of care evidence did not present a common fact issue that resolves a given hotel owner's duty or breach, which requires an intentional or knowing benefit.

Attorneys for the opposing sides did not immediately respond to requests for comment.

'Rabbit Hole'

Meanwhile, four of the Jane Doe cases now in federal court led to a U.S. Court of Appeals for the Fifth Circuit ruling on Dec. 19 upholding a district court's denial of a Salesforce motion for summary judgment.

The heart of Salesforce's argument is that section 230 of the Communications Decency Act grants Salesforce broad immunity in all cases arising from the publication of third-party content.

According to Salesforce, if the only link between a plaintiff's harm and the defendant is third-party content, the Fifth Circuit noted. But what if the defendant's conduct fell squarely within section 230's text? To say that in such situations section 230 would not provide immunity "taxes the credulity of the credulous," the court said.

The Fifth Circuit found, "Because neither the text of section 230 nor our precedent requires such a meandering analytical framework—that in any event leads right back to the proper framework—we decline Salesforce's invitation to go down the rabbit hole."

Meta names ex-Trump Justice Dept. lawyer to lead litigation strategy

[reuters.com/legal/legalindustry/meta-names-ex-trump-justice-dept-lawyer-lead-litigation-strategy-2025-01-08](https://www.reuters.com/legal/legalindustry/meta-names-ex-trump-justice-dept-lawyer-lead-litigation-strategy-2025-01-08)

Mike Scarcella

By Mike Scarcella

January 8, 2025 12:11 PM PST Updated 19 hours ago

A Meta logo is pictured at a trade fair in Hannover Messe, in Hanover, Germany, April 22, 2024. REUTERS/Annegret Hilse Purchase Licensing Rights , opens new tab

Jan 8 (Reuters) - Facebook owner Meta Platforms (META.O) , opens new tab has named a former senior U.S. Justice Department official from Donald Trump's first presidential administration to manage its worldwide litigation strategy.

Ethan Davis, who was most recently a partner at law firm King & Spalding based in San Francisco, will serve as head of global litigation strategy for Meta, according to Meta and the firm. Davis had been at 1,300-lawyer King & Spalding since 2020.

Meta and the law firm had no immediate further comment. Davis did not immediately respond to a request for comment.

Davis served in the Justice Department from 2017 to 2020, including as acting head of the civil division. He left for a year to serve as a law clerk to U.S. Supreme Court Justice Neil Gorsuch in 2018.

Meta separately elevated prominent Republican Joel Kaplan last week to be its chief global affairs officer, succeeding Nick Clegg, a former British deputy prime minister and leader of the country's center-left Liberal Democrats.

In December, Meta named Mike Haven as global head of legal operations. Haven previously held a top legal post at chipmaker Intel.

The company made headlines on Tuesday over a decision announced by its chief executive Mark Zuckerberg to scrap its U.S. fact-checking program and reduce curbs on discussions around contentious topics such as immigration and gender identity.

On the litigation front, Meta faces a trial in April in federal court in Washington, D.C., where U.S. antitrust enforcers are seeking to unwind the company's acquisitions of WhatsApp and Instagram. Meta and other tech companies are also fighting claims in court that they made their platforms addictive, fueling mental health problems among teens.

Meta has denied any wrongdoing in the cases.

Davis' clients at King & Spalding included Walmart, trade group Radio Music License Committee and baby food maker Beech-Nut Nutrition Company.

The Atlanta-founded law firm is home to former deputy U.S. attorney general Rod Rosenstein, a Republican, and Sally Yates, who held the role during the Obama administration.

Read more:

Meta shelves fact-checking in policy reversal ahead of Trump administration

Meta taps Republican Joel Kaplan to lead global policy team, replacing Nick Clegg
Reporting by Mike Scarcella

Class Action

Jan. 8, 2025, 1:54 PM PST

Audi Hit With E-Tron Car Battery Fire Defect Class Action Suit

By [Shweta Watwe](#)

- **COURT:** N.D. Ga.
- **TRACK DOCKET:** [No. 1:25-cv-00071](#) (Bloomberg Law subscription)

Audi of America LLC failed to disclose or repair a lithium-ion battery defect that created a fire risk in its 2019 to 2024 e-tron line of electric vehicles, a proposed class action alleged.

The batteries lose power and short circuit which can cause a fire, according to the class action complaint filed Tuesday in the US District Court for the Northern District of Georgia.

"Because they can store significant amounts of energy, they can overheat which can result in a fire or explosion," the complaint said. "This is called thermal runaway: when the battery's temperature rapidly and uncontrollably rises, leading to a fire."

The complaint said that the e-tron vehicles are particularly susceptible to this problem because "they are built on high voltage technology."

Volkswagen Group of America, Audi's parent company and a named defendant, recalled more than 26,000 e-tron vehicles in December 2023.

"Rather than identifying a repair or replacement of all the defective batteries, the recalls instruct Audi e-tron owners to limit charging to 80% capacity, resulting in a reduction of the advertised range that Audi e-tron owners and lessees paid for," the complaint said.

Lead plaintiff Dwight Kelly alleged more than 30,000 class vehicles were sold between 2019 and 2024. He alleged the car makers knew at least as early as April 2020 about the battery defect because of pre-sale durability tests, consumer complaints to the National Highway Transportation Administration, and warranty claims.

Kelly seeks to represent a Georgia state class of owners and lessees who had the vehicles before January 2024. He brings claims for fraudulent concealment, negligent misrepresentation, and breach of implied warranty. He is asking for damages and an injunction requiring a "comprehensive" program to repair and replace batteries in class vehicles.

Audi declined to comment on the suit.

Kelly is represented by Caplan Cobb LLC and Gibbs Law Group LLP.

The case is Kelly v. Audi of Am. Inc. , N.D. Ga., No. 1:25-cv-00071, complaint filed 1/7/25 .

Law Firms Close Southern California Offices Amid Devastating Wildfires

 [law.com/therecorder/2025/01/08/law-firms-close-southern-california-offices-amid-devastating-wildfires](https://www.law.com/therecorder/2025/01/08/law-firms-close-southern-california-offices-amid-devastating-wildfires)

Samson Amore

What You Need to Know

- Several Big Law firms have closed their Southern California operations in the wake of the Palisades Fire.
- Orrick, Goodwin Procter, Cozen O'Connor and other firms have operations in areas that were under an evacuation warning on Wednesday.

Several Big Law firms in Southern California closed their offices and shifted to remote work on Wednesday in the wake of the devastating wildfires that continue to roar across the region.

The Palisades Fire, spanning nearly 16,000 acres by late Wednesday afternoon, quickly made its way toward Malibu and Santa Monica, where several Big Law firms have operations, prompting evacuation warnings or orders in affected areas and neighboring communities.

Orrick, Herrington & Sutcliffe closed its offices in Los Angeles and Santa Monica on Wednesday, a firm spokesperson told The Recorder. The firm's Santa Monica office, at 631 Wilshire Blvd., was in a Level 2 evacuation warning zone as of Wednesday afternoon, according to data from nonprofit incident tracker Watch Duty.

Thompson Hine's Santa Monica office, near the Brentwood Country Club at 3130 Wilshire Blvd., was not in an evacuation zone but adjacent to an evacuation warning area. The firm said it closed the office and allowed all staff to work remotely on Wednesday.

"In light of the recent fires in Los Angeles, Thompson Hine is taking proactive measures to ensure the safety and well-being of our lawyers and staff, which remains our highest priority," Thompson Hine's Los Angeles partner in charge John Conkle said in an email to The Recorder.

"To prioritize the safety and well-being of our people, the Los Angeles office is currently operating in business continuity mode," Conkle said. "This approach allows us to maintain our operations effectively while ensuring that our team members are safe and supported."

Goodwin Procter's Santa Monica office, located at 420 Broadway, along with Cozen O'Connor's Santa Monica office, at 401 Wilshire Blvd., are also located in a current evacuation warning zone, according to Watch Duty. Neither firm could immediately be reached for comment.

Cooley's Santa Monica office, located at 1333 2nd St., is in the more densely-populated downtown area adjacent to Arizona Avenue, and is not an evacuation zone, though the area is under a red flag warning for decreasing air quality. Cooley representatives declined to further comment on the fires' impacts on its operations, but noted safety of its LA-area staff was a top priority and confirmed it has temporarily closed its Santa Monica office.

In addition to the Palisades Fire, the region is also suffering the impact of the Eaton Fire in Altadena's Eaton Canyon region, which spread to over 10,000 acres by Wednesday evening.

NOT FOR REPRINT

© 2025 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.



Courts, Lawyers Press On With Business as SoCal Wildfires Rage

 [law.com/nationallawjournal/2025/01/08/courts-lawyers-press-on-with-business-as-socal-wildfires-rage](https://www.law.com/nationallawjournal/2025/01/08/courts-lawyers-press-on-with-business-as-socal-wildfires-rage)

Cheryl Miller

A firefighter battles the Palisades Fire around a burned structure in the Pacific Palisades neighborhood of Los Angeles on Wednesday. Photo: Etienne Laurent/AP

News

Wind-driven wildfires in Los Angeles County destroyed the homes of two courts of appeal justices and forced an unknown number of court workers, jurors, judicial officers and attorneys to evacuate.

January 08, 2025 at 09:17 PM

By Cheryl Miller



The original version of this story was published on The Recorder

Lawyers, judges and courthouse workers pushed ahead with sometimes-limited court business on Wednesday after historic, wind-whipped fires charred more than 1,000 structures and forced thousands of residents to flee in Southern California. At least five people have been killed.

Los Angeles County Superior Court leaders announced early Wednesday that all courthouses would open. Operations in Glendale, Pasadena and Santa Monica continued through the afternoon, even as officials ordered evacuations in parts of those cities.

Officials later closed the Sylmar juvenile courthouse for the day due to its proximity to the Hurst Fire.

In a statement released Wednesday afternoon, Presiding Judge Sergio Tapia II said he and other court officials weighed the safety of court users, attorneys, judicial officers and staff in deciding to initially keep all courthouses open and to later close the Sylmar building.

"With all our courthouses located outside of mandatory evacuation zones this morning, coupled with the importance of maintaining access to justice for Los Angeles County residents, we decided to keep courthouses open whenever possible while continuing to reassess the situation as it unfolds," Tapia said.

"We are keenly aware that many of our judicial officers and court staff have lost homes and been directly impacted by this devastating disaster," he added. "Our court community mourns their loss along with them and their families."

The Second District Court of Appeal, Division Six courthouse in Ventura canceled oral arguments scheduled for Wednesday and Thursday, with a statement noting the fires' impact. Two Second District justices, Arthur Gilbert of Division Six and Helen Bendix of Division One, confirmed that their homes had burned in the fires.

"We lost everything," Gilbert stated in an email.

The U.S. Court of Appeals for the Ninth Circuit courthouse in Pasadena closed Wednesday, although employees were still working remotely, according to Clerk of Court Molly Dwyer. The Ninth Circuit will be closed Thursday to observe the national day of mourning for former President Jimmy Carter.

Across the Los Angeles region, an untold number of judges, lawyers and court employees were forced to leave their neighborhoods Tuesday and Wednesday, unsure of when they would be able to return or what they would find.

Anastasia Mazzella, a partner at Kabateck LLP, was one of them.

The winds began to roar Monday over Mazzella's Altadena home, knocking down olive trees and ripping tiles from the roof. The area is no stranger to Santa Ana winds and occasionally wildfires in the nearby San Gabriel Mountain foothills have been visible, from a safe distance, in the community.

But this blaze, dubbed the Eaton Fire, was different—closer and fast-moving. Early Tuesday evening, Mazella, her husband and their neighbors decided it was time to leave.

"In a million years, I never would have thought that a fire would have come down that far," she said. "And then it did."

Mazella and her sons were staying with her parents Wednesday while her husband and neighbors went back to their neighborhood. The Mazellas' home still stood Wednesday afternoon, but three or four houses on their block were burning or already gone, she said.

So were houses on surrounding streets. So were the nearby homes of her sons' babysitter and a longtime friend.

Embers continued to blow into the family's neighborhood. At one point, a neighbor broke down a fence to put out a spot fire in their backyard.

Mazella's husband used a fire extinguisher to douse a flare up across the street. Firefighters moved through the neighborhood, and Mazella's husband shared food and water with them.

When taps in the area ran dry, the firefighters used their pool as a water source, she said.

Mazella said she felt a bit of hope as winds died down a bit Wednesday but also "terrible—almost guilty that our house is still standing."

Amid the chaos in her community, Mazella is still preparing for an upcoming mediation in a toxic tort case involving 400 clients. Even after evacuating Tuesday she was sending emails at 11 p.m.

The Kabateck firm has handled a number of wildfire-related litigation cases, including those stemming from the 2023 Lahaina, Maui, inferno. Mazella said the firm has already received calls about potential issues related to the fire that drove her and others from their homes this week.

Investigators have not yet announced the cause of the fires burning in the Los Angeles region.

NOT FOR REPRINT

© 2025 ALM Global, LLC, All Rights Reserved. Request academic re-use from www.copyright.com. All other uses, submit a request to asset-and-logo-licensing@alm.com. For more information visit Asset & Logo Licensing.

[Latest](#)

Trending

Who Got The Work

Ruth Fong Zimmerman and Matthew M. Oliver of Lowenstein Sandler have stepped in to represent Bear Down Brands in a pending trademark lawsuit. The complaint, filed Jan. 1 in New York Eastern District Court by Antar Law Firm on behalf of Triplenet Pricing LLC, accuses the defendant of deliberately submitting false reports of intellectual property infringement to online platforms, including Amazon, in order to prevent third parties from reselling genuine products on the marketplace at

Courts open, but appearances complicated by wildfires

DJ [dailyjournal.com/articles/382784-courts-open-but-appearances-complicated-by-wildfires](https://www.dailyjournal.com/articles/382784-courts-open-but-appearances-complicated-by-wildfires)

Photos taken from Will Rogers SHO parking lot at ca. 10:50 and 11 am Tuesday 1/7. Photo:

Sue L. Himmelrich, special counsel, Western Center on Law & Poverty

- In an update issued Wednesday afternoon, the Los Angeles County Superior Court advised that the Sylmar Juvenile Courthouse would be closed for the remainder of the day due to its proximity to the Hurst fire.
- Other Los Angeles County Superior Court locations remained operational Wednesday despite nearby wildfire evacuations, though court officials continue to monitor the situation hourly and may announce closures through their social media channels.
- While courthouses are open, many defendants failed to appear for hearings in Pasadena, and the Los Angeles Sheriff's Department indicated it would not transport inmates from the North County Correctional Facility due to the emergency.
- Individual judges have discretion over continuances and jury trials, with court leadership acknowledging that evacuations throughout the night have affected judicial officers, staff, jurors, and court users across the county.

Most Los Angeles County Superior Court locations remained open Wednesday, but wildfire conditions throughout the county complicated efforts for attorneys who had scheduled hearings.

Attorneys with Campbell & Farahani LLP had three hearings Wednesday.

Frances M. Campbell said she drove from Encino to downtown Los Angeles on Tuesday and spent the night at a hotel across the street from the 2nd District Court of Appeal building ahead of oral arguments scheduled for Wednesday.

"I was concerned that the fire might jump, or the roads might close," she said. "It's hard to prepare for oral arguments when all this is happening."

Presiding Justice Brian M. Hoffstadt and Justice Dorothy C. Kim appeared in person. Justice Lamar W. Baker appeared via telephone, she said.

Campbell's associates had remote appearances, and they had to drive from their homes to places that had cellular reception. They made their appearances from their cars, she said.

All Los Angeles County Superior Court locations remained open as of 9 a.m. Wednesday despite evacuation orders in nearby locations due to wildfire emergencies. That included the Pasadena and Santa Monica courthouses, close to the Eaton and Palisades wildfires.

Los Angeles County Superior Court officials said they were monitoring the situation hourly and would announce closures through their social media channels. An update issued around lunchtime said that the Sylmar Juvenile Courthouse would be closed for the remainder of the day due to its proximity to the Hurst fire.

More than 11,000 acres in Pacific Palisades had been burned as of noon Wednesday with no containment, according to the Los Angeles Fire Department. There were several reported injuries to both civilians and firefighters. More than 1,000 structures are estimated to have been affected based on the footprint of the burn area. Parking restrictions will remain in effect until Friday so that firefighters have room to maneuver in the event of a fast-moving fire, and residents can evacuate if necessary.

In Altadena and Pasadena, affected by the Eaton fire, more than 10,000 acres had been burned, and two residents had been confirmed dead.

The Hurst fire in Sylmar consumed over 500 acres by 8 a.m. Wednesday. No injuries were reported.

Many defendants failed to appear for hearings in Pasadena, according to attorneys, and the Los Angeles County Sheriff's Department indicated it would not transport inmates from the North County Correctional Facility due to the emergency.

Individual judges have discretion over continuances and jury trials, and court leadership acknowledged in an internal email sent Wednesday morning that evacuations throughout Tuesday night had affected judicial officers, staff, jurors, and court users across the county.

Los Angeles County Superior Court spokesman Rob Oftring advised concerned parties to continue to check the court's X account for updates on court openings.

"Check our Twitter for the latest," Oftring wrote. "At this time all courthouses are open but it is a fluid situation and we continue to assess hour by hour. Any impending updates on specific courthouses will be communicated on Twitter and via public notice."

Oftring wrote that "continuances are at the discretion of each judicial officer."



The view from the Glendale foothills Wednesday. Photo: Laurinda Keys
Deputy Miesha McClendon, from Pasadena Courthouse's Department M, confirmed that the court was operating as usual when contacted via phone by the Daily Journal Wednesday morning.

Another court official advised that "the senior leadership team has had two meetings" that morning regarding the wildfires.

"The basic status of key operations was discussed. Judges are sensitive to the ability of litigants and counsel to

participate in hearings when there is an emergency that could affect access," the official said during a telephone interview.

An email to criminal judicial officers, shared with the Daily Journal, indicated that the court may have issues contacting jurors and that continuances were a possibility.

"With respect to jury trials - both planning and ongoing - each judicial officer should decide whether to seek a continuance for your trial/jury selection or proceed as scheduled," the email said. "If you need to cancel any panels for today or tomorrow, please inform administration as soon as possible. Be aware that we do not have 100% accuracy in our ability to communicate with summoned jurors."

Another email to judicial officers said that that while courthouses would remain open, contingency plans were being drawn up.

"Due to the importance of maintaining access to justice for the residents of Los Angeles County, our courthouses will remain open today for business, January 8. Nevertheless, we are actively monitoring the situation and working on contingency plans should closing one or more courthouses become necessary. Judicial officers and staff, whether directly impacted by the fires or not, should stay in contact with their supervising judge."

It added that, "If you have cases that are constitutionally or statutorily required to proceed, jail closures and transportation issues may impact your case. Please communicate with your supervising judge for guidance."

Responding to questions about what attorneys whose business has been affected by the fires should do, a California State Bar spokesperson advised: "The State Bar does not maintain any official guidance regarding natural disasters; however, attorneys with questions about their ethical obligations, including communication obligations, file damage and destruction, and contacting fire victims, are encouraged to contact the State Bar Ethics Hotline for research assistance for those questions by calling 800-238-4427 from 9 a.m. to 12 p.m. or completing a callback request form for a return call during State Bar business hours."

The spokesperson advised that attorneys who wish to help those affected by the fires can do so via the newly launched California Pro Bono Portal.

Antoine Abou-Diwan and Jack Needham contributed to this story. **Affected by the wildfires? Get in contact via jack_needham@dailyjournal.com**

#382784

FirstEnergy bribery case: Judge rejects defense request for grand jury transcripts

[cleveland.com/open/2025/01/firstenergy-bribery-case-judge-rejects-defense-request-for-grand-jury-transcripts.html](https://www.cleveland.com/open/2025/01/firstenergy-bribery-case-judge-rejects-defense-request-for-grand-jury-transcripts.html)

January 9, 2025

Subscriber

- Updated: Jan. 09, 2025, 9:58 a.m.
- |Published: Jan. 09, 2025, 9:30 a.m.



Former FirstEnergy CEO Chuck Jones, with his attorney Carole Rendon, at his arraignment February 13, 2024 in Summit County Common Pleas Court. (David Petkiewicz/Cleveland.com)David Petkiewicz, cleveland.com

By

Jake Zuckerman, jzuckerman@cleveland.com

COLUMBUS, Ohio – A Summit County judge rejected a pre-trial request from the former chief executive and senior vice president of FirstEnergy Corp., both of whom are accused of bribing a state utility regulator with \$4.3 million.

The two defendants – former CEO Chuck Jones and senior vice president of external affairs Mike Dowling – sought release of grand jury transcripts, which are typically held as secrets, claiming that prosecutors' choice to add and amend the original slate of dozens of charges

via a second grand jury risked inconsistency or even prosecutorial misconduct. While the dispute is minor and technical, a ruling for the defendants would likely have added months to the timeline given prosecutors' pledge to appeal any such ruling.

Common pleas Judge Susan Baker Ross wrote in an order that the grand jury reviewed the facts and agreed on an indictment. The defense made no showing of either need to release the transcripts or any misconduct.

Ross in an order seemed to crack the whip on a case involving a \$4.3 million payment prosecutors say was a bribe that changed hands more than six years ago. She scheduled a hearing for late February to handle several other pre-trial disputes and set a date for a criminal trial.

While some disputes are minor, others are quite salient. Among them are a battery of motions from the defendants to dismiss some or all of the charges; another is whether FirstEnergy qualifies as a "victim" under Marsy's Law, which affords certain rights to crime victims.

Background

According to prosecutors, Jones and Dowling paid Sam Randazzo, then a private lawyer, \$4.3 million in January 2019. The two executives planned to guide Randazzo to an appointment, nomination and confirmation to serve as chairman of the Public Utilities Commission of Ohio.

After a successful confirmation campaign, Randazzo, the head man regulating power companies like FirstEnergy, issued several rulings favorable to the company and helped lobby for legislation to bail out two nuclear plants owned at the time by its subsidiary.

Jones and Dowling have pleaded not guilty. They say the \$4.3 million was a payment to settle a consulting contract, not a bribe.

Both state and federal prosecutors charged Randazzo as well, though he died by suicide before trial. His companies used in the scheme were charged as well. At the behest of Randazzo's wife, they pleaded guilty to several counts late last year and agreed to a roughly \$2.2 million penalty pending the sale of real estate.

FirstEnergy, as a corporation, entered a deferred prosecution agreement with the U.S. Department of Justice in 2021 requiring payment of a \$230 million penalty. The company said Jones and Dowling orchestrated the bribe to Randazzo with money it had no obligation to pay.

The company also admitted to a related scheme to bribe ex-Ohio House Speaker Larry Householder, a Republican, with millions of dollars to champion legislation that created the subsidies for the company's nuclear plants. Householder is serving a 20-year prison sentence following a conviction at trial. However, neither state nor federal prosecutors formally accused Jones and Dowling of bribing Householder.

Stories by Jake Zuckerman

- Dave Yost continues five-year fight against records request at Ohio Supreme Court
- New GOP leadership, fresh faces take the Statehouse: Capitol Letter
- Data centers are booming in Ohio. Regulators will decide who pays the growing electric bill

Jake Zuckerman covers state politics and policy for Cleveland.com and The Plain Dealer.

If you purchase a product or register for an account through a link on our site, we may receive compensation. By using this site, you consent to our User Agreement and agree that your clicks, interactions, and personal information may be collected, recorded, and/or stored by us and social media and other third-party partners in accordance with our Privacy Policy.

Cracks appear between Mike Madigan and co-defendant Mike McClain in federal corruption trial

[courthousenews.com/cracks-appear-between-mike-madigan-and-co-defendant-mike-mcclain-in-federal-corruption-trial](https://www.courthousenews.com/cracks-appear-between-mike-madigan-and-co-defendant-mike-mcclain-in-federal-corruption-trial/)

Mike Madigan and Mike McClain have known each other since they both were state representatives in the 1970s, but their decades of friendship is now strained in the face of multiple corruption charges.

Dave Byrnes / January 8, 2025

Then-Illinois Speaker of the House Michael Madigan, D-Chicago, looks out over the House floor at the State Capitol in Springfield in 2017. (Justin L. Fowler/The State Journal-Register via AP, File)

CHICAGO (CN) — Ex-Illinois House Speaker Mike Madigan continued testifying in his own federal corruption trial on bribery and racketeering charges on Wednesday, making a few remarks that seemed to pin blame on his co-defendant Mike McClain.

The trial day started with Madigan's attorney Dan Collins resuming the former speaker's direct examination from Tuesday. Collins began with questions about a Nov. 13, 2014 email that McClain, then a contract lobbyist for energy company ComEd, sent ComEd's vice president for governmental and external affairs Fidel Marquez.

Jurors saw the email during Marquez' own testimony in November. In it, McClain claims "a friend of ours" — which jurors have heard was a euphemism for Madigan — wondered if there were "two Fidels." One who is "totally responsive and engaging," and one who "sometimes... is not with us."

Madigan told Collins and the jury that those weren't his thoughts.

"Did you authorize Mike McClain to express this sentiment?" Collins asked.

"No," Madigan responded.

Madigan also denied that he instructed McClain to push ComEd in 2016 to accept a contract renewal with favorable work hour terms for Reyes Kurson, a law firm owned by Madigan's associate Victor Reyes. In a Jan. 20, 2016 email to then-ComEd CEO Anne Pramaggiore, McClain said that if Reyes' law firm didn't get sufficient work hours with ComEd, "then he will go to our friend."

"Our friend will call me and then I will call you. Is this a drill we must go through?" McClain asked Pramaggiore in the email.

Madigan once again told jurors he hadn't told McClain to express this sentiment.

McClain goes back over 40 years with Madigan, with both having served as Illinois Democratic state representatives in the 1970s. McClain made the transition to lobbying in the 1980s and officially retired in late 2016 though he remained active in Springfield. Madigan would serve in the state House for 50 years and lead it as speaker for 36 — he only stepped down in 2021.

The jury has seen evidence that the pair remained close personally and professionally despite their diverging career paths — including several recorded conversations between the two where they discuss dinner plans. In a 2016 letter jurors saw early in the trial, McClain swore loyalty to Madigan and his wife Shirley.

"At the end of the day I am at the bridge with my musket standing with and for the Madigan family," McClain wrote. "I will never leave your side, Shirley and Mike."

When McClain's attorney Patrick Cotter began his own cross-examination of Madigan, Cotter asked if Madigan's friendship with McClain survived all their years together.

"It did, until recently," Madigan responded.

The comment sparked a chorus of winces and "oohs" from those watching Madigan's testimony.

Cotter got in his own lick in at the former speaker. The attorney asked if McClain helped arrange meetings between Madigan and the leaders of companies like ComEd on "multiple" occasions.

"I met with people from those companies, I don't know if I'd call it multiple," Madigan responded.

"Did you do it more than once?" Cotter asked.

"Yes," the speaker answered.

"That makes it multiple," Cotter said.

Madigan nevertheless told Cotter and the jury his office had a "generally" good relationship with McClain, and that he considered McClain one of his political advisors, "among many other people."

The former speaker added McClain was responsive when he needed help with issues in Springfield. On the stand, Madigan said McClain helped him encourage ex-Illinois Democratic state representative Lou Lang to step down amid sexual misconduct accusations — of which the legislative inspector general eventually cleared him — in 2018.

Madigan said he believed part of the reason McClain was so responsive was because McClain respected him, and also because McClain wanted to maintain a good lobbying relationship with the speaker's office.

"I was able to make requests of Mr. McClain, as I did with others," Madigan told Cotter in a separate exchange.

Madigan nevertheless said he didn't use McClain's lobbying efforts to push his interests on ComEd or other players in Springfield. Regarding employers like ComEd and AT&T Illinois, he repeatedly denied he ever leveraged action by his office on those employers offering jobs and contracts to individuals Madigan and/or McClain referred.

The jury left after Cotter finished cross-examining Madigan, leaving the attorneys to hash out multiple issues that could impact prosecutors' own cross-examination as well as their rebuttal case. U.S. District Judge John Robert Blakey said jurors would only return after the attorneys had a chance to meet and confer on those issues and discuss them in court on Monday.

"At a minimum, it's going to be a serious argument," the judge said.

No trial proceedings are scheduled for Thursday, given the national day of mourning for President Jimmy Carter.

Follow @djbyrnes1

Categories / Courts, Criminal, Politics, Regional, Trials

Subscribe to Closing Arguments

Sign up for new weekly newsletter Closing Arguments to get the latest about ongoing trials, major litigation and hot cases and rulings in courthouses around the U.S. and the world.

Matt Levine's Money Stuff: The Fannie and Freddie Trade Is Back

By Matt Levine

Opinion

The GSE trade

The Fannie Mae and Freddie Mac saga has been going on for, depending how you count, 16 years, or perhaps many decades. There are strong feelings and a lot of lore. It's back in the news now, and I thought it might be nice to start with the basics.

In the US, as a matter of policy for many decades now, the federal government wants it to be relatively easy to buy a house. Most people do not have enough money to buy a house, so this policy mostly means that the government wants someone to lend buyers the money on generous terms. In practice, "generous terms" means something like "a 30-year fixed-rate mortgage with an interest rate not that much higher than Treasury bond rates."

There are various ways for the government to make that happen. Here are three possibilities :

1. The government, which has lots of money (and can print more), lends people money to buy houses, at subsidized rates. This is not especially practical in the US, because the government is not really in the lending business; banks are.
- 2. Banks lend people the money to buy houses, but the government encourages them to do so by *guaranteeing* the loans. "Lend money to anyone who meets our criteria," the government could say, "and if they don't pay you back, we will." The banks handle all of the customer-service and data-collection aspects of the loan — they have the branches and loan officers, they collect the payments, they appraise the house, they verify the borrower's income, they make sure that the loan meets the government's criteria, etc. — and collect the mortgage payments when things go well. (And pay a modest fee to the government for the guarantee.) But if things go poorly, the banks don't have any credit risk: If the borrower defaults, the government pays back the mortgage. Government-guaranteed mortgages should be pretty good assets for the banks to hold, so they will make a lot of them, and because they have the same credit risk as the US government, the rates should be pretty low.

- 3. Banks lend people the money to buy houses, but someone else guarantees the loans. There's a big Mortgage Guarantee Company (or several), and banks can pay it a modest fee, and in exchange it insures their mortgages (that meet its criteria): If the borrowers don't pay them back, the Mortgage Guarantee Company will. And the Mortgage Guarantee Company is a regular public company, owned by shareholders, but it is a large good safe company with sterling credit. It's not the US government — it can't print money — but it is very well capitalized and has plenty of money to cover the risk of defaults. And the Mortgage Guarantee Company is carefully regulated by the US government to make sure that it is well capitalized and safe, so banks will happily rely on its guarantees. They're not government guarantees, but they're AAA-rated, government-regulated guarantees, almost as good as the government. The government, in this approach, is not providing a *financial guarantee*, but it is putting its seal of approval on the Mortgage Guarantee Company's guarantee, saying "you should trust this guarantee almost as much as you would trust our guarantee, because we endorse this company and regulate it carefully."

The approach that the government settled on for many decades was "mostly 2, but kind of really 3." Congress chartered two main mortgage guarantee companies, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac). Those companies guarantee mortgages, or rather, they *acquire* conforming mortgages (mortgages that meet their underwriting criteria) from banks, hold the mortgages on their balance sheets, and in exchange give the banks mortgage-backed securities backed by the mortgages they gave Fannie and Freddie. But Fannie and Freddie guarantee the payments on their mortgage-backed securities: Banks hand in risky mortgages and get back risk-free mortgage-backed securities. And in exchange for this, the banks pay a guarantee fee.

Fannie and Freddie are giant companies with lots of money (Fannie Mae is the largest company in the US by assets), they are regulated by a dedicated US government agency (currently the Federal Housing Finance Agency), and they were chartered by Congress to achieve a regulatory purpose. Their guarantees were, for a long time, considered almost as good as a US government guarantee. This was in part because they were regulated and well-capitalized, and because Fannie and Freddie were after all in a pretty good business: They had reasonably high standards for loans, they charged billions of dollars of guarantee fees to banks, and they seemed to have plenty of money put aside to pay out those guarantees even if there was a big wave of mortgage defaults.

But people also thought that the guarantee was good because they assumed that, if anything *did* go wrong at Fannie or Freddie, the government would step in to bail them out. They were created by the government, they were a policy tool of the government, they are normally referred to as "the GSEs" (government-sponsored enterprises), they were far too big to fail, and it just seemed obvious that the government wouldn't let them fail. This was so obvious to everyone that, on the cover of the prospectus for every Fannie and Freddie mortgage-backed security, there would be a warning like "The certificates, together with interest thereon, are not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof other than Fannie Mae." Everyone assumed that Fannie and Freddie bonds *were* backed by the government, so Fannie and Freddie constantly went around saying that they weren't. But no one believed them.

And then in 2008 Fannie and Freddie went bust. Part of the problem was that there was a historic housing downturn, a lot of people defaulted on their (conforming) mortgages, and Fannie and Freddie had big losses on their guarantees. Another part of the problem is that, over the years leading up to 2008, Fannie and Freddie built up sort of an investment portfolio that was horrific in very 2008 ways. Fannie and Freddie bought only high-quality conforming mortgages in their basic business of guaranteeing mortgages, but they invested their money — the insurance reserve they'd need to pay out those guarantees — in a surprisingly large amount of subprime mortgages.

And it turns out that everyone was right: The government did not let Fannie and Freddie fail. Instead, the government took them over: The FHFA, Fannie and Freddie's regulator, was appointed "conservator" of the enterprises, basically kicking out their public-company directors and taking over their management. And the US Treasury gave them a huge line of credit to make sure that they could pay back all of their guarantees.

The important thing, for the government, was to make sure that Fannie and Freddie's *guarantees* were good, because they were the underpinning of the housing market. This was a bailout of their *creditors*, the people (banks, etc.) who relied on their guarantees to make mortgages. Fannie and Freddie didn't have enough money to pay their creditors, which is a problem that the government fixed. But if they didn't have enough money to pay their creditors, that suggests that their *capital* was negative, which suggests that their *stock* was worthless.

We have talked a lot in recent years about what happens when a big financial company is insolvent and someone with deeper pockets steps in to rescue it. Back when the action was in crypto exchanges, I wrote that the normal form of transaction here is "we will buy your exchange, make sure that all your customers are made whole, and give you a Snickers bar in exchange for 100% of the equity." The proper form of bailout is to give the creditors 100 cents on the dollar, and to give the shareholders something as close a possible to zero.

That is *almost* what the government did in the Fannie and Freddie bailouts? I think? It is debatable. The actual terms of the bailout were:

1. Treasury committed to financing facilities in which it loaned Fannie and Freddie tens of billions of dollars, and Fannie and Freddie promised to pay 10% interest on those loans. Technically these loans were preferred equity, not loans, and the interest is technically a preferred dividend, but for simplicity I am going to say "loans" and "interest."
- 2. As an additional sweetener, Treasury got warrants to purchase 79.9% of Fannie's and Freddie's common stock for free.

The result, in 2008, was that considerably more than 100% of Fannie and Freddie's income, for the foreseeable future, would go to Treasury in the form of 10% interest on its giant bailouts, and if for some reason any money *was* left over for shareholders, Treasury would get 79.9% of it. This looked, in 2008, quite close to "we will give you a Snickers bar." Fannie and Freddie's common stocks were delisted from the New York Stock Exchange, because their prices fell below \$1 per share, and who would buy them? They continued to trade over the counter, as a weird curiosity for optimists who thought that one day there would be money in them for shareholders.

In fact, for several years, Fannie and Freddie did not earn nearly enough money to pay Treasury its 10% coupon, which meant that each year they became *less* solvent, and had to borrow more money from Treasury just to pay Treasury the interest on the money they had previously borrowed. This became quite embarrassing. So in 2012, Treasury and Fannie and Freddie (now controlled by FHFA, their conservator) amended the deal. "Instead of paying you 10% on the money we have drawn, which is more than we can afford," they said, "we will just pay you whatever we can afford. Whatever our net income is, we'll give you 100% of it, even if that is less than 10% of the money we have already borrowed. Or if it's more. Forever."

This is called the "third amendment," and it is the central point of the story. Because right around then — a little before or a little after the third amendment, depending on which side you're on — Fannie and Freddie's circumstances changed. The housing market had recovered, they were charging economically appropriate guarantee fees, and they basically had a good business. They started making more than enough money to pay Treasury the 10% interest on its loans, and in fact to start paying down the principal of those loans. There was light at the end of the tunnel: Eventually Fannie and Freddie would be able to pay back Treasury and get back on their feet; Treasury would get 10% interest on its money plus 79.9% of the stock of the companies as payment for its help, but Fannie and Freddie would go back to their old lives and the public shareholders, who owned the other 20.1% of the stock, would be real shareholders again.

Except the deal had changed and now there was no way for Fannie and Freddie to pay back the loans: Instead of "we will pay you 10% annual interest on the money you loaned us," the deal after the third amendment was "we will pay you 100% of our income forever." When their income was considerably less than the 10% interest, I suppose that looked generous. When it was considerably more than the 10% interest, it looked harsh. The loans could never be paid back, because every penny that came in to Fannie and Freddie had to go to Treasury, without ever reducing the amount they owed.

Shareholders sued. They argued: Look, fine, you did a bailout in 2008; you gave us a huge loan, and you negotiated pretty tough terms, with a 10% interest rate and 79.9% of the company. But you left us with 20.1% of our company, if it ever could get back on its feet and pay off that loan with 10% interest. That 20.1% did not, in 2008, look like it was worth very much. But we had faith, and we held onto (or bought) the stock. And we were right: The company *did* get back on its feet, it *can* pay off the loan with interest, and we want our 20.1% of what's left. But you arbitrarily changed the deal in 2012 to give us nothing. Zeroing shareholders, in a huge bailout in the middle of a financial crisis, would be understandable. But you didn't do that! You left us with something in 2008, and then you zeroed us in 2012, when things were starting to go well. That's not fair!

These lawsuits never exactly worked, but they put some pressure on the government to do something. Also, there is a longstanding widespread belief that Fannie and Freddie can't continue to be in conservatorship forever: Eventually, everyone thinks, they have to be returned to the private sector. I have spent many years making fun of this belief, in part because the status quo seems fine — the GSEs, which are a policy tool of the government, are controlled by the government — and in part because the status quo has gone on for *sixteen years now*, so it's weird to think that it's impossible.

But there has been, for many years, talk about returning Fannie and Freddie to private hands, and thinking about how one would do it. As part of that thinking, in 2021, the terms of the bailout deal were changed again: Fannie and Freddie are now allowed to keep all of their income to build up capital, rather than paying it to the government. But only sort of: They don't have to pay their income in *cash* to the government, but each increase in net worth adds to the amount that they *owe* the government, so they still can't pay off the debt. But building up capital is the sort of thing that you'd want them to do if you wanted to eventually launch them on their own again as private companies.

That happened in January 2021, at the very end of the first Trump presidency. There was rather less urgency over the last four years. But here we are again:

Two months after the US election, the most spectacular of all Trump trades isn't Bitcoin, Tesla Inc. or any other likely suspects. Rather, it's shares of a stodgy, 87-year-old company many on Wall Street had forgotten about long ago.

The Federal National Mortgage Association, the government-backed home loan giant better known as Fannie Mae, has soared 227% since Trump's election. And it's done so in large part due to the promotion of one man: Bill Ackman.

Ackman, the founder of Pershing Square Capital Management, called this moment an "extraordinarily compelling" opportunity to scoop up shares of Fannie Mae and rival Freddie Mac on the cheap before the US government unwinds its massive stakes in the companies, acquired as part of a roughly \$190 billion bailout during the financial crisis. After a late December social media post laying out his case for the trade, the stocks skyrocketed 45% in less than an hour, and have continued to climb.

Ackman has tried this gambit, unsuccessfully, before. Over a decade ago, his hedge fund bought hundreds of millions of dollars worth of Fannie and Freddie shares, betting the firms would surge in value once restructured and released from US oversight, technically known as conservatorship.

He wasn't wrong, just early. I mean, he might have been wrong; it hasn't happened yet. And he's still a little early. "Releasing the companies would likely entail a lengthy process, with Bloomberg Intelligence analyst Ben Elliott calling a government exit 'at best a 2026-27 prospect.'" But, yes, after 16 years, it does seem pretty likely that Fannie and Freddie will be re-privatized sometime before, you know, just to pick a date, January 2029. (Not investing advice!)

The question is price. Right now, if you look at Fannie Mae's balance sheet, you will see \$4.3 trillion of assets (mostly mortgages), \$4.2 trillion of liabilities (mostly mortgage-backed securities), and total shareholders' equity of \$90.5 billion. (Freddie: \$3.34 trillion, \$3.29 trillion, \$56 billion.) But the amounts that Fannie and Freddie owe the government — which are counted as part of shareholders' equity, not liabilities, because they are technically preferred stock — are \$212 billion and \$129 billion, respectively, or more than double their shareholders' equity. The actual book equity available to common shareholders is negative many tens of billions of dollars. Fannie and Freddie have nowhere close to enough money to pay back Treasury.

But you could do different accounting. Fannie Mae borrowed \$119.8 billion from Treasury, and has since paid back a total of \$181.4 billion. Freddie Mac borrowed \$71.6 billion and has paid back \$119.7 billion. Big chunks of those repayments came in 2013, when Fannie and Freddie started paying all of their net income to the government. If you treated those repayments as *paying down* their borrowing — which, again, is *not* how they are treated under the amended terms of the bailout — then they have arguably paid back everything by now, with interest. Ackman wrote on X last week:

The scenario we envision is that ... the GSEs are credited with the dividends and other distributions paid on the government senior preferred, which would have the effect of fully retiring the senior preferreds at their stated 10% coupon rate with an extra \$25 billion profit (in excess of the preferreds' stated yield) to the government. This extra profit could be justified as payment to the government for its standby commitment to the GSEs during conservatorship.

Ackman's argument is that, if you went back to the original deal, Fannie and Freddie have *already* paid back the government, so they don't have to pay any more. So their \$146 billion of combined shareholders' equity actually belongs to the shareholders, that is, 79.9% to the government and 20.1% to the public shareholders, who Ackman says are "millions of small investors who owned the stock [before 2008] as it was perceived to be safe dividend payer," plus him.

And so privatization is mostly a simple matter of declaring that actually Treasury has already been paid back and the \$341 billion that Fannie and Freddie in aggregate owe the government is just (as Felix Salmon puts it) "a function of bad accounting." You wipe that debt from their (and Treasury's) balance sheets and you get more or less viable-looking companies. Maybe not quite viable yet, but they have a few more years to accumulate capital from their profitable businesses before they are actually released, and when they are, you do an initial public offering to raise the rest. Ackman: "Assuming a Q4 2026 IPO, the two companies collectively would need only raise about \$30 billion to meet the 2.5% capital standard, a highly achievable outcome."

And then the stock is worth tens of billions of dollars; Ackman puts it at \$34 per share by 2026. (They're both a bit below \$5 today.)

Anyway that's roughly the state of play. We'll see what happens. Here are three things that I am thinking about.

One: Why would the government agree to (1) write off \$341 billion that technically, legally, Fannie and Freddie still owe to Treasury and (2) essentially transfer that value from taxpayers to Fannie and Freddie's existing common shareholders? You can imagine some possible answers:

It's the fair thing to do, the third amendment really was an unfair confiscation of private property, the government has already been amply repaid for its support, and even if Fannie and Freddie still technically owe the government that money, they *shouldn't*, so the government should do the right thing and cancel that debt.

- You'll never actually succeed in re-privatizing Fannie and Freddie without writing off that debt: Those enterprises will need ongoing support from public investors, and they will never invest as long as that government overhang — and the unfair confiscation it represents — is still there. Forgiving that debt is a necessary step toward funding the enterprises with private capital and unlocking the housing market.
- Relatedly, that \$341 billion is just an accounting entry that can never be monetized: The way to actually turn the government's Fannie and Freddie stakes into real cash is to do IPOs and sell Treasury's 79.9% of the stock, and the only way to do that is to pare back the debt.
- Donald Trump is a transactional president who likes to reward his friends and flatterers and is not all that public-spirited, and giving \$341 billion of taxpayer money to hedge funds is, you know, a possibility.

I think that the first three answers there are all pretty plausible, but it is notable that very little happened on this over the last four years, and there's a lot of excitement for it now.

Two: *Do* Fannie and Freddie need to be re-privatized? It does not seem to be especially impossible to get a mortgage today, and Fannie and Freddie are profitable for the government. What problem would it solve to re-privatize them? "A successful emergence of Fannie and Freddie from conservatorship should generate more than \$300 billion of additional profits to the Federal government," argues Ackman, "while removing ~\$8 trillion of liabilities from our government's balance sheet," but presumably he thinks the enterprises are a good investment *for him*. Why are they a bad investment for the government?

Three: What does it mean to re-privatize them? I started this column by talking about the various ways you could imagine the government encouraging home ownership. One of those ways is a well-capitalized, fortress-balance-sheet, privately owned mortgage guarantee company that operates with the ... blessing and regulation, let's say, but not the financial backing of the government. Another way is a government guarantee. For historical reasons, but also for too-big-to-fail reasons, pre-2008 Fannie and Freddie were technically the former but actually the latter.

Perhaps post-2026 Fannie and Freddie will be different. We have learned some lessons from 2008. They will be better capitalized, better regulated, less likely to run into trouble, and everyone will understand that, if somehow they *do* run into trouble, the government won't bail them out again. But ... why? Is the Trump administration regulator who releases them from conservatorship also going to be particularly strict about their capital requirements and prudential regulation? Under new private ownership, will they not be tempted to invest in risky trades again? If they continue to guarantee a huge chunk of US mortgages, will they no longer be too big to fail?

I think those are answerable questions. For one thing, Fannie and Freddie do much more to transfer the credit risk of their guarantees to private investors already. And we *have* learned lessons from 2008, which are incorporated into their capital requirements.

Still, for many decades, the value of a Fannie and Freddie guarantee was “we have a lot of money, but we are not backed by the government, but wink wink.” And now for ... probably almost two decades, when this shakes out ... it is “we are fully backed by the government.” And when this does shake out, it will be “we have even more money, but we are not backed by the government.” But will there be a wink?

Green accounting

You could imagine a world without generally accepted accounting principles. In this world, companies would report their financial results in whatever way seemed right to them. They'd add up all the money that came in, throw in all the money that they think really should have come in, and subtract all of the expenses that they wanted to subtract. The result would be their “net income.” It would probably be high? Deep down every company thinks it's doing great, and making money is the main indication of doing great, and the companies will all make the accounting choices that make them look good.

And some of this will be fraud, but most of it won't be; most of it will be companies making good-faith choices that they think represent their financial position accurately. But those choices will be biased by their optimism, and by how they run their business: They will mostly do deals that they think are good, so they will account for those deals as profitable.

And so you can see why GAAP exists: If every company is required to use the same methods to prepare their financial reports, those financial reports will be comparable with each other. Some companies will make money; others will lose money. Whereas if every company could use its own methods, every company would make money.

Actually you don't need to do too much imagining here: Lots of US public companies *do* report both GAAP net income *and* some other, non-GAAP income number — “adjusted EBITDA” is the stereotypical name for it — that tends to make them look better. (The stereotypical way to calculate adjusted EBITDA is to take your negative net income for the quarter and add things back to it until you get a positive number.) Loosely speaking, it is almost true that every company makes money, by its own standards, but some companies lose money, by GAAP standards.

Still this can only be so true. There is a lot of room for interpretation, but not *infinite* room. At some level, either the money comes in or it doesn't.

Meanwhile companies increasingly disclose information about environmental sustainability and carbon emissions, and while there are a lot of sustainability accounting standards at this point, we do seem to be much closer to the world without GAAP. And presumably every company will think “we are doing the right things for sustainability, so our sustainability score is positive 100,” or whatever, whereas if you just picked a single standard for sustainability accounting some companies would be positive 100 and others would be negative 60.

Anyway here's a funny story about how the European Investment Bank's climate-friendly loans make up *either* 50% of its assets *or* 1%, depending how you count:

The European Investment Bank fears a "reputational disaster" this year if the EU applies reporting rules that would shatter its climate-friendly credentials, according to leaked internal correspondence.

The world's biggest multilateral lender by assets has branded itself as "the climate bank" and from 2021 phased out all fossil fuel investments from its loan book of more than €500bn.

But in a confidential email to colleagues seen by the Financial Times, the EIB's head of operations Jean-Christophe Laloux warned of a "major reputational risk" to the bank from new EU sustainable reporting rules, which this year require a taxonomy classifying green investments.

The reporting reforms would force the bank to declare a "Green Asset Ratio" — an EU standard intended to show the proportion of a bank's assets considered climate-friendly — of "around 1 per cent", compared with its current "Climate Action ratio" based on EIB-defined metrics that stands "above 50 per cent".

Both sides have some points:

[A letter from development banks including the EIB] said that "the way in which the Green Asset Ratio is currently calculated penalises a whole range of otherwise green investments, and will inadvertently, and paradoxically, discourage the financing of climate action by policy-driven lenders such as our institutions".

The commission has said that investments outside the EU are not included in the GAR because those businesses are not obliged to comply with the bloc's corporate sustainability rules. SMEs are also excluded.

The EIB, however, has been accused by campaign groups and current and former employees of a lack of transparency in the way it operates and being overly concerned about its reputation at the expense of proper due diligence.

And this is broadly true of GAAP too: There are some imperfections in GAAP, some places where you could argue that it doesn't reflect economic reality, often because it is too conservative. But it is probably a good thing, in general, to have a uniform accounting standard that sometimes embarrasses some companies.

\$5 wrench attack

If you do financial crimes, the government might put you in prison and take your money. If your money is in a bank, the government can go to the bank with a court order saying it can take your money, and the bank will cheerfully hand over the money. (If it didn't, it would get in trouble.) If your money is in *Bitcoin*, though, there is no one for the government to go to with a court order: Your money is on a decentralized, censorship-resistant blockchain, impervious to the demands of the government.

This is somewhat less appealing than people sometimes think, though, because the government can just come to *you* with that court order, and say “hand over your Bitcoin or we’ll throw you back in jail.” Only you have the private key, but the government has the jail. Bloomberg’s David Voreacos reports:

An early Bitcoin investor sentenced last month to two years in prison for tax fraud related to cryptocurrency sales has been ordered to disclose his secret pass codes so US officials can unlock digital assets now valued at about \$124 million.

Frank Richard Ahlgren III, who owes the government about \$1 million in restitution from the criminal case, must hand over the pass codes and identify any devices used to store them, along with disclosing all his cryptocurrency accounts, US District Judge Robert Pitman ruled Monday in federal court in Austin, Texas.

...

In their request, prosecutors said Ahlgren’s property “cannot be attached by ordinary physical means.” The government asked “not only to restrain any virtual currency by order of this court, but to obtain the private keys to enable it access so that it cannot be moved by others. Should the private keys be lost or destroyed, the virtual currency is irretrievable.”

A lot of technologies would work better and more simply and more pleasingly if people did not have bodies that exist in physical reality, but we do.

Things happen

Fighting for a Share of a \$1 Trillion Market in Borneo’s Jungle. AI Startup Anthropic Raising Funds Valuing It at \$60 Billion. U.S. Expands RealPage Price-Fixing Lawsuit to Include Six Big Landlords. Xi Jinping Muzzles Chinese Economist Who Dared to Doubt GDP Numbers. JPMorgan Planning to Bring Staff to Office Five Days a Week. Zuckerberg Wears \$900,000 Watch to Announce End of Meta Fact Checks. Former MoviePass Executive Pleads Guilty to Fraud Over ‘Unlimited’ Plan.

If you'd like to get Money Stuff in handy email form, right in your inbox, please subscribe at this link. Or you can subscribe to Money Stuff and other great Bloomberg newsletters here. Thanks!

To contact the author of this story:

Matt Levine at mlevine51@bloomberg.net

To contact the editor responsible for this story:

Wendy Pollack at wpollack@bloomberg.net

- 1. There will be many, many nuances that this column skips over, and this is one. As in student loans, it is possible that making it easy to borrow money to buy a house pushes up the price of houses and thus ultimately makes it harder to buy a house, but never mind!
- 2. You can imagine many more possibilities. “Bank regulators put lower capital requirements on residential mortgages,” maybe, or “bank regulators punish banks for not lending broadly enough,” or “banks don’t have to pay taxes on mortgage interest received,” or other things.

- 3. As we often discuss around here, banks historically dominated lending, but increasingly they don't. US mortgage lending — in part **because** of the guarantee structure we'll discuss — has long involved a lot of non-bank lenders.
- 4. Actually, the original approach in the 1930s was more of a blend of Approaches 1 and 2: Fannie Mae was originally a federal agency disbursing US government money to banks to make mortgages. But in the 1960s, "Fannie Mae became a private shareholder-owned corporation chartered by the U.S. Congress," apparently to get its (giant) operations off the government's financial statements.
- 5. The FHFA was created in 2008 and succeeded the Office of Federal Housing Enterprise Oversight, the previous regulator.
- 6. "All the Devils Are Here," Bethany McLean and Joe Nocera's financial crisis book, covers these issues brilliantly.
- 7. I assume the reason for this was roughly to make the Treasury facility junior to all of the mortgage guarantees. But here is "Ratings Agencies: The Forgotten Constituency of Financial Crisis Interventions," a clever recent paper by Ayo George and Steven Kelly at the Yale Program on Financial Stability, arguing that a lot of bailouts are structured as preferred stock to appease ratings agencies: A bailout in the form of additional lending could make the problem worse as a matter of credit ratings. I'm not sure that was relevant here, though.
- 8. After they build up enough capital to meet regulatory requirements (which has not happened yet), their payment to the government will be "the lesser of 10% of the liquidation preference of Treasury's senior preferred stock, or the incremental increase in the GSE's net worth in the prior quarter."
- 9. These numbers — the liquidation preferences of the preferred stocks — adjust each quarter, as each increase in the enterprises' net worths is added to the amounts they owe. So Fannie says: "The aggregate liquidation preference of the senior preferred stock increased to \$208.0 billion as of September 30, 2024 from \$203.5 billion as of June 30, 2024, due to the \$4.5 billion increase in our net worth in the second quarter of 2024. The aggregate liquidation preference of the senior preferred stock will further increase to \$212.0 billion as of December 31, 2024, due to the \$4.0 billion increase in our net worth in the third quarter of 2024." And Freddie: "Net worth was \$56.4 billion as of September 30, 2024, up from \$44.7 billion as of September 30, 2023. The quarterly increases in net worth have been, or will be, added to the aggregate liquidation preference of the senior preferred stock. The liquidation preference of the senior preferred stock was \$125.9 billion on September 30, 2024, and will increase to \$129.0 billion on December 31, 2024 based on the increase in net worth in 3Q 2024."
- 10. See pages 8-9 of Fannie's most recent 10-K and page 5 of Freddie's.
- 11. "I do not believe the common stocks have much institutional or hedge fund ownership today except for Pershing Square so nearly all value recovered will go to the government, taxpayers and small investors."
- 12. The regulatory capital framework for the enterprises includes a leverage ratio of 2.5% of adjusted total assets, meaning roughly 2.5% of mortgages guaranteed. (See page F-58 of Fannie's 10-K.) There are also risk-based capital metrics that might, depending how you count, be more constraining. Ackman: "A 2.5% capital ratio is the same required for mortgage insurers who by comparison guarantee the first ~20% of losses on often riskier mortgages with less creditworthy borrowers, compared with the GSEs' guarantee which attaches at the senior-most <=80% of the property's mortgaged value. Mortgage insurers therefore typically incur 100% losses on a default whereas by comparison GSE losses on a default are minimal."

- 13. A classic in the financial sector is: You think some asset is worth \$100, it's trading at \$80, you buy it for \$80. What is the value of that asset on your financial statements? Do you have \$20 of income the minute you buy it? The GAAP answer is mostly no, but there are controversies.
- 14. This is very unfair, and for a while I liked to make fun of "people are worried about non-GAAP accounting," but, you know, a little.
- 15. This is a standard crypto term, from an xkcd.
- 16. Actually there's a decent chance that your money is at a centralized crypto exchange, and the government can go to the exchange with a court order, and the exchange will cheerfully hand over the money. (If it didn't, it would get in trouble.) But let's assume it isn't, that you self-custody.

© 2025 Bloomberg L.P. All rights reserved. Used with permission.

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Coinbase Wins Bid for Fast Second Circuit Review in SEC Suit (1)

By Gillian R. Brassil

- Appellate decision could topple SEC's enforcement action
- Could alter how crypto platforms are regulated more broadly

Coinbase Inc. will get a chance to immediately appeal a district court order and have the Second Circuit address whether transactions involving digital assets are securities under federal law.

The resolution could ultimately topple the US Securities and Exchange Commission's enforcement action against the country's largest crypto exchange, Judge Katherine Polk Failla said in granting Coinbase's request for an interlocutory appeal to the US Court of Appeals for the Second Circuit on Tuesday. The US District Court for the Southern District of New York judge stayed proceedings in the SEC case pending the appeal.

The appeal queries how courts should apply the "Howey test" to crypto transactions, Failla said, "a difficult issue of first impression for the Second Circuit." The Howey test comes from a 1946 Supreme Court case that provided a roadmap for determining whether a transaction is an investment contract.

A Second Circuit decision finding that token trades aren't securities transactions could more broadly loosen US crypto regulation amid other SEC actions.

The district court decision comes ahead of a Trump administration SEC shakeup that might also provide crypto companies more regulatory leeway.

The SEC sued Coinbase in 2023, alleging the trading platform violated federal law by selling crypto as an unregistered securities exchange, broker, and clearing agency. Coinbase argued its crypto-assets weren't investment contracts, that crypto token issuers don't owe a "contractual obligation to a retail buyer," and thus their regulation doesn't fall under the SEC's purview.

Coinbase likened its trading to real estate transactions, which have been found not to be securities, Failla said Tuesday. Coinbase had asked the SDNY to dump the case following a 2023 decision by a different federal judge that Ripple Labs' XRP wasn't a security when sold on exchanges.

Failla previously found certain transactions involving tokens qualified as investment contracts, allowing the SEC case against Coinbase to move forward.

“Another blow against the current SEC’s leadership’s effort to sow continued uncertainty and confusion,” Coinbase’s chief policy officer Faryar Shirzad said on X, the social media platform formerly known as Twitter.

The SEC declined to comment in an email.

Coinbase’s counsel includes Wachtell, Lipton, Rosen & Katz.

The case is SEC v. Coinbase, Inc. , S.D.N.Y., No. 1:23-cv-04738, 1/7/25 .

(Updates story to include Coinbase’s comment in the ninth paragraph.)

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

To contact the editor responsible for this story: Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Kraken Unlikely to Revive Major Questions Defense Against SEC

By Isaiah Poritz

- Crypto platform can ask to raise defense if industry evolves
- Judge will likely allow firm to proceed with two other defenses

Cryptocurrency platform Kraken during a court hearing Wednesday appeared unlikely to revive a key legal defense in its battle with the US Securities and Exchange Commission over whether it should have registered as a securities broker.

Judge William H. Orrick III said he had already determined in a prior ruling that Kraken couldn't invoke the major questions doctrine, a legal principle that says agencies lack regulatory power over important economic issues unless Congress explicitly designated that authority.

The judge sitting for the US District Court for the Northern District of California had previously determined that the question of whether crypto assets sold on Kraken's platform are securities doesn't give rise to a major economic or political issue at the moment.

But Orrick said he would be willing to revisit the defense at a later time.

"It may be that the situations have changed, the contexts have changed," he said. "I imagine that we're going to see a whole lot of change in the industry during the time of this case."

The case is one of a number of lawsuits brought by the SEC against crypto trading platforms alleging that they should have registered with the agency because they operate as broker-dealers and exchanges for crypto asset securities.

Kraken, one of the oldest crypto platforms founded in 2011, allows users to buy and sell a range of cryptocurrencies on through its online market. The SEC sued Kraken in 2023, alleging the platform reaped hundreds of millions of dollars from investors without properly registering as a securities broker.

Orrick said he likely would allow Kraken to put forward two other legal defenses that the SEC failed to provide fair notice that Kraken's conduct was unlawful, and that the agency's argument that digital assets are investment contracts is too vague.

The judge said he would issue a written ruling on the SEC's motion for judgment on the pleadings, which seeks to strike Kraken's three legal defenses.

In 2024 Orrick denied Kraken's motion to dismiss, finding that the SEC plausibly alleged that the crypto transactions on the platform are unregistered securities transactions, as defined by the US Supreme Court test *SEC v. WJ Howey Co.*

The judge declined to certify that ruling to the US Court of Appeals for the Ninth Circuit.

Waymaker LLP and Cleary Gottlieb Steen & Hamilton LLP represent Kraken.

The case is SEC v. Payward Inc., N.D. Cal., No. 3:23-cv-06003, hearing 1/8/25 .

To contact the reporter on this story: Isaiah Poritz in San Francisco at iporitz@bloombergindustry.com

To contact the editor responsible for this story: Amy Lee Rosen at arosen@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

**Bloomberg
Law**[Request a Demo](#)[Login](#)[Securities Law News](#)

Jan. 8, 2025, 2:00 PM PST

Analyst Job Cuts, Pay Squeeze Upend Wall Street Equity Research

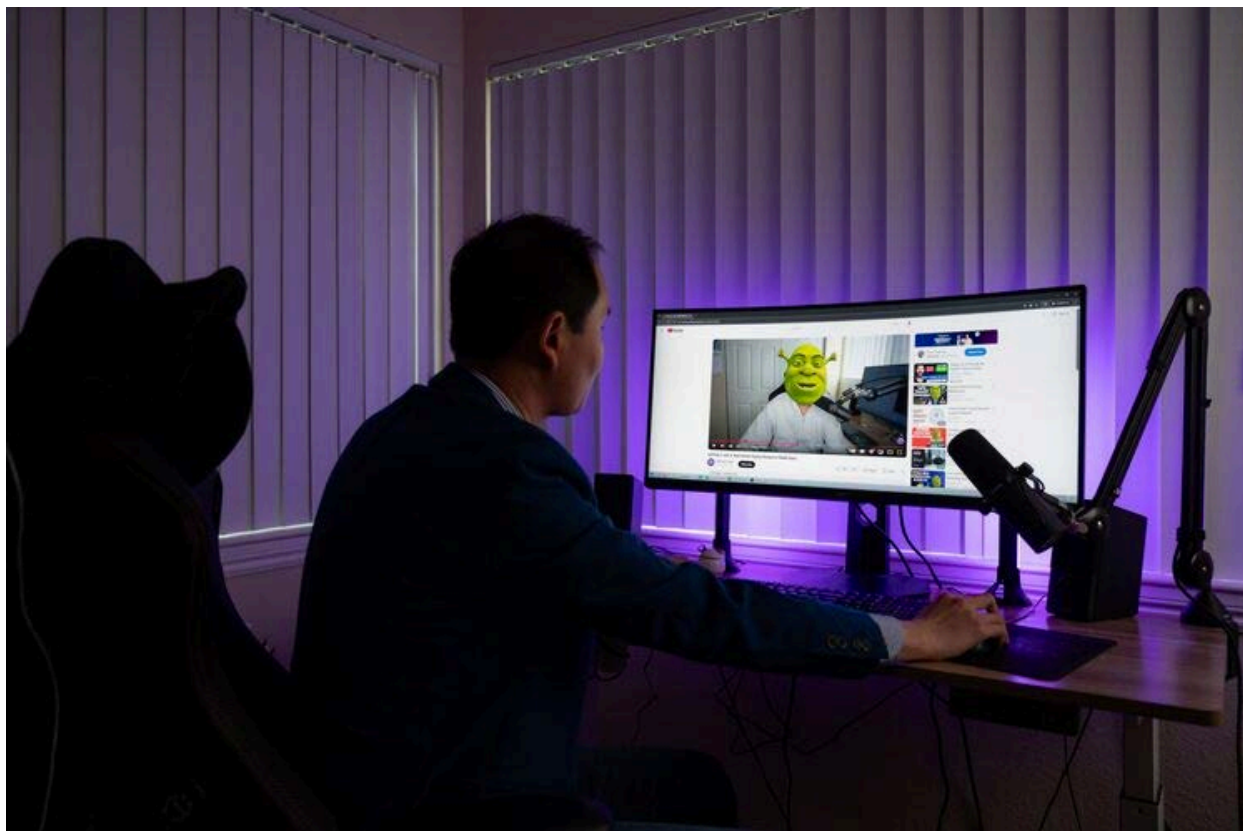
By Sujata Rao, Denitsa Tsekova and Isolde MacDonogh

Deep Dive

Jerry Diao had all the makings of a successful Wall Street analyst. A degree in statistics from UC Berkeley. An MBA from NYU. And a job in equity research at a big bank covering Silicon Valley tech stocks.

But instead of a life of market-moving stock calls, six-figure bonuses and glad-handing execs on another great quarter of earnings, these days, Diao plies his trade on social media, dishing out advice on the finance industry. On YouTube, Diao goes by the nom de guerre “Richard Toad,” and until recently, he masqueraded his irreverent takes behind an avatar of Shrek.

It’s been humbling for Diao, who started out in so-called sell-side research six years ago. He’s had to move back home to Northern California, and despite a 40,000-strong following, his “five-figure income” is just a third of what he used to earn. But after trying, and failing, to get back into the industry after leaving Wall Street in 2022, Diao has little choice. Making it as a “content creator,” he says, is the No. 1 goal now.



Jerry Diao previously used a “Shrek” avatar to hide his face in his videos before going public.

Photographer: Mike Kai Chen/Bloomberg

“Maybe in hindsight, I will thank all the companies that rejected me,” he said.

Diao, 37, is just one of scores of former analysts who’ve had to reinvent themselves in the face of a seismic upheaval reverberating through Wall Street.

Few corners of finance have been hit harder by job cuts in recent years than equity research. Regulations on how banks charge for research, a shrinking market for publicly listed companies, and the popularity of index-tracking funds have conspired to squeeze equity research in ways few could have imagined even a decade ago. Leaps in artificial intelligence only threaten to accelerate that trend, with firms like JPMorgan already experimenting with AI-powered analyst chatbots, sowing deeper doubts about the value of fundamental analysis and whether investors will keep paying for it.

Compared with their post-financial crisis peak, it’s estimated that the biggest banks globally have slashed the ranks of equity analysts by over 30% to lows not seen in at least a decade. Those who remain often cover twice, or even three times, as many companies. And the pay, while still far higher than most jobs in industries outside finance, has stagnated.

For example, starting salaries for entry-level equity analysts currently range from \$110,000-\$170,000 a year, barely above their pre-crisis levels, according to Vali Analytics. After taking inflation into account, total compensation has actually decreased by nearly a third over that span.

The fallout is already reshaping Wall Street. But it's also having knock-on effects on the structure of the stock market itself, in how individual companies, both big and small, are valued. (More on that later.)

No one expects compensation to return to the heyday of the late '90s and early 2000s, of course, when star analysts like Mary Meeker and Jack Grubman were fêted like celebrities and reportedly made upwards of \$15 million or more, and stock recommendations, more often than not, were geared toward winning underwriting business for their banking arms. And it's not too hard to understand why equity analysts might be in the crosshairs as automation proliferates, investors embrace cheap, passive-investing strategies like ETFs and the broader market keeps hitting record after record.

Nevertheless, the numbers underscore an industry in steep decline.

At the world's 15 biggest banks, the number of equity analysts has fallen to about 3,000 from almost 4,600 a decade ago, according to Vali Analytics. The biggest cuts have occurred in Europe and Asia, excluding Japan. Data from Coalition Research shows a similar decline. Apart from an outlier or two, the reductions have been widespread and few equity research departments have been spared. Industry insiders say Citigroup and Deutsche Bank were among the more notable banks in paring headcount. Both declined to comment. (Bloomberg LP, the parent company of Bloomberg News, produces equity research that competes with analysis from Wall Street firms.)



Meanwhile, despite a small uptick in the first half of last year, spending on research globally has sunk 50% since 2018, data from Substantive Research show. That year, MiFID II was enacted, forcing asset managers in the UK and European Union to pay for research, rather than offering it for free as part of a suite of services. US brokers supplying research to Europe-based managers also became subject to the rule two years ago.

The result? Equity research has become “an orphaned child that’s always looking for a home,” according to Robert Buckland, who was Citigroup’s head of equity strategy until 2023.

Some former analysts have managed to find work at hedge funds, while others have jumped ship to work in investor relations at firms they once covered. Buckland himself is now at a startup called EngineAI, which applies AI programs to various fields, including equity research.

For those who have stuck around, job security is tenuous.

Take, for instance, George O’Connor. The technology analyst has bounced around London from one firm to the next in recent years, and has now worked for a half-dozen shops since becoming an equity analyst in the late 1990s. Currently at Progressive Equity Research, O’Connor says the “unbundling” of research from trading, ostensibly meant to level the playing field, gave big banks an upper hand because they could charge less for more wide-ranging coverage.

“There was also a flight to cheap driven by much larger global providers, which sort of knocked smaller companies out of the water,” he said. “It’s just economics 101.”

Individual analysts are saddled with more companies to cover, leaving less time for in-depth analysis. According to Zaki Ahmed, a veteran headhunter who runs recruiting firm Financial Search, banks often want analysts to cover as many as 20 stocks as they shrink their research teams.

The buy-side is feeling the pinch, too. Matt Stucky, a money manager at Northwestern Mutual Wealth Management, says there either simply aren’t enough analysts covering the companies he’s interested in or they’re spread too thin. As a result, he’s had to do more of the legwork himself to get the answers he wants.

You don’t get the “same level of information you had when a company had 20 people covering it,” Stucky said.

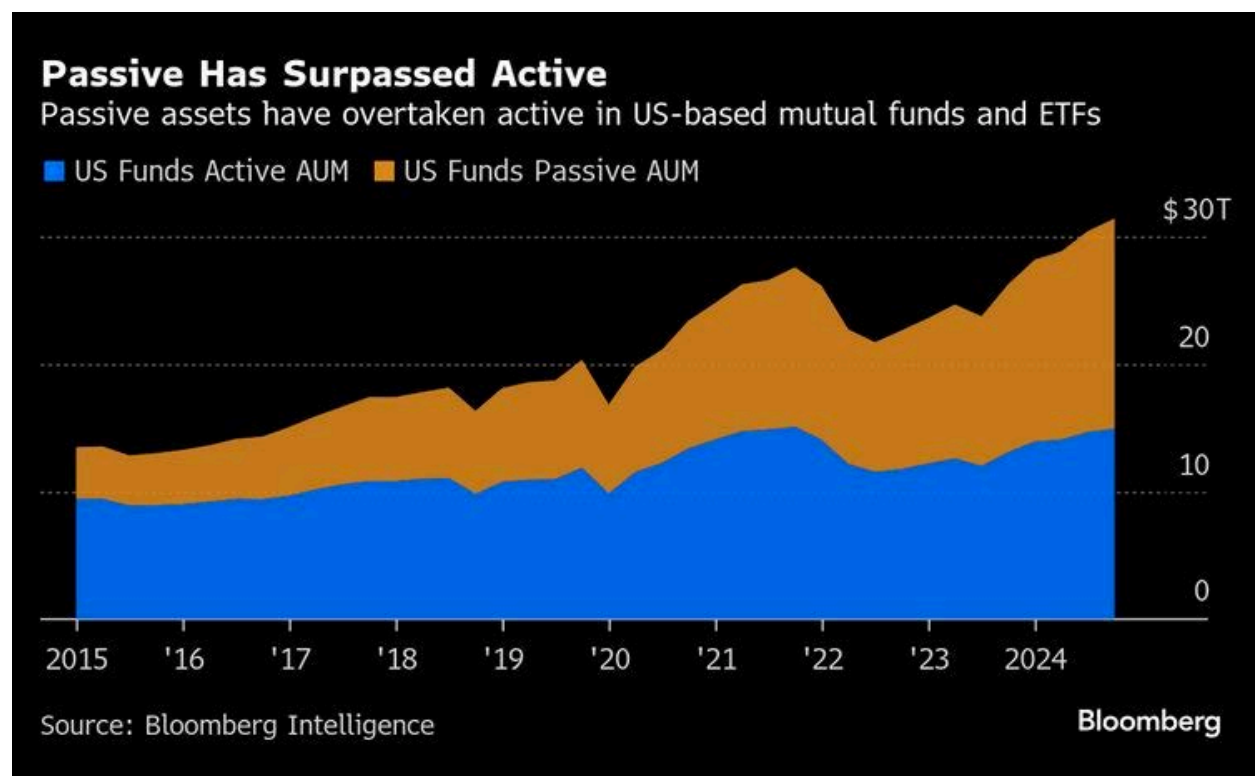
Currently, companies in the Russell 2000 Index with fewer than 10 analyst recommendations have ballooned to some 1,500 from 880 a decade ago, an increase of 70%, data compiled by Bloomberg show. Conversely, coverage has become concentrated in the biggest names. Today, about 97% of the S&P 500 have 10 or more ratings, up from about two-thirds in 2014.

A growing body of evidence suggests stocks that fall off the sell-side radar often struggle to attract investors, distorting valuations and making markets less efficient.

One academic paper, which looked at data over a 40-year period, showed how investors consistently over- or undervalued companies covered by fewer analysts. Another study found firms that had a decrease in coverage showed a significant decline in investor recognition, increasing their cost of capital. A third showed that low-coverage stocks traded less and had wider bid-ask spreads, while “orphaned” companies were far more likely to be delisted.

They’re also more likely to underperform. Small-cap companies with no coverage, for example, have lagged behind those covered by more than 10 analysts by nearly 3 percentage points a year since 2001, according to Steven DeSanctis, a small- and mid-cap strategist at Jefferies.

“For small companies that are already covered by fewer analysts to start with, each one less will hurt them more,” said Kevin Li, a professor at Santa Clara University and co-author of one of the papers. “The downtrend is probably not preventable, given the move away from active investment. Now, with AI, we could see that (human) role reduce further.”



Part of the irony is that the lack of in-depth analysis which asset managers bemoan is a direct consequence of their unwillingness to pay for it. And as they “continue to spend less and less” for bank research, Integrity Research’s Mike Mayhew says they’ll likely look for more cost-effective ways to fill the gaps.

That includes relying on in-house analysts or non-bank sources like those on blogging platform Substack, often written by the very analysts caught up in budget cuts and staffing culls. Northwestern Mutual’s Stucky subscribes to a few himself and values their “unfiltered” takes. (He declined to identify them.)

Indeed, online finance blogs have exploded in recent years, with Substack estimating it now hosts tens of thousands of them.

One is written by Alex Morris. He runs TSOH Investment Research (it stands for *The Science Of Hitting* — he's a big baseball fan), which has racked up nearly 700 paid subscribers since 2021. At \$499 annually, that equates to roughly \$260,000 a year after fees, etc. — more than double what he earned at the Fiduciary Group, a small investment adviser in Savannah, Georgia.

Morris discloses his recommendations at 5 p.m. Eastern time and then invests in them the next day. Last year, his 10-stock portfolio, which included Netflix and Meta, returned 21%, versus the S&P 500 Index's 23% gain. It's the third time in the past four years that he's fallen short of his benchmark, yet he's continued to attract followers despite his mixed record.

Asked why they should stick with him rather than buying an ETF, Morris says history suggests the S&P 500's outsize gains won't likely last. Part of his draw, he says, is that he talks about his winners and losers and puts all his investable assets behind his calls.

"The industry has had issues in the past in terms of what the person writing the research actually thinks, versus what they would do if they were managing their own money," he said.

Another is by Barry Knapp, a longtime strategist who built a following over four decades on Wall Street with Lehman Brothers, BlackRock, and most recently, Guggenheim. He currently has "hundreds" of paying Substack subscribers, each of whom forks over \$999 a year for his macro research.

His home office faces the slopes of Vail, Colorado, a nice change from his commutes into Manhattan. But Knapp says that even with his résumé and built-in following, the market for sell-side research isn't what is used to be.

"For someone like me to go back and work on the Street for a number that is not even close to what I was making in 2000?" Knapp mused. "What would be the point?"



Jerry Diao

Photographer: Mike Kai Chen/Bloomberg

Reliable figures on how lucrative financial blogging is as a full-time profession are scant, as is data on how many analysts have parlayed their Wall Street bona fides into genuine success on social media. While some, like Morris and Knapp, have managed to make it work, the signs suggest that most end up toiling away in relative obscurity.

Back in the San Francisco Bay Area, Diao continues to create content on YouTube, Substack and Instagram, hoping one day to break through.

He touts the benefits of his newfound vocation. No need to dress up or commute to the office, no more 80-hour weeks. He can produce all his blogs and podcasts in his bedroom with a laptop and a microphone.

All he needs now is a little bit of luck — and a few more paying subscribers.

“These kinds of things, once they hit critical mass, can suddenly become big enough to pay rent and put meals on the table,” Diao said. “And at this point, that’s all I’m hoping for, because the freedom that comes with it, you can’t put a price on that.”

To contact the authors of this story:

Sujata Rao in London at sraocoverley@bloomberg.net

Latham & Watkins Flexes Its Muscle in Shrunk IPO Market

By Roy Strom

Column

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at one firm that outperformed in a down market for taking companies public. Sign up for Business & Practice , a free morning newsletter from Bloomberg Law.

Latham & Watkins separated itself from the pack of law firms, both in the US and across the globe, in another slow year for initial public offerings.

No firm advised on as many IPOs as Latham, between its company-side and underwriter-side work. The firm also topped the global rankings for the amount raised on both sides of its IPO work, according to data compiled by Bloomberg.

"It helps to be number one in a down market," said Ian Schuman, Latham's global chair of capital markets. "When there are not as many deals out there, you want to make sure you get as many as you can."

In capital markets, top firms in a given product area can outperform in a down year. With less activity, clients have their pick of law firms, helping those with a top brand to stand out.

Latham represented the most issuers of newly-public shares in the US, helping companies raise \$7.5 billion last year, Bloomberg data show. That's more than twice the next closest law firm, Venable, LLP. Latham's high-profile deals included shepherding Lineage Inc. to the largest IPO of 2024, helping the temperature-controlled warehouse REIT raise an initial \$4.4 billion. The firm also advised Reddit Inc., StandardAero Inc., and UL Solutions Inc.

Combined with its work on the underwriter side—and excluding blank-check vehicles—Latham said it worked on nearly half of all large IPOs in the US last year. Firms rarely achieve that market share in a highly fragmented and competitive space.

What's Ahead?

The question is what comes next—both for an important market for Big Law firms, and Latham itself.

Latham's global capital markets chair Ian Schuman said he expects 2025 will be a "step up" from IPO activity last year, noting a deep backlog of clients preparing to go public. The firm is targeting a repeat of its 50% market share among large deals for next year, a goal he said is "ambitious but definitely achievable."

The end of 2024 and early days of this year have been promising, as a handful of large companies filed paperwork with US regulators showing they intend to list new shares. At least nine companies targeting IPOs this year may each raise \$1 billion or more for a total of around \$18 billion.

A strong market in 2025 is important to law firms on multiple fronts. The value of the IPO practice goes beyond the revenue generated on the matter itself, Schuman said. It helps develop relationships with large, growing companies.

"It makes us a much more stable business and a much more growth-oriented business," Schuman said, "because we're not just beholden to the capital markets in any given year. It serves as a fulcrum to cultivate more relationships."

Splintered Leadership

The US IPO market is traditionally fragmented among leading law firms. Between 2013 and 2022, Simpson Thacher & Bartlett posted the highest mark by representing 15.5% of issuers of newly-public shares in 2015.

The leading market share figures have grown in the past two years, however, as the overall IPO market significantly contracted. Latham grabbed a 22% market share on the company side this year, and Cravath Swaine & Moore held 21% of the market in 2023—thanks to its work on a single megadeal that raised \$4.37 billion (Johnson & Johnson's healthcare unit Kenvue Inc.).

Deals Consolidate as IPO Market Struggles

Table lists the top firms advising on US company-side IPOs.

Year	Top Firm By Value	Top Firm Deal Count	Top Firm Market Share
2013	Vinson & Elkins	9	11.5%
2014	Vinson & Elkins	12	10.0
2015	Simpson Thacher & Bartlett	6	15.6
2016	Weil Gotshal & Manges	4	7.1
2017	Cooley	14	12.5
2018	Debevoise & Plimpton	1	7.0
2019	Cooley	21	14.7
2020	Kirkland & Ellis	35	8.7
2021	Latham & Watkins	71	13.3
2022	Maples & Calder	19	11.3
2023	Cravath Swaine & Moore	1	20.9
2024	Latham & Watkins	12	21.6

Source: Bloomberg Terminal

Bloomberg Law

When Latham grabbed the top spot in 2021, the busiest year for US IPOs on record, it did so with a 13% market share—while advising on 71 total deals.

Latham has multiple avenues for capturing IPO work through its relationship with banks underwriting the transactions and private equity firms whose portfolio companies go public, and by capturing business from growing companies outside the private equity landscape.

“We’re not just a private equity or public company law firm,” said Stelios Saffos, global vice chair of Latham’s capital markets and public company representation practices. “We’re doing so much of everything. We think that’s important because clients get more value from being in the Latham ecosystem than just pure legal work.”

It all adds up to Latham being well-positioned if there’s another down year in the market. Still, the firm is hoping there is more IPO work to go around in 2025.

Worth Your Time

On Big Law 2025: My colleagues Meghan Tribe, Justin Henry, and Chris Opfer went on Bloomberg Law’s On The Merits podcast to discuss all the important trends for Big Law firms in 2025.

On M&A: Jones Day partner David Grubman is heading to Sidley Austin to help lead the firm's global mergers and acquisitions practice, Justin Henry reports.

On US Attorneys: John Irving, a lawyer for top Donald Trump allies caught up in Jan. 6 riot scrutiny and the Mar-a-Lago documents case, is being considered as the president-elect's US attorney in Washington, Ben Penn reports.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

To contact the reporter on this story: Roy Strom in Chicago at rstrom@bloombergindustry.com

To contact the editors responsible for this story: John Hughes at jhughes@bloombergindustry.com; Chris Opfer at copfer@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Litigation

Jan. 9, 2025, 1:30AM PST

Heightened ERC Claim Scrutiny Poses M&A Challenges, Other Risks

- *Berkeley Research Group experts review ERC claim risks*
- *Independent professionals can help taxpayers weigh options*

Companies involved in mergers and acquisitions must navigate complexities that can affect their valuation and operational integrity. The rise of questionable employee retention credit claims recently has emerged as one such concern.

The Coronavirus Aid, Relief, and Economic Security Act established the credit to support small businesses affected by the Covid-19 pandemic—up to \$26,000 per employee. Many companies submitted claims that, given recent IRS guidance and announcements, may not survive IRS scrutiny. Accordingly, companies should perform thorough due diligence of a claim—whether pending or already received—to mitigate risks that cause significant issues post-transaction.

Increased ERC Scrutiny

The IRS continues to raise concerns about questionable claims and has ramped up its evaluation and enforcement of ERC submissions, such as by implementing a yearlong moratorium on processing claims.

The agency's focus stems from what it asserts are alarming trends indicating that businesses may have engaged in questionable practices. These include misrepresenting employee counts, claiming credits for wages not actually paid, failing to deduct Paycheck Protection Program funds, claiming the credit for too many quarters, citing governmental orders that don't meet the program's eligibility requirements, and alleging false or misleading operational impacts resulting from the pandemic.

Even well-supported claims may face scrutiny due to the IRS's narrow interpretation of its guidance, leading to "good" claims being denied, audited, or clawed back if payments have already been made.

The IRS has warned of civil and criminal penalties for individuals and businesses submitting claims it deems ineligible. This scrutiny can affect mergers and acquisitions, as buyers may become wary of potential liabilities stemming from the target company's ERC claims.

Potential Risks

When companies engage in M&A, potential buyers conduct thorough due diligence, scrutinizing tax filings, revenue projections, and financial metrics. Questionable ERC claims can create significant discrepancies and mislead prospective buyers.

If these claims are deemed erroneous or fraudulent, the company could face penalties, including repayment of the credits, interest, fines, and legal action. Such liabilities can hurt a company's valuation, leading to renegotiations, deal cancellations, litigation, or bankruptcy—and create a chilling effect on the M&A market, as potential buyers may shy away from deals perceived as high-risk.

Questionable ERC claims also can raise risks during or after a transaction has closed. If a company's claim is challenged there are several other risks to consider.

Enforcement risk. An improper ERC claim could result in IRS denial, audit, claim clawback, or civil enforcement that may include repayment, penalties, interest, and other fees. Criminal enforcement by the IRS or Department of Justice is possible in egregious cases.

Litigation risk. If claims are found to be erroneous, companies could face lawsuits from stakeholders.

Transaction risk. A questionable ERC claim can erode confidence with prospective buyers, impact transaction terms, or jeopardize the transaction.

Reputational risk. In an era where corporate integrity is paramount, avoiding publicized disputes or penalties related to ERC claims can help preserve a company's image and make it more attractive to buyers, reducing the risk of reputational damage.

To reduce risks, companies engaged in M&A should consider hiring independent experts who are experienced with reviewing claims.

These professionals provide unbiased assessments, identify weaknesses, ensure supporting documentation aligns with IRS guidance, and address potential red flags. They also can recommend withdrawing claims or returning funds and can represent taxpayers in IRS audits or litigation.

Resolving Unsupportable Claims

If a company discovers a questionable ERC claim during a merger or acquisition, it may consider several resolution options.

Withdraw the claim. If the option is available, proactively withdrawing an ERC claim may eliminate or reduce potential penalties and interest and demonstrate good faith.

Disclose to the buyer. Full disclosure of any ERC claim to the buyer is crucial. This transparency aids in negotiating the terms of the deal, including purchase price adjustments or indemnification clauses for potential liabilities.

Renegotiate deal terms. If an ERC claim substantially affects the financials of the deal, a company may need to renegotiate the terms of the transaction.

Purchase ERC insurance. ERC insurance may be available, but it is often costly and may involve lengthy and extensive underwriting.

Escrow ERC funds. Companies often opt to put an amount equal to the ERC claim in escrow until the statute of limitations lapses or, in cases where there is already an appeal, a final decision is made.

Prepare for potential repayment or appeal. If the IRS disallows the claim, the company should prepare either to repay the credit and any applicable penalties and interest or appeal the IRS's decision through litigation.

Seek professional advice. Independent experts can help navigate the complexities of the ERC, strengthen claims, or work with the IRS to minimize risks.

The rise of questionable ERC claims presents a complex challenge for companies navigating M&A. As the IRS intensifies scrutiny of these claims, the risks associated with ERCs continue to increase.

By prioritizing transparency and engaging independent experts to review ERC claims, companies can mitigate financial, enforcement, litigation, transaction, and reputational risks. This proactive approach allows companies to proceed with M&A with greater confidence.

This article does not necessarily reflect the opinion of Bloomberg Industry Group, Inc., the publisher of Bloomberg Law and Bloomberg Tax, or its owners.

Author Information

Jesse R. Morton is a managing director, and Joe Kody is a senior managing consultant, in the forensic accounting and compliance, investigations, and disputes group at Berkeley Research Group.

Write for Us: Author Guidelines

To contact the editors responsible for this story: Daniel Xu at dxu@bloombergindustry.com; Melanie Cohen at mcohen@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

U.S. Steel's thwarted merger, and a novel bid for recompense

 [reuters.com/legal/government/column-us-steels-thwarted-merger-novel-bid-recompense-2025-01-08](https://www.reuters.com/legal/government/column-us-steels-thwarted-merger-novel-bid-recompense-2025-01-08)

Jenna Greene

A United Steelworkers sign is seen outside the Great Lakes Works United States Steel plant in River Rouge, Michigan U.S., September 16, 2024. REUTERS/Rebecca Cook/File Photo
Purchase Licensing Rights [↗](#), opens new tab

Jan 8 (Reuters) - “Thuggish tactics.” “Campaign of lies.” “Xenophobic.” “Befitting a mafia boss.”

A sense of anger thrums throughout the lawsuit by U.S. Steel and Nippon Steel against rival steel maker Cleveland-Cliffs, its CEO and the president of the United Steelworkers union, in a case that plaintiffs claim could yield billions of dollars in damages for allegedly subverting their now-scuttled merger.

Filed Monday in federal court in Pittsburgh, the 93-page complaint [↗](#), opens new tab alleges that the defendants violated the Sherman Antitrust Act and the federal law against racketeering in opposing Nippon Steel’s \$14.9 billion bid for U.S. Steel.

Ohio-based Cleveland-Cliffs’ offer to buy U.S. Steel was previously rejected by the company, despite adamant union support.

“I’m not aware of any other (cases) like this,” Freshfields antitrust partner Andrew Ewalt, who is not involved in the dispute, told me. “It’s outside the mainstream.”

Still, if the plaintiffs (and their army of lawyers from five major firms) were to prevail, the implications for the merger review process -- where it’s not uncommon for complaining competitors to lobby against regulatory approval of their rivals’ deals or for conditions to be imposed -- could be significant.

Though as Ewalt pointed out, “It’s a very, very steep uphill climb.”

Spokespeople from Nippon Steel and U.S. Steel did not respond to requests for comment.

Cleveland-Cliffs CEO Lourenco Goncalves in a statement called the lawsuit “legal theatrics” and “a shameless effort to scapegoat others.”

A USW spokesperson said the union is “reviewing the complaint and will vigorously defend against these baseless allegations.”

President Joe Biden last week blocked Japanese-owned Nippon’s acquisition of U.S. Steel on national security grounds. In a separate petition [↗](#), opens new tab against the

government also filed on Monday, the companies argue the president's decision was motivated by politics rather than legitimate security concerns, and that their due process rights were violated.

As my Reuters colleagues reported, that lawsuit may also be a stretch, given judicial deference to the executive branch on questions of national security. Moreover, the Committee on Foreign Investment in the United States, or CFIUS, statute explicitly bars courts from reviewing presidential decisions on the merits--though a due process challenge by Chinese-owned Ralls Corp succeeded in 2014.

Nippon Steel's bid is the ninth foreign transaction blocked by a U.S. president since the law's inception in 1988, according to the Congressional Research Service [\[1\]](#), opens new tab, and the only one involving Japan, a close U.S. ally.

Regardless of whether Nippon and U.S. Steel succeed in getting Biden's order set aside, the companies argue that Cliffs, its CEO Goncalves and USW President David McCall are "monopolists and racketeers" whose unlawful conduct should be enjoined by the court and punished with steep monetary penalties.

Nippon, represented by lawyers from Reed Smith and Ropes & Gray, and U.S. Steel, with counsel from K&L Gates; Wachtell, Lipton, Rosen & Katz; and Milbank, argue that Cliffs struck an illegal deal with the USW.

According to the complaint, the defendants' basic labor agreement includes a provision in which the USW committed to help Cliffs "aggressively pursue opportunities" to "acquire steelmaking capacity."

Cliffs allegedly secured the union's "exclusive support" to buy U.S. Steel, scaring other suitors away and making the Ohio company the lone viable bidder, the plaintiffs allege -- an unlawful conspiracy under the Sherman Act.

While specifics of the alleged agreement are likely to be key in determining its propriety, it's not uncommon for unions generally to play a role in merger review, pressuring one or both firms to drop or modify merger plans, or to demand concessions in exchange for support, according to Chicago Law School Professor Eric Posner.

In his law review article [\[2\]](#), opens new tab published last year, Posner, who did not respond to a request for comment, reviewed 46 attempted mergers over the last 25 years with union involvement. Posner found unions supported seven of the tie-ups, opposed 34 and took mixed positions on five.

Indeed, USW in 2006 worked to thwart Brazilian steel giant Companhia Siderurgica Nacional's acquisition of Wheeling-Pittsburgh Steel Corp.

Nippon and U.S. Steel also allege that the defendants "so corrupted and tainted the CFIUS process that there was no process."

But the supporting details seem scant. The complaint alleges that Cliffs CEO Goncalves “admitted to being in regular communication with the Secretary of Commerce, a CFIUS member and co-lead for the transaction review.”

Also, the complaint alleges, the USW’s McCall was appointed by the president to be an official advisor to Ambassador Katherine Tai, the United States Trade Representative, who allegedly opposed the merger.

As far as accusations go, these don’t strike me as especially damning.

Still, Ewalt’s Freshfields colleague Aimen Mir, who heads the firm’s CIFIUS practice, said there appears to have been “significant problems with how the process unfolded.”

For example, Biden spoke out against the transaction in March before the review even started. (President-elect Donald Trump in a post on his Truth Social platform also said [he](#), opens new tab he was “totally against” it.) Nor does U.S. Steel produce any military-grade products or have defense contracts, according to the complaint, undercutting purported national security worries.

But is it plausible to blame Goncalves and McCall for “subverting” the CIFIUS outcome by urging government decision makers to block the deal?

The allegations may be tricky to stick, given the Noerr-Pennington doctrine [he](#), opens new tab, Alden Abbott, a senior research fellow at George Mason University’s Mercatus Center and former general counsel of the U.S. Federal Trade Commission, told me.

Per a series of cases known collectively as Noerr-Pennington, courts in interpreting the Sherman Act must respect the rights of citizens to request government action, even if that action limits or eliminates competition.

Do the alleged actions of Goncalves and McCall in lobbying CIFIUS to kill the deal “raise antitrust issues?” Abbott said. “I doubt it.”

Jumpstart your morning with the latest legal news delivered straight to your inbox from The Daily Docket newsletter. Sign up [here](#).

Reporting by Jenna Greene

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

- Suggested Topics:
- Government

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

- 
- 
- 

UnitedHealth Investors Seek Care Costs Study After CEO's Killing

By Andrew Ramonas

- Shareholders push for vote on report at company's annual meeting
- Campaign follows fatal shooting of Brian Thompson in New York

UnitedHealth Group Inc. shareholders are pressing the company's board to report on public health costs and risks from restricting or delaying patients' access to care, following the shooting death of one of its executives.

A group of investors organized by the Interfaith Center on Corporate Responsibility submitted a proposal seeking the study for a vote at UnitedHealth's annual shareholder meeting this year, the advocacy group said Wednesday. The 2025 meeting, which has yet to be scheduled, will be the first such gathering since the December killing of Brian Thompson, CEO of UnitedHealth's insurance unit.

Luigi Mangione has pleaded not guilty to murder charges stemming from the shooting in Manhattan. The 26-year-old Ivy League graduate has received support from some observers on social media and elsewhere who are frustrated with health insurers.

"As the tragic murder of UNH's Brian Thompson made evident, public outrage over the exorbitant costs and restricted access to healthcare has reached a dangerous level in our country," Timnit Ghermay of the Congregation des Soeurs des Saints Noms de Jesus et de Marie, a UnitedHealth shareholder behind the proposal, said in a statement. "Our proposal suggests some introspection by UNH that will help the company and all its stakeholders thrive."

The Interfaith Center on Corporate Responsibility advocates on behalf of faith-based investors and others focused on sustainable investing.

UnitedHealth hasn't said whether it will include the resolution on its 2025 proxy ballot. Companies are allowed to bar any proposals that micromanage their business, among other reasons, under Securities and Exchange Commission rules.

Companies often seek advice from the SEC before they decide to block votes on shareholder proposals.

A UnitedHealth representative declined to comment.

To contact the reporter on this story: Andrew Ramonas in Washington at aramonas@bloomberglaw.com

To contact the editors responsible for this story: Jeff Harrington at jharrington@bloombergindustry.com;
Andrea Vittorio at avittorio@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

DOJ accuses nation's largest landlords of scheme to rip-off tenants

 [rawstory.com/justice-department-sues-six-of-the-nations-largest-landlords-in-effort-to-stop-alleged-pr](https://www.rawstory.com/justice-department-sues-six-of-the-nations-largest-landlords-in-effort-to-stop-alleged-pr)

Heather Vogell, ProPublica

January 9, 2025

The headquarters of the FBI. (Shutterstock)

The Department of Justice on Tuesday sued six of the nation's largest landlords, accusing them of using a pricing algorithm to improperly work together to raise rents across the country.

The lawsuit expands an antitrust complaint the department filed in August that accused property management software-maker RealPage of engaging in illegal price-fixing to reduce competition among landlords so prices — and profits — would soar. Officials conducted a two-year investigation into the scheme following a 2022 ProPublica story that showed how RealPage was helping landlords set rents across the country in a way that legal experts said could result in cartel-like behavior.

Together, the six landlords manage more than 1.3 million apartments in 43 states and the District of Columbia. Prosecutors have already negotiated a settlement with one of them.

“While Americans across the country struggled to afford housing, the landlords named in today's lawsuit shared sensitive information about rental prices and used algorithms to coordinate to keep the price of rent high,” said acting Assistant Attorney General Doha Mekki of the Justice Department's Antitrust Division. The suit seeks to end “their practice of putting profits over people” and to make housing more affordable.

The legal action is the latest development to follow ProPublica's initial investigation. Since 2022, senators have introduced legislation seeking to ban the use of rent algorithms similar to RealPage's, and tenants have filed dozens of ongoing federal lawsuits. Cities around the country, including San Francisco, Philadelphia and Minneapolis, have also moved to bar landlords from using similar algorithms to set rents.

RealPage's popular software was collecting nonpublic pricing information from multiple property managers and feeding it through a common algorithm, which then recommended an optimal rent level to those who used it — in violation of rules that prohibit such coordination, federal prosecutors alleged. They also accused the landlords of improperly communicating directly about their pricing through calls, emails and participation in “user group” forums hosted by RealPage.

The company pushes landlords to use an “auto-accept” feature on its software, authorities said, and makes it onerous for property managers to reject its suggestions.

RealPage Senior Vice President Jennifer Bowcock called the federal case “flawed” and said the company is “committed to vigorously defending ourselves and our customers against the DOJ’s accusations.” RealPage has already changed its software to remove nonpublic data, despite its view that its technology was legal and “pro-competitive,” she said.

“It’s past time to stop scapegoating RealPage — and now our customers — for housing affordability problems when the root cause of high housing costs is the undersupply of housing, which we have been saying from the beginning,” she said.

Three of the landlords sued in this week’s action appeared in ProPublica’s 2022 story, including the nation’s biggest landlord, Greystar, and Camden Property Trust.

Camden CEO Ric Campo told the news organization at the time that the apartment market in Houston, where the company is headquartered, was so big and diverse that “it would be hard to argue there was some kind of price fixing.”

But when Camden adopted the nascent rent-setting technology in 2006, the company found that its profits grew even though more tenants were moving out.

“The net effect of driving revenue and pushing people out was \$10 million in income,” Campo told a trade publication then. (He later said that quote doesn’t reflect how he or Camden views renters today.)

Neither Campo nor Camden responded to a request for comment.

Greystar, the biggest manager and owner of rentals in the U.S., said in a statement that it was “disappointed” that the Justice Department added the company to the suit.

“At no time did Greystar engage in any anti-competitive practices,” the statement from the South Carolina-based company said. “We will vigorously defend ourselves in this lawsuit.”

ProPublica’s 2022 data analysis also found Willow Bridge Property Company (formerly Lincoln Residential) managed dozens of buildings in markets that had seen fast growth in rent. The company did not immediately respond to a request for comment about the Justice Department lawsuit.

One property owner and manager, Cortland, has already agreed to stop using competitors’ nonpublic data to train or run pricing models under a settlement with federal prosecutors. The proposed agreement has been submitted to the court for consideration.

Atlanta-based Cortland manages over 80,000 rentals in 13 states. A related federal criminal investigation that led to a May 2024 search of its headquarters has been closed, a spokesperson said.

The spokesperson said the company is “pleased” to announce the settlement.

“We believe we were only able to achieve this result because Cortland has invested years and significant internal resources into developing a proprietary revenue management software tool that does not rely on data from external, nonpublic sources,” the spokesperson said.

Revenue management software can help landlords manage rents “efficiently” and avoid discrimination, said a spokesperson for defendant Cushman & Wakefield, which also owns defendant Pinnacle. The spokesperson said that as a manager only, the company does not “set strategy, pricing, or occupancy targets,” decide which software to use, or whether to accept any software’s recommendations.

The lawsuit also named as a defendant Blackstone’s LivCor. Blackstone did not immediately respond to requests for comment.

In addition to naming landlords as defendants in the claim, it also added the attorneys general of Illinois and Massachusetts as co-plaintiffs, bringing the total number of participating states to 10. The states include the country’s most populous — California, which has 17 million renters.

RealPage said that “fewer than 10% of all rental housing units in the U.S. use RealPage software to suggest rental prices, and our software recommendations are accepted less than half the time.”

But a White House report in December said that number could be higher. It said RealPage and census data suggest that as many as 1 in 4 rentals nationwide use a RealPage pricing algorithm. And the company’s penetration is higher in some markets, it said.

Using models of what competitive markets would look like, researchers found that algorithmic pricing costs renters in units where it is used \$70 more a month, or 4% of rent, on average. In six major metro areas, the cost exceeds \$100 a month, the report found.

The report estimated the total added cost to renters from the use of such algorithms in 2023 to be roughly \$3.8 billion.

RealPage said that the analysis is “riddled with flawed assumptions,” and that the White House never contacted the company about the report.

The fate of the Justice Department’s lawsuit under the incoming administration is unclear. President-elect Donald Trump has nominated Gail Slater, a veteran antitrust attorney and economic advisor to JD Vance, to lead the department’s antitrust division.

The 'I Love Lucy' Effect, and Why Gensler's SEC Checkout Matters

By Andrew Ramonas

Elevated Take

President Joe Biden's SEC chair was already checked out when Donald Trump reclaimed the White House in November.

Gary Gensler would take a couple more weeks to announce his plans to step down as the Securities and Exchange Commission's leader on Jan. 20. But a final sprint to advance dozens of unfinished regulations on his agenda never materialized, after little rulemaking progress in the fall.

Gensler's predecessors used the waning months of their terms to accomplish several priorities. Mary Jo White ushered in a vast stock market surveillance system and new reporting forms for investment funds. Jay Clayton eased private market investments and tightened shareholder proposal rules.

Gensler? He and his fellow SEC commissioners rubber-stamped the Public Company Accounting Oversight Board's budget.

Gensler joined the agency in 2021 with an ambitious agenda focused on bringing more rules and tougher policing to corporate America. Environmental, social, and governance disclosures, cryptocurrency restrictions, and other Democratic priorities gained more traction.

Four years later, Gensler's work has included corporate greenhouse gas emissions reporting requirements and aggressive crypto market oversight. But the climate rules now are mired in litigation, and Gensler cast the decisive vote to approve the first exchange-traded funds that invest directly in Bitcoin despite concerns he said he had about risks crypto poses for investors. Many of his planned regulations never came to fruition, including ESG rules aimed at boosting board diversity and workforce management disclosures.

Now the SEC is expected to bring back lighter regulation with fewer restrictions on companies that seek investors' money under Trump's pick to lead the SEC, Paul Atkins, who has called Gensler's rulemaking plans "very much overreaching."

Gensler recently compared the SEC chairmanship to the classic "I Love Lucy" episode where Lucy and Ethel work on a chocolate factory assembly line, with candy whizzing by them faster than they could wrap it. He said the SEC faces "fifty- to a hundred-thousand matters a year," and he tried his best to manage.

"It's just so much," Gensler said in December.

Gensler's last full year as chair had a rough start when he voted with the two Republican commissioners in January 2024 to allow the Bitcoin ETFs, saying he was influenced by a court ruling against the SEC on that issue.

He pushed climate rules out in March but, reflecting fierce opposition from business interests, they were far less stringent than proposed in 2022. Companies, Republicans, and others still sued, and the SEC paused the regulations.

The vote that brought the climate rules happened during an open meeting, the SEC's biggest public stage for advancing regulatory matters. Gensler wouldn't hold another open meeting for five months.

To be fair, Gensler did wrap up some regulatory work in August and September. The commission boosted disclosure requirements under Form N-POR and N-CEN—the White initiative—and let exchanges quote stocks in increments of a half penny, instead of a 1-cent minimum. So like Lucy and Ethel, he at least tried to wrap some chocolates.

Gensler on Wednesday defended his tenure, saying on Bloomberg TV he felt "terrific" during his last two weeks at the SEC. He said he looked out for everyday Americans and helped them save for a better future.

There wasn't much else he could do now other than talk. New management's already on its way to the chocolate factory.

To contact the reporter on this story: Andrew Ramonas in Washington at aramonas@bloomberglaw.com

To contact the editors responsible for this story: Bernie Kohn at bkohn@bloomberglaw.com; Jeff Harrington at jharrington@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Sam Alito Offers Flimsy Excuse For Conversation With Donald Trump

A abovethelaw.com/2025/01/sam-alito-offers-flimsy-excuse-for-conversation-with-donald-trump

Joe Patrice

January 9, 2025

Courts

Ain't no party like an ex parte... conversation with the judge.

By Joe Patrice

on January 9, 2025 at 12:12 PM

Donald Trump just asked the Supreme Court to intervene in his New York state criminal case and extend its newly expanded presidential immunity just a little further to cover illegally concealing a hush money scheme to pay off an adult film star before he ever became president. A matter of hours before that case — number 666 because you cannot make this stuff up — arrived at the Court, Trump had a phone conversation with Justice Sam Alito.



(Photo by Ali Shaker/VOA)

You know, just the kind of light-hearted catch-up you have with your bros right before asking them to suspend the criminal code for you.

In his remarks about the call, Alito puts a lot of weight on the fact that it took place before Trump filed his application. Alito seems to think this means he had no way of predicting a potential conflict when all it really seems to say is “Trump decided this was worth filing after checking in on Alito.”

While the emergency filing over the NY case hadn't hit the docket yet, Trump already had business before the Court with his half-baked effort to halt the planned TikTok ban from going into effect, presumably so he can try to exact some sort of personal vig from the company. But since Alito doesn't think it's a problem to go on a vacation with litigants with business before him, a telephone call with a litigant certainly wouldn't raise any flags for him.

And we know his thoughts on flags.

“William Levi, one of my former law clerks, asked me to take a call from President-elect Trump regarding his qualifications to serve in a government position,” Justice Alito told ABC News. “I agreed to discuss this matter with President-elect Trump, and he called me yesterday afternoon.”

On the one hand, an employer checking references is a reasonably innocuous explanation. On the other hand, this might be the least believable excuse Alito could have cooked up.

Levi almost certainly came up during the call. He might’ve even been the subject superficially the whole time. But it’s a special kind of gullible to believe this call wasn’t really about Trump’s legal interests. “No one is questioning Levi’s credentials, which are as good as can be,” says Fix the Court’s Gabe Roth. “The call was merely an excuse for Trump to speak with one of the nine people determining the fate of his hush money sentencing in the coming days and who will review many more Trump-related issues over the next four years.” It’s also unnecessary when Alito could’ve responded to the ethically fraught request with a letter explaining why he couldn’t take the call but reaffirming his faith in his former clerk.

The call makes even less sense when you consider that Trump’s barely vetting his cabinet secretaries. Trump didn’t feel the need to check Matt Gaetz’s public Venmo feed but feels the need to personally check references on whatever middling job he’s giving Bill Barr’s former chief of staff? Industrial-grade credulity cannot hold up to this kind of strain.

Alito claims the conversation never strayed into Trump’s upcoming Supreme Court cases. There’s no record of what transpired on the call, but we should totally take him at his word. It’s not like he said in 2023 that he barely knew Paul Singer, the billionaire litigant giving him a free private plane trip, even though back in 2009, ABOVE THE LAW contemporaneously reported on an event where Alito was introduced by his personal friend... Paul Singer. I mean, a guy who tried to mislead the public on such an easily checked matter like that would be a thoroughly unreliable narrator about his own ethical issues!

Trump wanted to take Alito’s temperature — directly or indirectly — and found a justice more than willing to comply with this request. Alito should recuse himself from Trump’s case given this revelation about his stunning lack of judgment. But he won’t because while the *Trump v. United States* opinion is reported as a 6-3 supermajority providing necessary slack for Alito to sit out and still deliver for “the Boss,” it’s not so simple. Trump’s attack on the New York criminal case arises — in part — from the section of the *Trump* opinion suggesting unofficial acts can earn immunity if any of the evidence involves an official act and Trump’s arguing that testimony from White House aides about what he did *after* the fact with the crime that took place *before* becoming president should nix the whole case. And on *that* issue, Amy Coney Barrett refused to hop aboard, making it much closer to a 5-4 question.

If the Chief Justice wants the public to regain faith in the legitimacy of the courts, this might be a good place to start. Even assuming an entirely innocent phone call this time — a big ask — if Alito hears this case, it establishes a precedent for Trump to have private chit-chats with the justices with no consequences. The risk of mischief is extraordinary.

This is where that whole “avoid the mere appearance of impropriety” thing would come into play. Except this Court reads that classic maxim a little differently these days: avoid the mere *appearance* of impropriety.

[UPDATE: I hastily wrote “Peter” Singer in the first draft, apparently confusing billionaire Paul Singer with bioethicist and moral philosopher Peter Singer which probably says something but I’m not sure what it is.]

Trump speaks with Justice Alito amid push to halt criminal sentencing [ABC News]

Earlier: Sam Alito Laments It’s Getting So You Can’t Take All-Expense Paid Luxury Vacations Funded By Billionaires Anymore
Donald Trump Demands SCOTUS Do Him A Favor Though



Joe Patrice is a senior editor at Above the Law and co-host of Thinking Like A Lawyer. Feel free to email any tips, questions, or comments. Follow him on Twitter or Bluesky if you’re interested in law, politics, and a healthy dose of college sports news. Joe also serves as a Managing Director at RPN Executive Search.

Topics

Courts, Donald Trump, Legal Ethics, Sam Alito, Supreme Court, William Levi



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

Biotech Co.'s Facility Failures Lost Investors Money, Suit Says

By **Sydney Price**

Law360 (January 8, 2025, 7:40 PM EST) -- The executives and directors of biotechnology company Humacyte Inc. have been hit with a shareholder derivative suit in North Carolina federal court alleging the company concealed that its manufacturing facility failed to comply with certain quality assurance practices, leading to delayed regulatory review for its product candidate.

According to the **complaint** shareholder Nathan Silva filed Tuesday, Humacyte and its executives and directors failed to disclose for several months there were issues at its Durham, North Carolina, manufacturing facilities, such as the absence of microbial testing. These deficiencies were not revealed publicly until the U.S. Food and Drug Administration announced in October 2024 that Humacyte's facilities were noncompliant.

Humacyte manufactures acellular tissue engineered vessels, or lab-grown blood vessel implants, that can serve as replacements for damaged blood vessels, according to the complaint. In addition to naming the company as a nominal defendant, its CEO Laura E. Niklason and several company directors are named defendants in the suit.

The suit's relevant period begins April 29, 2024, the day Humacyte filed an allegedly false and misleading annual proxy statement with the U.S. Securities and Exchange Commission.

"The 2024 proxy failed to disclose that the Company was beset with compliance problems that posed significant risks of harm, and that the board lacked a system to oversee mission-critical compliance risks," Silva said.

In other statements throughout the relevant period, Humacyte continued to conceal problems at its manufacturing facilities, the shareholder alleged. For example, on May 10, the defendants touted the company's "strong progress" on its application for its blood vessel implant and told investors Humacyte had a "very successful interaction" with the FDA regarding the application's approval.

A couple of months later, on Aug. 9, Humacyte announced the FDA will require additional time to complete its review of Humacyte's application.

On this news, Humacyte shares fell \$1.29, or about 16%, to close at \$6.62 per share on Aug. 12, according to the complaint.

Despite the disclosure, investors would not learn of Humacyte's compliance failures until Oct. 17, when the FDA released a statement confirming it had observed quality oversight issues at Humacyte's North Carolina manufacturing facilities.

On this news, Humacyte shares fell 95 cents, or about 16%, to close at \$4.86 per share on Oct. 17, according to the complaint.

Additionally, Silva alleged Humacyte agreed to sell approximately \$30 million worth of common stock to an institutional investor in a deal that was expected to close Oct. 7, several days before the FDA's announcement, according to the suit.

The suit accuses the defendants of wasting corporate assets, insider trading, abuse of control, gross mismanagement and violating the Exchange Act.

The complaint also notes Humacyte is facing a **securities class action** in North Carolina federal court alleging the company misstated and omitted information regarding its facilities.

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

Silva is represented by Emily J. Beeson of Ward Black Law, Seth D. Rigradsky, Timothy J. MacFall and Vincent A. Licata of Rigradsky Law PA, and Joshua H. Grabar of Grabar Law Office.

Counsel information for Humacyte and the individual defendants was not available Wednesday.

The case is Silva v. Sebelius et al., case number 1:25-cv-00005, in the U.S. District Court for the Middle District of North Carolina.

--Editing by Lakshna Mehta.

All Content © 2003-2025, Portfolio Media, Inc.



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

Shareholder Atty Urges Del. Justices To Revive Skechers Suit

By **Jeff Montgomery**

Law360 (January 8, 2025, 7:23 PM EST) -- An attorney for a shareholder of footwear maker Skechers Inc. told Delaware's Supreme Court on Wednesday that the Court of Chancery had ample reason to keep alive his suit alleging failure to control insider use of corporate aircraft for personal travel that the court dismissed instead.

Melinda A. Nicholson of Kahn Swick & Foti LLC, representing Michael Conte, told the full five-member court that the travel, worth millions of dollars over time, "was both a breach of [executives'] duty of loyalty and a breach of their employment agreement" allowing only "reasonable" use of company aircraft.

"Between 2020 and July of 2022 the percentage of aircraft personal use increased to over 50% of aircraft flying time," and the shift had tax implications damaging to Skechers, Nicholson said.

Vice Chancellor Morgan T. Zurn nevertheless dismissed the complaint in February 2024, concluding that Conte unjustifiably filed the derivative complaint without first trying to show that a majority of Skechers' board was too conflicted to consider the claims, which are the company's property.

Conte, the vice chancellor noted, also failed to show that the directors and officers sued faced a substantial risk of liability for oversight, disclosure and corporate waste claims.

Nicholson argued in part that the ruling failed to give weight to "interconnections which infect" the company's top tier, including a longstanding personal relationship between Robert Greenberg, Skechers' founder, controlling stockholder, chairman and chief executive, and Richard Siskind, a director and supposedly a personal friend who lived in Greenberg's Florida neighborhood.

Siskind also sold a house to Greenberg in Siskind's Boca Raton neighborhood and chaired a Skechers compensation committee that oversaw board perquisites, including company aircraft use.

"We think that when you show those business relationships tied in with choosing to be neighbors" and other connections "it does show a close relationship, whether or not we used the magical word 'friend,'" Nicholson said. "Moreover, we believe the lower court ignored how Robert's domination as controlling stockholder, founder, board chair and CEO colors the rest of the independence analysis."

John M. Gildersleeve of Munger Tolles & Olson LLP, counsel for Siskind and other directors at the time of the litigation demand futility claim, said the case was about "business risk only," with no suggestion that more than 2.8% of the compensation paid to the three aircraft-using officers was involved.

"There's no suggestion that anything about the alleged excessive use of this perquisite would have caused the company to be unable to design and sell shoes," Gildersleeve told the justices.

Vice Chancellor Zurn, Gildersleeve said, correctly concluded that the case is a challenge to the manner and timing of the compensation committee's response to an issue before it. That doesn't suffice for a "Caremark claim" alleging breaches of the corporate duty of oversight, he said.

Justice N. Christopher Griffiths asked Nicholson to respond to arguments that the travel record simply showed a "mere blip" during a time when COVID-19 left some unwilling to fly commercial.

"Their usage during the entire period was well above median," Nicholson replied. "The excessive use is not just during COVID." Much larger companies logged much smaller private aircraft use expenses per individual, she said.

Gildersleeve argued that "for multiple reasons" the vice chancellor correctly found that bad faith could not be inferred from the special committee's response to the issue.

"First, there was no legal risk to the company. Without a violation of the law being alleged, without a legal risk, there is far less reason to infer bad faith" from the response," Gildersleeve said. "Second, there is also no violation in clear cut, quantitative terms of a stockholder approved compensation plan."

Michael Conte is represented by Thomas A. Uebler and Terisa A. Shoremoun of McCollom D'Emilio Smith Uebler LLC, Melinda A. Nicholson and Nicolas Kravitz of Kahn Swick & Foti LLC, Roger A. Sachar of Newman Ferrara LLP and Domenico Minerva of Labaton Sucharow LLP.

Skechers is represented by Matthew F. Davis and Tyler J. Leavengood of Potter Anderson & Corroon LLP and Kenneth A. O'Brien Jr. of Shepard Mullin Richter & Hampton LLP.

Katherine Blair, Morton Erlich, Richard Siskind, Jeffrey Greenberg, Geyer Kosinski and Richard Rappaport are represented by A. Thompson Bayliss and E. Wade Houston of Abrams & Bayliss LLP and Brad D. Brian, John M. Gildersleeve and Abraham B. Dyk of Munger Tolles & Olson LLP.

Robert Greenberg, Michael Greenberg and David Weinberg are represented by Kenneth J. Nachbar and Susan W. Waesco of Morris Nichols Arsht & Tunnell LLP and Abby F. Rudzin of O'Melveny & Myers LLP.

The case is Michael Conte v. Robert Greenberg et al., case number 76,2024, in the Supreme Court of the State of Delaware.

The Chancery case is Michael Conte v. Robert Greenberg et al., case number 2022-0633, in the Court of Chancery of the State of Delaware.

--Editing by Brian Baresch.

All Content © 2003-2025, Portfolio Media, Inc.



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

Chancery Awards \$176M Atty Fee In Tesla Board Pay Suit

By **Jeff Montgomery**

Law360 (January 8, 2025, 1:26 PM EST) -- Delaware's chancellor approved on Wednesday a \$176.16 million Tesla stockholder class attorney fee award to three firms for a settlement of an excessive director compensation suit that is expected to return \$734 million to the company through a combination of director stock, option and cash givebacks.

The fees award to McCarter & English LLP, Fields Kupka & Shukurov LLP and Bleichmar Fonti & Auld LLP in the more than four-year-old case ranks among the larger derivative settlements in Court of Chancery history, but fell short of a \$230 million request based on class attorney arguments that the settlement carried a \$919 million benefit.



Chancellor Kathaleen St. J. McCormick's approval of the \$176.16 million Tesla stockholder class attorney fee award fell short of a \$230 million request but still ranks among the larger derivative settlements in Court of Chancery history. (Aaron M. Sprecher via AP)

Chancellor Kathaleen St. J. McCormick also awarded a \$50,000 incentive fee to the lead plaintiff, a public pension fund in Detroit.

Approval of the original request would have ranked the deal as the second-largest by the court, trailing only Dell Inc.'s \$1 billion settlement of a direct stockholder class suit in late 2022.

Prompting most of the reduction, Chancellor McCormick said, was a dispute between Tesla and the stockholders over the forgone value of future options excised from the plan. While attorneys for the class

valued the benefit at \$180 million, Tesla pegged the gain at zero.

"I struggle to value this benefit in this case," the chancellor said, citing court concern for avoiding windfalls in compensation decisions.

Attorneys for Tesla argued previously that the company viewed the value of the settlement at \$63 million. Most stock returned is earmarked exclusively for its equity incentive plan, which already has a large reserve and is unlikely to reissue the shares from the derivative recovery, the company asserted.

While the agreement to forgo compensation was a clear benefit, "I worry that ignoring the value will disincentivize the use of similar terms in derivative lawsuits," the chancellor said. On the other hand, the chancellor said, "It's hard to quantify the value of compensation never awarded."

Despite the pruning, Chancellor McCormick said attorneys for Tesla stockholders earned the award.

"Plaintiff's counsel litigated on a fully contingent basis for years with no certainty that they would ever receive a penny for their efforts," Chancellor McCormick said during a more than 40-minute telephone bench ruling on the fee bid.

The settlement would apply to current and former board members, including Elon Musk's brother Kimbal Musk, media mogul James Murdoch, Tesla board Chair Robyn Denholm, Ira Ehrenpreis, Lawrence J. Ellison, Antonio J. Gracias, Stephen T. Jurvetson, Linda Johnson Rice, Kathleen Wilson-Thompson and Hiromichi Mizuno.

The electric car and solar energy system manufacturer claimed during the litigation that the suing pension fund was a beneficiary of its success, with company revenues increasing from \$413.3 million in 2014 to \$24.6 billion in 2019 and \$81.46 billion last year.

The plaintiff is represented by Sarah Delia of McCarter & English LLP, William Fields, Christopher Kupka and Samir Shukurov of Fields Kupka & Shukurov LLP and Joseph Fonti, Nancy Kulesa, George Bauer and Thayne Stoddard of Bleichmar Fonti & Auld LLP.

The board directors are represented by Raymond DiCamillo, Kevin Gallagher and Kyle Lachmund of Richards Layton & Finger PA and Evan Chesler and Vanessa Lavelly of Cravath Swaine & Moore LLP.

Tesla, as a nominal defendant, is represented by Jason Jowers and Sarah Andrade of Bayard PA.

The case is Police and Fire Retirement System of the City of Detroit v. Elon Musk et al., case number 2020-0477, in the Court of Chancery of the State of Delaware.

--Editing by Daniel King.



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

Musk Appeals \$56B Pay Package Rejection To Del. High Court

By **Dorothy Atkins**

Law360 (January 8, 2025, 7:28 PM EST) -- Tesla Inc. CEO Elon Musk and other top Tesla executives officially appealed to the Delaware Supreme Court on Wednesday a series of chancellor rulings that scuttled Musk's \$56 billion, 10-year pay package and awarded a shareholder's counsel \$345 million in fees in the yearslong derivative dispute.

In a six-page notice, Musk and other Tesla officials notified the trial court that they were appealing Chancellor Kathaleen St. J. McCormick's September 2019 decision denying their motion to dismiss; her January 2024 posttrial opinion voiding Musk's pay package; a December ruling ordering the company to pay in cash or post sufficient bond for a \$345 million stockholder attorney fee, and "all other rulings and interlocutory orders made appealable through the judgment."

Counsel for the parties did not immediately respond to requests for comment Wednesday. Nor did representatives for Tesla.

The appeal is the latest chapter in hotly contested derivative shareholder litigation that Richard Tornetta initially filed in 2018, seeking to block Tesla's attempt to award Musk more than \$55 billion in a 10-year pay package.

Following a weeklong November 2022 trial, Chancellor McCormick **struck down** the pay package, which she noted would be the largest compensation plan in the history of public markets. She ruled that disclosure failures, murky terms, a conflicted board and Musk's own hand on the tiller warranted an order to roll back the award.

In her ruling, Chancellor McCormick said rescission is uniquely available in this case because "no third-party interests are implicated, the entire grant sits unexercised and undisturbed, and exercised shares would be subject to the five-year hold period."

The same day as the ruling, Musk posted on the social media platform X, "Never incorporate your company in the state of Delaware," and he officially moved the company to Texas before putting another similar pay package **to an investor vote** last summer — which **most investors approved**.

Following the chancellor's ruling, counsel for the investors **made an unusual move** and **asked** the court to award them more than 11% of the 266,947,208 Tesla shares freed up by the ruling as attorney fees. The value of the stock-based fee request was estimated to initially be \$5.6 billion.

However, in December, the chancellor approved a **\$345 million attorney fee award**, rejecting the plaintiff's bid for \$5.6 billion in freely tradable company shares while also **declining to reinstate** Musk's proposed pay despite the most recent investor vote. Later that month, the chancellor issued a **judgment** in the case, teeing up the dispute for an appeal.

Earlier this month, three Florida-based Tesla stockholders also **moved ahead with appeals**, after the chancellor denied most bids to intervene in the lower court case late last year, citing in part the lateness of their actions.

Tornetta is represented by Gregory V. Varallo and Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, and Peter B. Andrews, Craig J. Springer, David M. Sborz and Jackson E. Warren of Andrews & Springer LLC.

Nominal defendant Tesla Inc. was represented before the trial court by John L. Reed, Ronald N. Brown III, Caleb G. Johnson and Daniel P. Klusman of DLA Piper, William M. Lafferty, Susan W. Waesco, Ryan D. Stottmann, Miranda N. Gilbert and Jacob M. Perrone of Morris Nichols Arsht & Tunnell LLP, Rudolf Koch, John D. Hendershot, Kevin M. Gallagher and Andrew L. Milam of Richards Layton & Finger PA, Catherine A. Gaul and Randall J. Teti of Ashby & Geddes PA.

The appellants are represented on appeal by Alex Spiro, Christopher D. Kercher, Todd G. Beattie, Jonathan E. Feder, Michael A. Barlow and Christopher G. Michel of Quinn Emanuel Urquhart & Sullivan LLP, David E. Ross, Garrett B. Moritz and Thomas C. Mandracchia of Ross Aronstam & Moritz LLP, and Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP.

The appeal is Elon Musk et al. v. Richard Tornetta et al., case number 11-2025, in the Supreme Court of the State of Delaware.

–Additional reporting by Jeff Montgomery. Editing by Amy French.

All Content © 2003-2025, Portfolio Media, Inc.



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

Colo. Judge Certifies National Class Of Senior Care Investors

By **Thy Vo**

Law360 (January 8, 2025, 7:59 PM EST) -- A Colorado federal judge on Wednesday certified a nationwide class of stockholders in a securities suit alleging a senior health care company made misleading statements in an initial public offering that later caused stock prices to tank after a government audit exposed the falsehoods.

Three public pension funds based in Texas and Indiana have accused InnovAge Holding Corp. and parties behind its March 2021 IPO of falsely claiming its business providing seniors with comprehensive health care grew because of an innovative business model, when a government audit and media reporting later showed that growth came at the expense of senior citizens.

A September 2024 amended complaint — brought against InnovAge, its board, private equity firms that funded the IPO and the deal's underwriters — argued InnovAge's stock price for the IPO was set based on those misleading statements, only for prices to later plummet after the federal government suspended enrollment at one of the company's centers.

In an order Wednesday, U.S. District Judge William J. Martinez certified a class of any person or entity who purchased or acquired InnovAge stock between May 11, 2021, and Dec. 22, 2021, or who acquired the company's stock "in or traceable to" the company's IPO.

Judge Martinez was unpersuaded by InnovAge's argument that the lead plaintiffs — the El Paso Firemen & Policemen's Pension Fund, San Antonio Fire & Police Pension Fund and Indiana Public Retirement System — can't fairly represent an entire class of stockholders.

The defendants claimed the lead plaintiffs lacked "sufficient knowledge of the facts of the case to adequately represent the class," arguing in briefs that the public pension funds are relying entirely on their lawyers for key components of the suit, Judge Martinez wrote.

"As lead plaintiffs aptly point out, the class representatives 'are sophisticated institutional investors who manage billions in assets,'" Judge Martinez said, adding that each lead plaintiff has "capably demonstrated their understanding of this action" in testimony.

The judge also rejected the defendants' argument that an alleged Securities Exchange Act violation can't be brought on a class basis because the plaintiffs haven't explained how damages could be calculated classwide, instead finding the method proposed by the plaintiffs has been backed by other courts.

Judge Martinez also appointed Cohen Milstein Sellers & Toll PLLC as class counsel.

Denver-based InnovAge provides care for seniors through the federal Program of All-Inclusive Care for the Elderly, or PACE.

The lawsuit alleges InnovAge and its executives told investors that its business model would drive its entry into a \$200 billion market for growth, despite knowing the company's focus on "maximizing enrollment" had led to staff shortages, high caseloads and was overwhelming its ability to provide care.

When the IPO was launched, InnovAge stock was priced at \$21 and rose to \$25.98 within another

week, according to the suit. But when the Centers for Medicare & Medicaid Services shut down an InnovAge center in California six months later, based on a finding that the company had "substantially failed" to provide participants with the services covered by PACE, the company's stock quickly fell from \$14 a share to \$6.76, the complaint alleges.

The company later disclosed that CMS and the state of Colorado suspended enrollment at all InnovAge centers in Colorado — accounting for more than half the company's revenue — based on patient care deficiencies "mostly or partially prior to the IPO," according to the complaint.

That prompted stock prices to fall another 36%, or a 78% decline since the March 2021 IPO, the plaintiffs alleged.

The lawsuit, **originally filed** in October 2021, **also takes aim** at the IPO's underwriters, including J.P. Morgan Securities LLC and Barclays Capital Inc., alleging they were negligent and failed to flag problems in InnovAge's business.

Attorneys for the plaintiffs, InnovAge defendants and underwriter defendants did not immediately respond to requests for comment Wednesday.

The plaintiffs are represented by Julie G. Reiser, Molly J. Brown, Jan E. Messerschmidt, Brendan R. Schneiderman, Carol V. Gilden and Manuel J. Dominguez of Cohen Milstein Sellers & Toll PLLC and Cecil E. Morris and Adrian P. Castro of Fairfield & Woods PC.

The underwriter defendants are represented by Mary Eaton, Nicholas A. Caselli, Abhinaya Swaminathan and Courtney Sohn of Freshfields US LLP.

InnovAge Holding Corp. and related defendants are represented by Karen Patton Seymour and Diane L. McGimsey of Sullivan & Cromwell LLP and Peter Kurtz and Matthew D. Benedetto of Wilmer Cutler Pickering Hale & Dorr LLP.

The case is McLeod v. InnovAge Holding Corp. et al., case number 1:21-cv-02770, in the U.S. District Court for the District of Colorado.

--Additional reporting by Jared Foretek and Katryna Perera. Editing by Kelly Duncan.



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

Audi Electric SUVs Are 'Ticking Time Bombs,' Suit Claims

By **Linda Chiem**

Law360 (January 8, 2025, 6:22 PM EST) -- Audi of America LLC and Volkswagen Group of America Inc. were hit with a proposed class action in Georgia federal court alleging certain Audi electric SUVs are "ticking time bombs" that can lose power, short-circuit and catch fire.

Plaintiff Dwight Kelly accused the automakers of failing to disclose a "dangerous and widespread" defect in the high-voltage lithium-ion batteries in model years 2019-2024 Audi e-tron electric SUVs, the first fully electric luxury line of vehicles under the Audi brand.

According to the **complaint filed Tuesday**, Audi and Volkswagen have known since April 2020 that the battery packs in Audi e-tron vehicles could spontaneously catch fire, and they began piecemeal recalls in December 2023 involving thousands of e-tron vehicles.

"Unfortunately, the recalls do not address the root cause of the defect, and defendants have not agreed to affirmatively repair or replace all the defective batteries," Kelly alleged. "Rather than identifying a repair or replacement of all the defective batteries, the recalls instruct Audi e-tron owners to limit charging to 80% capacity, resulting in a reduction of the advertised range that Audi e-tron owners and lessees paid for and requiring owners to charge the class vehicles more frequently."

Moreover, Audi still hasn't provided an exact date for when it will roll out a diagnostic software update that's meant to address the problem, according to Kelly. That update is meant to "purportedly allow defendants to monitor data from the class vehicles for anomalies in the battery and when one is spotted, to replace the affected battery modules," according to the complaint.

"But even if the software update can successfully discover all data anomalies and predict a problem — which is an open question that won't be answered, at best, for months — defendants admit that the batteries may have problems in the future by virtue of the monitoring that Audi dealers need to undertake," Kelly said.

"Audi e-tron owners trusted and relied on the Audi brand and defendants' representations and are left with a ticking time bomb," he continued. "Defendants have left their customers with two terrible choices: owners can decide to stop driving their vehicles for which they paid approximately \$70,000 or more, or they can continue driving the e-trons at the risk of losing power while driving on a highway or, even worse, experiencing a fire."

Audi declined to comment Wednesday. Volkswagen representatives could not be immediately reached for comment.

The complaint echoes claims raised in a separate, but similar **proposed class action** against Porsche Cars NA Inc., which is also part of the Volkswagen Group. That Nov. 29 suit, filed by the same attorneys in this case, alleged the lithium-ion batteries in Porsche's model years 2020-2024 Taycan electric vehicles could also short-circuit and catch fire.

Kelly and the proposed class are represented by Rosemary M. Rivas, David Stein and Rosanne L. Mah of Gibbs Law Group LLP, and Michael A. Caplan, T. Brandon Waddell and Ashley C. Brown of Caplan Cobb LLC.

Counsel information for the defendants was not available Wednesday.

The case is Kelly v. Audi of America LLC et al., case number 1:25-cv-00071, in the U.S. District Court for the Northern District of Georgia.

--Editing by Lakshna Mehta.

All Content © 2003-2025, Portfolio Media, Inc.



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

Consumers Get Class Cert. In Suit Over Law Firm's Robocalls

By **Allison Grande**

Law360 (January 8, 2025, 10:36 PM EST) -- A West Virginia federal judge has granted class status to consumers who are accusing a plaintiffs' firm of violating the Telephone Consumer Protection Act by blasting them with unsolicited calls seeking their participation in litigation against the federal government over contaminated water at Marine Corps Base Camp Lejeune.

While Washington, D.C.-based Principal Law Group LLC **had been fighting** plaintiff Diana Mey's claims over allegedly unwanted automated calls that its telemarketing vendor purportedly placed in an attempt to sign up clients for the Camp Lejeune mass toxic tort litigation, the law firm's counsel withdrew from the TCPA dispute in January 2024, citing Principal Law Group's failure to "fulfill its obligations to" these attorneys.

After the plaintiffs' firm failed to retain new counsel within the time period allotted by the court, U.S. District Judge John Preston Bailey concluded that Principal Law Group had abandoned its defense and moved in February to strike the law firm's answer to the complaint and directed entry of a default judgment against it.

Mey then moved in November to certify a class of consumers who appear on call records that she obtained that detail 1,027 outbound calls that Principal Law Group's marketing partner, MCM Hustle LLC, made and forwarded to the law firm for additional screening and onboarding for the mass tort litigation.

Judge Bailey backed this request in an order issued Tuesday, finding that the plaintiff had put forth a sufficiently large and readily identifiable proposed class that assert common claims that "arise from the same standardized conduct and result in uniform damages across the class."

"Here, plaintiff and the putative class members suffered the same injury: they all received telephone solicitations, despite their inclusion on the [National Do Not Call] Registry, by or on behalf of Principal Law, in contravention of the TCPA," Judge Bailey found. "This common injury arises from the same practice and course of conduct: Principal Law outsourced its telemarketing to MCM Hustle LLC, which proceeded to call plaintiff and each of the putative class members in contravention of the TCPA."

Resolving these allegations, which were "deemed admitted as a product of" the default judgment entered against Principal Law Group, will require the court to consider several common questions of fact or law, including whether each putative class member received more than one call, whether these alleged violations were willful and whether the law firm is vicariously liable for calls placed by its telemarketing vendor, according to Judge Bailey.

"These questions apply equally to the class and will generate common answers which are central to the validity of the class members' claims," the judge held. He also found that these issues predominate over any individual questions, noting that the key questions over whether class members were contacted despite their inclusion on the DNC Registry and whether Principal Law Group can be held vicariously liable "can be resolved via the Call Detail Records and allegations deemed admitted as a result of default."

As part of Tuesday's order, Judge Bailey also appointed Mey as class representative and Ryan M. Donovan and Andrew C. Robey Hissam Forman Donovan Ritchie PLLC as class counsel.

Mey said in her November motion for class certification that, if the court granted her request, she planned to move for a default judgment "seeking an appropriate amount of statutory damages as reflected in the class call records." Under the TCPA, litigants can recover statutory damages of between \$500 and \$1,500 per violation.

The plaintiff first sued Principal Law Group, along with MCM Services Group and law firm Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA, in **February 2023**. The West Virginia resident claimed that the named defendants and some unknown parties had made multiple unwanted phone calls to recruit plaintiffs for mass tort cases relating to toxic water exposure at Camp Lejeune, a Marine Corps base on the North Carolina coast, near Jacksonville.

The two law firms shot back in a May 2023 dismissal motion that they were not responsible for telephoning potential clients on the federal do-not-call list, **contending that** Mey hadn't alleged that the firms made the initial calls to her residential number or that they controlled those calls.

Judge Bailey denied these dismissal bids, **concluding that** the plaintiff had established her claims well since her phone was used for residential purposes and she was listed on the national do-not-call registry and **subsequently finding** that it was too soon for the defendants to appeal his ruling.

Before its counsel dropped out of the suit, Principal Law Group doubled down on its claims, arguing in an August 2023 motion that the claims against it should be tossed because Mey allegedly "invited and/or gave permission for attorneys to contact her," and the initial call was made by a third party not directly representing the firm.

These arguments were wiped out by last year's entry of default judgment.

Judge Bailey also entered an order of default against MCM Hustle LLC in October 2023 after the company failed to respond to the lawsuit, and Mey informed the court **in April** that she was dropping her claim against Pensacola, Florida-based Levin Law, although the parties' joint stipulation of dismissal didn't specify whether a settlement had been reached or the reasons behind the move.

The remaining litigants couldn't be reached for comment on the latest class certification ruling.

The consumers are represented by Ryan M. Donovan and Andrew C. Robey of Hissam Forman Donovan Ritchie PLLC.

Counsel information for Principal Law Group was not available.

The case is Mey v. Levin Papantonio Rafferty Proctor Buchanan O'Brien Barr & Mougey PA et al., case number 5:23-cv-00046, in the U.S. District Court for the Northern District of West Virginia.

--Additional reporting by Daniel Connolly and Jonathan Capriel. Editing by Jay Jackson Jr.



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

Google Still Has To Face Users' Mobile App Privacy Suit

By **Jared Foretek**

Law360 (January 8, 2025, 5:39 PM EST) -- Google is facing the prospect of another trial, this time over allegations it secretly tracked millions of Google app users' browsing and ad interactions, after a California federal judge rejected the tech giant's bid for summary judgment.

In his **order Tuesday**, U.S. District Judge Richard Seeborg said Google's disclosures about its various forms of personalized ad tracking, some of which can be toggled on and off by users, are harder to parse than the company claims.

According to Judge Seeborg, Google painted the ad-related tracking as "basic record-keeping" of pseudonymous data, but the classes of plaintiffs have said the company has been collecting data that Google makes users think they can restrict through its web app and activity, or WAA, and supplemental web app and activity, (s)WAA settings, regardless of whether that setting is toggled on or off.

Google does offer descriptions of the WAA settings on certain control pages for apps, according to the order. But where the company has argued the facts around the settings and what Google can track when the settings are turned off are indisputable and warrant summary judgment, Judge Seeborg said Tuesday those disclosures far more ambiguous.

"Nowhere do these disclosures indicate with reasonable clarity that (s)WAA controls not whether Google will collect data about a user's app activity at all, but only whether Google will delink the collected data from the user's [Google account identification]," the judge said. "The various interpretations of these disclosures render them ambiguous such that a reasonable user would expect the WAA and (s)WAA settings to control Google's collection of a user's web app and activity on products using Google's services. Documents Google produced in discovery only emphasize the WAA settings' ambiguity."

In one document, Google states that when a user clicks on an ad or buys something from an advertiser's site, that information is saved.

According to Judge Seeborg, a user might reasonably think they could disable that tracking by turning the (s)WAA setting off, but they couldn't, because it's still being collected through Google Analytics for Firebase kits for third-party developers, which are software development kits Google created to track ad interactions regardless of the WAA settings.

"What is meant by the (s)WAA disclosures is thus a disputed material fact," Judge Seeborg said.

The ruling comes just over a year after Judge Seeborg **certified two nationwide classes** of Google app users, one for Android users and the other for non-Android users who say their activity was tracked despite having the WAA settings switched off.

The users **first filed suit** in 2020, calling Google a "voyeur extraordinaire" that deceives users into thinking they have some agency over what the company can track when they use its apps.

Now on their fourth amended complaint, the classes are alleging three claims under California law: invasion of privacy under the California constitution, common law intrusion upon seclusion, and violations of the Comprehensive Computer Data Access and Fraud Act.

Alongside the ambiguity of Google's disclosures, Judge Seeborg on Tuesday also took some issue with the consent Google claims to have received from users on the front-end, whether through its individual settings disclosures or the Google Privacy Policy.

As in the Ninth Circuit's ruling last year in another recent intrusion upon seclusion case involving the company, *Calhoun v. Google LLC* , Judge Seeborg said the key question about consent — even with the various disclosures — is whether "a reasonable user reading them would think that he or she was consenting to the data collection."

In this case, he said, the evidence isn't clear enough for summary judgment.

"Google provides plaintiffs with several disclosures, ranging from general privacy disclosures in its PP to more specific disclosures surrounding the WAA/(s)WAA buttons," the judge said Tuesday. "From the perspective of a reasonable user, it is unclear plaintiffs were consenting to the data collection at issue."

And while Google claimed the plaintiffs had no reasonable expectation of privacy where their pseudonymous, aggregate data was concerned, the judge held that Google's language in the WAA settings — describing the activity "on sites, apps, and devices" that wouldn't be saved if the setting was turned off — could be read to create a reasonable expectation of privacy for users.

The other part of the Ninth Circuit's invasion of privacy test under the California Constitution and the state's common law, from the 2020 case *In re Facebook Inc. Internet Tracking Litigation* , is whether the alleged intrusion was "highly offensive" and unwarranted, "so as to constitute an 'egregious breach of social norms.'"

Contrary to the plaintiffs' claims, Judge Seeborg said, the profit Google made from data tracking is largely irrelevant to whether the conduct could be considered offensive.

But he pointed to several internal Google communications from 2019, in which a Gmail employee first wrote that the company "would need to modify" the WAA disclosures "to indicate that WAA off is identical to being not logged into your account (data logged, but not tied to your account)." Later in 2019, the employee raised the issue once again, after which another employee wrote that "teams should not use user data at all if WAA is off."

Google defended its internal communications by claiming they were meant to help the company improve its services. But the judge said Tuesday that should be a question for a jury.

"The remarks and Google's internal statements reflect a conscious decision to keep the WAA disclosures vague, which could suggest that Google acted in a highly offensive manner, thereby satisfying the intent element of the tort claim," Judge Seeborg said. "Then again, these comments could also be ascribed to the unremarkable culture in large technology enterprises where employees simply offer improvements of the company's products or services. Whether Google or Plaintiffs' interpretation prevails is a triable issue of fact."

Attorneys for the app users declined to comment Wednesday.

A spokesperson for Google, meanwhile, said the company would continue to fight the case.

"Privacy controls have long been built into our service, and the allegations here are a deliberate attempt to mischaracterize the way our products work," Google spokesperson José Castañeda said in a statement to Law360. "We will continue to make our case in court against these patently false claims."

The users are represented by David Boies, Mark C. Mao, Beko O.R. Reblitz-Richardson, James W. Lee, Rossana Baeza, Alison L. Anderson and M. Logan Wright of Boies Schiller Flexner LLP, Bill Carmody, Shawn J. Rabin, Steven M. Shepard, Alexander P. Frawley, Ryan Sila and Amanda K. Bonn of Susman Godfrey LLP, and John A. Yanchunis, Ryan J. McGee and Michael F. Ram of Morgan & Morgan PA.

Google is represented by Benedict Y. Hur, Simona Agnolucci, Eduardo E. Santacana, Argemira Flórez

and Harris Mateen of Willkie Farr & Gallagher LLP.

The case is Rodriguez et al. v. Google LLC et al., case number 3:20-cv-04688, in the U.S. District Court for the Northern District of California.

--Editing by Lakshna Mehta.

All Content © 2003-2025, Portfolio Media, Inc.



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

Meta Slams 'Alarming' AI Discovery Demands In IP Fight

By **Dorothy Atkins**

Law360 (January 8, 2025, 5:53 PM EST) -- A proposed class of authors urged a California magistrate judge Wednesday to order Meta to produce certain datasets used to fine-tune its artificial-intelligence product Llama in their high-stakes copyright fight, while Meta's counsel slammed the discovery demands for being belated, speculative and placing an "alarming level of burden" on Meta.

The arguments came during an hours-long hearing before U.S. Magistrate Judge Thomas S. Hixson on the latest discovery dispute in litigation launched by high-profile plaintiffs, including Sarah Silverman, Ta-Nehisi Coates and Junot Diaz, in **July 2023**, alleging they never gave Meta permission to use copyrighted works purportedly in datasets used to train versions of Meta Platforms Inc.'s Llama AI language-learning model.

During the hearing, Margaux Poueymirou of Joseph Saveri Law Firm LLP, the authors' counsel, argued Meta must be required to hand over the so-called posttraining datasets it used to fine-tune its AI product.

Poueymirou pointed to deposition testimony, Meta's source code and other documents Meta has produced in discovery, suggesting the datasets include copyrighted books and material. She argued that the plaintiffs believe Meta uses the material to "safety" test its AI tool for various categories, such as defamation issues and IP protection, to ensure the AI bot doesn't respond to users' prompts by "regurgitating" specific copyrighted material.

Poueymirou went on to argue that Meta also should have to produce posttraining datasets it uses to ensure the AI tool doesn't memorize the copyrighted material and noted that Meta "dumped" 3.8 terabytes on plaintiffs' counsel, or all of its WhatsApp and Meta source code, which they have had to hire experts to sort through.

However, Bobby Ghajar of Cooley LLP, counsel for Meta, argued the posttraining datasets aren't relevant to the plaintiffs' claims, and Poueymirou's argument that copyrighted books are used to fine-tune Llama is based on speculation and not evidence, even though the plaintiffs have the burden of showing their discovery demands are warranted.

"The datasets they imagine exist do not contain books, so we're really far afield," Ghajar argued.

He noted there are no "safety-related" claims asserted in the case, and that plaintiffs are seeking the various categories of posttraining datasets too late in the discovery process.

Kathleen Hartnett of Cooley LLP additionally criticized Poueymirou's arguments and the plaintiffs' demand for multiple categories of posttraining data, arguing that requiring Meta to locate and produce the datasets would be overly burdensome, particularly at this stage of discovery.

"It's an alarming level of burden what they're suggesting ... and this is really unfair for us to defend against that request during this hearing," Hartnett said.

Hartnett also took issue with Poueymirou's comment that Meta "dumped" source code on plaintiffs, noting that Meta had produced the data in response to plaintiffs' discovery demands for information that couldn't easily be extracted.

"We gave them the entire source code," Hartnett said. "That was a good thing, not a bad thing. Not a dump."

Judge Hixson has taken the arguments under consideration.

On Thursday, U.S. District Judge Vince Chhabria, who has **been critical of lead class counsel** in the case, is scheduled to hear oral arguments on the authors' heavily redacted motion to amend their latest complaint, which Meta opposes. The motion seeks to add additional claims and details regarding the copyright infringement allegations that class counsel learned from documents Meta produced in discovery.

A hearing on the motion is scheduled in person in San Francisco at 10 a.m.

The plaintiffs were represented during the hearing by Margaux Poueymirou of Joseph Saveri Law Firm LLP, Max Pritt of Boies Schiller Flexner LLP, Betsy A. Sugar of Lieff Cabraser Heimann & Bernstein LLP and Nada Djordjevic of DiCello Levitt LLP.

Meta was represented during the hearing by Bobby Ghajar and Kathleen Hartnett of Cooley LLP and Angela L. Dunning of Cleary Gottlieb Steen & Hamilton LLP.

The case is Richard Kadrey et al. v. Meta Platforms Inc. et al., case number 3:23-cv-03417, in the U.S. District Court for the Northern District of California.

--Additional reporting by Ivan Moreno. Editing by Drashti Mehta.

All Content © 2003-2025, Portfolio Media, Inc.