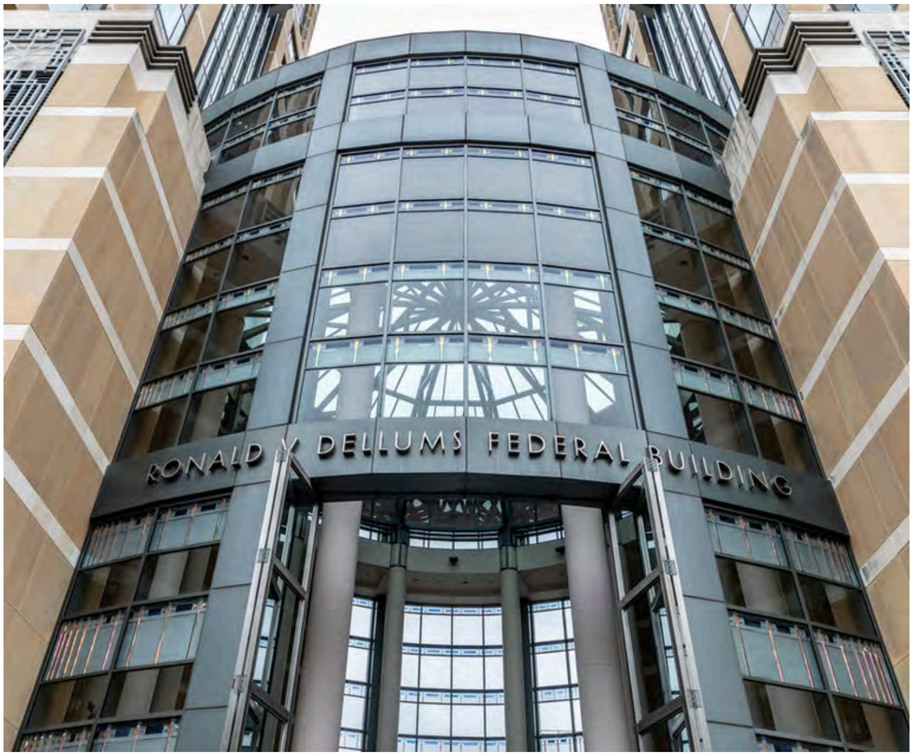
Crypto Exchange's 'Meteoric Rise' Leads to Nationwide Class Action Trend

law.com/therecorder/2025/01/14/crypto-exchanges-meteoric-rise-leads-to-nationwide-class-action-trend

Michael A. Mora



What You Need to Know

- OKX Group and its various entities are facing a nationwide class action.
- The potential class alleged violations of U.S. laws and regulations that were established to "protect consumers, investors, and American national security."
- The plaintiffs also alleged claims under the Racketeer Influenced and Corrupt Organizations Act, plus conversion and aiding and abetting conversion.

OKX, the world's second-largest cryptocurrency exchange, is facing a nationwide class action lawsuit in a California federal district court over allegations that its "meteoric rise was achieved through willfully violating numerous U.S. laws and regulations" at the expense of "consumers, investors, and American national security."

Tonya M. Evans, a leading authority in digital asset litigation and a Penn State Dickinson Law professor who is not involved in the matter, said that the allegations raised the issue not only of the responsibility of centralized exchanges to deliver the primary transactional services, but also their fiduciary duty to safeguard assets.

"We will see more class actions and that, in turn, will put more pressure on centralized exchange owners to adopt more robust governance practices," Evans said in an email. "Failure to do so increases risks to investors and consumers and risk to trust and integrity in the larger ecosystem, still reeling in some ways from the crypto contagion years of 2023/24 with the collapse of Terra and failure of FTX."

Star Xu, a Chinese entrepreneur, founded OKX Group in 2013 to develop blockchain and crypto-related businesses. As part of this venture, Xu launched Okcoin, which became one of China's largest bitcoin exchanges. Later on, Xu launched OKX as a global crypto exchange through OKX Group. However, due to regulatory changes in China, Okcoin moved its headquarters to San Francisco. The two entities—Okcoin and OKX—have since merged.

OKX allows customers to deposit, trade and withdraw hundreds of digital assets, including cryptocurrencies such as bitcoin and ethereum. The platform has generated billions of dollars in revenue since its launch and the plaintiffs alleged in the complaint that OKX's growth was largely fueled by targeting the larger and more lucrative U.S. crypto market.

"Specifically," the plaintiffs alleged in the complaint, the "defendants knowingly failed to register its primary exchange at OKX.com as a money transmitting business, willfully violated the Bank Secrecy Act by failing to implement and maintain an effective anti-money laundering program, and disregarded crucial Know Your Customer rules—all in a deliberate and calculated effort to profit from the U.S. market, without implementing controls required by U.S. law."

OKX did not have counsel listed in the docket. The company did not respond to an email requesting comment sent on Monday.

And the plaintiffs, represented by Eric I. Niehaus, a partner at Robbins Geller Rudman & Dowd, alleged the defendants' willful disregard of these laws and regulations turned the OKX platform into "a magnet and hub for criminals, users from sanctioned jurisdictions, terrorists, and other bad actors" who would launder crypto, which was stolen or obtained by other unlawful means.

The plaintiffs, such as Alister Watt of North Carolina, alleged in the complaint that bad actors would steal crypto, such as $725,000 in bitcoin and ethereum, and would avoid the permanent record of the theft on the public blockchain by laundering the tokens on the platform. Similarly, the plaintiffs alleged that millions of dollars were stolen throughout the class period between Jan. 10, 2021, to the date of judgment through the "OKX Crypto-Wash Enterprise."

Now, the case is pending before U.S. District Judge Jeffrey S. White of the Northern District of California. And in the nationwide class action complaint, the plaintiffs also alleged claims for violations of the Racketeer Influenced and Corrupt Organizations Act, conversion and aiding and abetting conversion.

"Decentralize exchanges are getting hit left and right," said Joe Doll, general counsel at Magic Eden, one of the biggest NFT platforms in the world, who is not involved in the matter. "So this is definitely a trend to watch."

Read the Complaint:

Securities Law News
Jan. 14, 2025, 1:21 PM PST

Pacira Patent Void Surprised Investors to Big Selloff, Suit Says

By Gillian R. Brassil

- **COURT**: D.N.J.
- **TRACK DOCKET**: No. 2:25-cv-00322 (Bloomberg Law subscription)

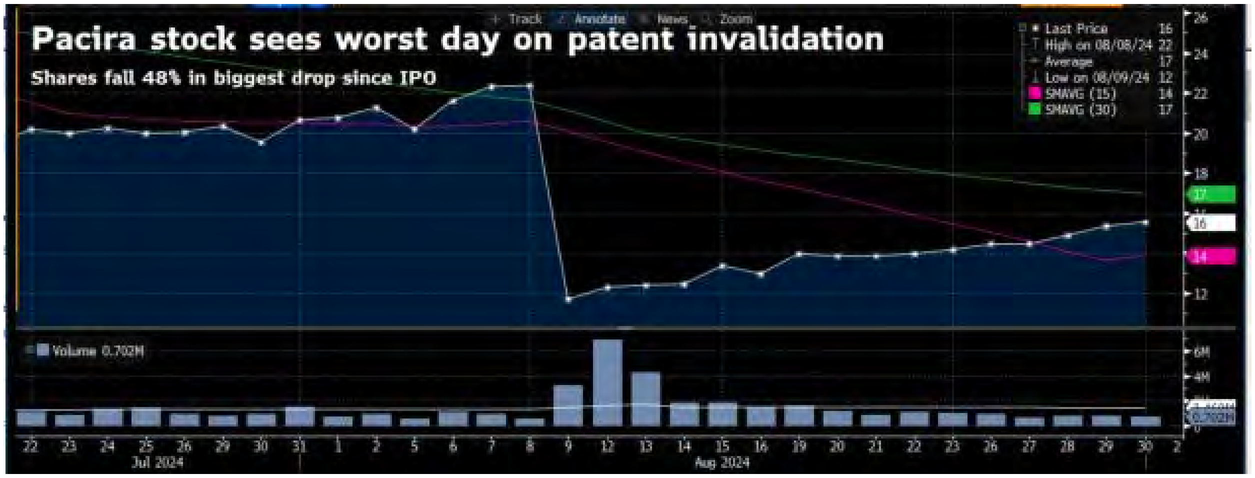
Pacira Biosciences, Inc., current and past executives misled investors on the viability of a patent for its top-selling drug amid litigation, leading to a record stock drop in August 2024, a proposed class action says.

Pacira issued rosy projections about the protection of its post-surgical painkiller after the company had already sustained an adverse ruling, and then the same federal court canceled its '495 patent, investor Leandro Alvarez said in a complaint filed Monday in the US District Court for the District of New Jersey.

The company had touted its ability to continue expanding use of Exparel, and the strength of its '495 patent's validity and scope, the complaint said. Sales of the non-opioid painkiller accounted for 80% of its 2023 total revenue.

But the New Jersey federal court held in August that eVenus Pharmaceutical Laboratories, Inc. didn't infringe Pacira's '495 patent in pursuing a generic version of the product due to obviousness and anticipation. The decision voiding the patent came after the same court's 2023 ruling in a similar case on claims construction involving Pacira patents, including the '495, that favored eVenus, Alvarez said.

Pacira's stock price collapsed by almost 48%, its largest-ever single-day drop, according to data compiled by Bloomberg.



Bloomberg terminal data

Pacira appealed to the Court of Appeals for the Federal Circuit where it is pending.

Pacira had sued eVenus for allegedly infringing on its ‘495 patent in November 2021, the complaint said. The New Jersey court held a five-day bench trial in February 2024. Closing arguments were that May. Pacira submitted new evidence in July, but the court didn't find that would impact its decision, and voided the patent in August.

It would have otherwise expired in 2041, according to the complaint.

Pacira has filed a slew of Exparel-related suits in recent years against eVenus and its parent, Jiangsu Hengrui Medicine Co., Ltd., most of them in the New Jersey court.

The proposed class includes investors who bought Pacira shares from Aug. 2, 2023 through Aug. 8, 2024. Alvarez, who estimates anywhere from hundreds to thousands of class members, seeks damages and alleges securities law violations.

Pacira didn't respond to an email seeking comment.

Levi & Korsinsky, LLP represents Alvarez. The attorney didn't respond to an email seeking comment.

The case is Alvarez v, Pacira Biosciences, Inc. , D.N.J., No. 2:25-cv-00322, complaint filed 1/13/25 .

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Securities Law News

Jan. 14, 2025, 11:02 AM PST

Skadden-Myovant Appeals Court Skeptical of 'Family' Conflict

By Gillian R. Brassil

- Appellant attorney says to view Japanese groups like family
- Second Circuit notes slim stake in actual buyout company

The Second Circuit appeared skeptical that there was a conflict of interest in need of disclosure when Skadden, Arps, Slate, Meagher & Flom LLP advised Myovant Sciences Ltd. on its buyout of with Sumitovant Biopharma Ltd. given the plaintiff's attorney's description of Japanese corporations' "family-like" structure.

Judges have to consider corporate structure and relationships under US law, one judge said in oral arguments on Tuesday. The panel included US Court of Appeals for the Second Circuit Judges John M. Walker, Jr., Joseph F. Bianco, and Beth Robinson, according to the calendar.

Attorney Joshua Fruchter, who represented investor and plaintiff-appellant Joseph Zappia, told the three-judge panel that Sumitovant and Sumitomo group businesses were like "family," their bond "strong if not stronger" than connections between affiliates in the US. That Skadden represented Sumitomo Mitsui Banking Corp. and different Sumitomo groups in other legal matters was something Myovant shareholders would've liked to know in the proxy statement for the buyout, he said.

A judge expressed hesitancy, saying "layers of ownership" separated Sumitovant, the real counterparty in the buyout of remaining Myovant shares, to the point that the banking portion Skadden had represented had about a 2% stake in Sumitomo Chemical Co. Ltd., which owned a majority of Sumitovant's corporate parent, Sumitomo Pharma Co.

The comment echoed the decision of Judge Jed S. Rakoff in the Southern District of New York who dismissed Zappia's allegations in 2023, saying the complaint never alleged Skadden represented Sumitovant, the real counterparty in the buyout, or Sumitomo Pharma, among other issues.

Sumitovant acquired Myovant in 2023 at $27 a share—it's "best and final offer," per the defendant-appellees' brief. Zappia sued alleging Skadden, serving as a legal adviser to Myovant's committee negotiating the merger's sale price, had a conflict because it had represented Sumitomo Banking, which financed the merger, and other Sumitomo group members. The proxy statement was misleading because it touted Skadden's advise was "independent" and free of conflict, Zappia said in his brief, and the purported relationships might have impaired the deal given Myovant didn't solicit competing bids.

When Myovant and Sumitomo Pharma attorney Boris Feldman was asked by Robinson whether it would be a conflict for Skadden to have a relationship with the financier of the transaction, he said not legally.

In regards to disclosing the bank-lawyer relationship in the proxy statement, Feldman said there's no "special carve-out in materiality standards" for US courts in regards to Japanese companies "that might share a newsletter together." Feldman also said the proxy statement addressed the solicitation of other bids, including that another company declined to make an offer and seeing it wouldn't happened given Sumitovant already owned 52% of Myovant.

Fruchter said that legal precedent has shown its good to solicit other bids to bolster your deal, and that the negotiations were very friendly.

"They did go back and forth like four times, so it wasn't that friendly," a judge said.

Fruchter said if allowed to re-plead, Zappia could further explain the family-like business structure.

Wohl & Fruchter LLP and Weiss Law LLP represent Zappia. Freshfields Bruckhaus Deringer LLP represents the defendants-appellees. Neither firm responded to an email seeking comment ahead of the arguments.

Skadden, which isn't a party to the suit, didn't immediately respond to a request for comment.

The case is Zappia v. Myovant Sciences Ltd. , 2d Cir., No. 24-253, 1/14/25 .

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Wells Fargo seeks dismissal of fraud claims linked to fake job interviews

courthousenews.com/wells-fargo-seeks-dismissal-of-fraud-claims-linked-to-fake-job-interviews

Michael Gennaro

Wells Fargo said there is no proof that its officers acted with intent to defraud or mislead in statements to the public or the government about the company's diverse hiring guidelines.

FILE - This July 14, 2014 file photo shows Wells Fargo offices in Oakland, Calif. (AP Photo/Ben Margot, File)

SAN FRANCISCO (CN) — Arguing for the dismissal of misrepresentation claims relating to its hiring practices in federal court Tuesday afternoon, Wells Fargo said there is no evidence that its officers acted with intent to defraud or knew about the company conducting fake job interviews.

A class of plaintiffs who are former investors of Wells Fargo sued the bank in 2022, claiming that it conducted fake job interviews to get around the company's diversity guidelines. After the New York Times published a story detailing the sham interviews, Wells Fargo's common stock price plummeted, causing the investors to suffer significant losses and damages.

Leonid Traps, counsel for Wells Fargo, told Thompson that the amended complaint — submitted after U.S. District Judge Trina Thompson, previously allowed misrepresentation claims to survive against Wells Fargo's board in 2024 but dismissed the claims against the Wells Fargo officers in September 2024 — does not contain any new facts against the officers.

The attorney added that the complaint should be dismissed with prejudice because the plaintiffs have still not pleaded that the Wells Fargo officers knowingly made statements to defraud anyone.

Any inconsistencies or differences in statements made by directors and officers of Wells Fargo can be explained by the officers and directors not having the same information, Traps said.

"There are no allegations that the directors and officers knew the same things, nor that they made the same statements at the same time. The allegations as to what the directors knew were separate from what the allegations are as to what the officers knew," he said.

Traps also said the amended complaint did not address demand futility — a legal principle that allows a shareholder to avoid the requirement of demanding that a corporation's board of directors bring a lawsuit on their behalf. It applies when a demand would be pointless or rejected by the board, or if the board is involved in the reported wrongdoing.

Gia Jung, counsel for the investors, told Thompson that the amended complaint “unequivocally” addressed demand futility.

“When we amended we made sure to make clear on the face of the pleadings that a demand on the board as to the claims against the officer defendants would have been futile. The discriminatory hiring statements that this court has already found to be actionable against the board completely overlap and are nearly identical to the statements that underlie the securities claims against the officer defendants,” Jung said. “A demand on the board as to any of the alleged claims against the officer defendants would be futile, because the board would be conflicted.”

Thompson, a Joe Biden appointee, asked Jung what was in the amended complaint that could change her mind about her previous order dismissing the claims against the officers.

Jung replied that the false statements of both the directors and officers implicate and are intertwined with liability allegations.

“And so here we’re tying those as it relates to the board with those that relate to the officer defendants,” Jung said.

Thompson took the matter under submission.

The plaintiffs had argued previously that Wells Fargo executives knew about the practice of fake interviews and did not do anything to address them even after the New York Times story was published, so the company’s statements made in reports and notices filed with the Securities Exchange Commission and press releases, which emphasized the company's commitment to improving workforce diversity, were materially false.

Wells Fargo’s 2020 diversity guidelines required that at least 50% of candidates interviewed for positions that have salaries of more than $100,000 a year come from an underrepresented racial, ethnic or gender group or were veterans, people with disabilities or members of the LGBTQ community.

Categories / Business, Financial, Securities

Securities Law News

Jan. 14, 2025, 4:51 PM PST

CVS Escapes Claims Investors Were Misled During Aetna Merger

By Mike Vilensky

- Plaintiffs waived challenge to merits decision, judge says
- CVS doesn't get costs, Rhode Island Supreme Court also rules

CVS and its top executives succeeded Tuesday in convincing Rhode Island's top court to affirm the dismissal of allegations from investors that the company provided them with misleading information during its merger with Aetna Inc.

The investors waived their right to challenge a lower court's dismissal because they didn't include a merits-based argument in their brief, the Rhode Island Supreme Court said.

The lower court dismissed the investors' suit because it was barred by collateral estoppel, which prohibits parties from relitigating issues that have been decided in a prior action. The lower court also said it was persuaded by the merits of recent rulings— *Labourers' Pension Fund of Central and E. Canada v. CVS Health Corp.* and *City of Miami Fire Fighters' and Police Officers' Ret. Trust v. CVS Health Corp.* —dismissing suits against CVS with similar allegations. In those decisions, courts ruled that CVS shareholders failed to show CVS' alleged misstatements or omissions related to the merger were sufficiently misleading.

The plaintiffs had argued that offering documents relating to the 2018 merger violated the Securities Act of 1933 because they contained misstatements of fact and omitted certain information.

The lower court erred by dismissing the suit against CVS in Rhode Island based on collateral estoppel because the prior actions weren't yet certified as class actions, said Rhode Island Supreme Court Justice Erin Lynch Prata. But the lower court's dismissal stands because the plaintiffs waived their challenge to the lower court's merits-based ruling, Prata said in the opinion.

The investors—City of Warren Police and Fire Retirement System and David Freundlich—didn't pose a question for the Rhode Island Supreme Court about the merits of lower court's merits decision, Prata said. Therefore, they waived a challenge to that part of the lower court decision, Prata said.

Prata made a distinction between the lower court's procedural reasoning for dismissing the case—collateral estoppel—and its ruling on the substance of the claim that CVS issued misleading statement. The latter—which Prata referred to as the merits—wasn't argued by the investors on appeal, Prata said.

"'We will not give life to arguments that the plaintiff has failed to develop on his own,'" Prata said, citing a Rhode Island Supreme Court 2016 precedent.

The investors argued that the lower court ruling was based only on collateral estoppel, but Prata disagreed.The lower court adopted the reasoning and findings of two similar rulings, Prata said, . That as a reasoning to dismiss the investors' complaint "separate and apart from the trial justice's collateral estoppel rationale," which the investors failed to challenge on appeal, Prata said

The court denied CVS' request for costs, however, saying the company didn't make a meaningful argument for the costs and thereby waived that request.

Justices Paul A. Suttell and William P. Robinson III joined the opinion.

Scott & Scott and Strauss, Factor, Laing & Lyons represented the investors. Williams & Connolly and Whelan Corrente & Flanders LLP represented CVS.

The case is In re CVS Health Corp. Securities Litig. , R.I., No. 2023-115, 1/14/25 .

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Class Action
Jan. 15, 2025, 7:32 AM PST

Xerox Suit Says Leaders Overhyped Overhaul, Forcing Stock Down

By Gillian R. Brassil

- **COURT**: S.D.N.Y.
- **TRACK DOCKET**: No. 1:25-cv-00371 (Bloomberg Law subscription)

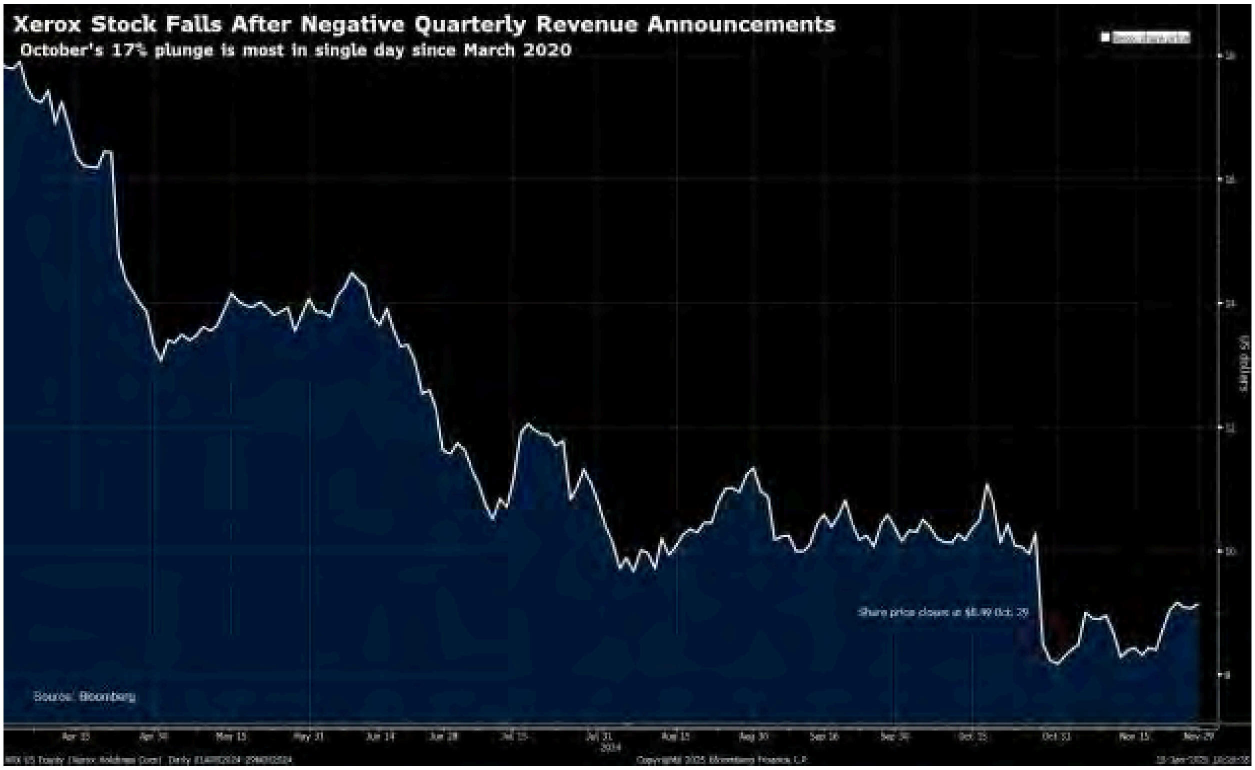
Xerox Holdings Corp. executives and board members misled investors about how an overhaul would impact the company, sending the stock down and exposing it to a proposed class action when revealing the reorganization dampened quarterly sales and revenue in 2024, a shareholder derivative lawsuit says.

The company's self-described "reinvention" included job cuts that hurt Xerox's sales productivity, leading it to sell through older products at a lower rate which in turn delayed launching new ones, stockholder Victor LaVallee says in the complaint filed in the US District Court for the Southern District of New York on Tuesday. He says Xerox leaders violated securities laws from Jan. 25 through Oct. 28 by overhyping the reorganization, which began in 2023.

Officers also allegedly harmed the company by having it repurchase thousands of Xerox shares at artificially inflated prices in 2024. Xerox spent an aggregate of more than $10.8 million for 690,183 shares between January and October, causing the company to overpay for repurchases by more than $4.9 million, the complaint said.

Executives disclosed lower revenue for the first quarter of the 2024 fiscal year, citing the reinvention as "initially disruptive to sales operations," the complaint said. This sent the stock down more than 10% on April 23. That was its worst selloff in more than six weeks, according to data compiled by Bloomberg.

Then on Oct. 29, Xerox revealed sluggish improvements in sales productivity and delays in global launches for a pair of new products, with quarterly revenue down 7.5% year-over-year to $1.53 billion in Q3, LaVallee said. Share prices fell 17%, the most since March 2020, according to data compiled by Bloomberg.



Another investor filed a proposed class action regarding the same allegations against Xerox and two top executives in November.

The Brown Law Firm PC represents LaVallee.

Xerox didn't respond to an email seeking comment. Neither did a firm representing them in the proposed class action.

The case is LaVallee v. Bandrowczak , S.D.N.Y., No. 1:25-cv-00371, complaint filed 1/14/25 .

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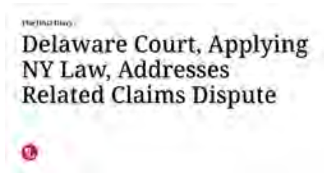
Delaware Court, Applying NY Law, Addresses Related Claims Dispute

dandodiary.com/2025/01/articles/d-o-insurance/delaware-court-applying-ny-law-addresses-related-claims-dispute

January 14, 2025



By Kevin LaCroix on January 14, 2025
Posted in D & O Insurance

Whether or not two or more claims are interrelated within the meaning of a D&O insurance policy is a recurring issue. The outcome of interrelatedness disputes often reflects the specific facts involved and the relevant policy language. In addition, the applicable law can also be a factor. A recent decision of the Delaware Superior Court reflects all these factors, and the case outcome at least raises the question whether the applicability of New York law to the dispute was determinative. The Court's opinion, as updated and reissued on January 6, 2025, can be found here.

Background

Prior to filing for bankruptcy, Benefytt Technologies was a health insurance technology business. During the period 2018 and 2019, Benefytt faced seven different lawsuits or other enforcement actions alleging a variety of charges. The two key lawsuits were the Keippel action and the Belin action. There were five other matters (the Daniels, DeFalco, Rector, FTC, and Spiewek actions). At least some of these five other matters were filed during the earlier of two policy periods, both of which are described further below. One of the many questions at issue in this coverage dispute is whether the Keippel or Belin actions related to the five other actions, or any of them.

The Keippel action, a securities class action lawsuit, was filed in February 2019 (during the policy period of Benefytt's 2018-2019 insurance program). The gist of the complaint is that Benefytt had failed to disclose to investors the details of an alleged scheme involving Benefytt and a health insurance provider, Simple Health. The Keippel action ultimately settled for $11 million. Benefytt incurred $4.2 million in insurance fees.

The Belin action was filed on June 7, 2019 (during the policy period of Benefytt's 2018-2019 D&O insurance program). The initial complaint alleged RICO violations and related aiding and abetting violations on behalf of consumers who had purchased Benefytt insurance products through Simple Health. After the expiration of the 2018-2019 insurance program, the Belin action complaint was amended to include Benefytt's chairman, Michael Kosloske, as a defendant. The Belin action ultimately settled for $27.5 million.

During the policy periods 2017-2018 and 2018-2019, Benefytt maintained successive $25 million D&O Insurance programs. Each program consisted of a $10 million layer of primary insurance and three layers of $5 million excess insurance. The programs were essentially identical except that the second layer excess in the two programs were provided by different insurers.

Benefytt submitted the Keippel action to its insurers as a claim. The primary insurer initially accepted coverage of the Keippel claim under the 2018-2019 program, but later changed its position to contend that the Keippel action was interrelated to previously filed lawsuits and therefor that the Keippel action fell within the 2017-2018 coverage period. The primary insurer agreed to cover the Keippel action under the 2018-2019 primary policy while reserving its rights to contest the applicable policy.

Benefytt initiated a declaratory judgment action to sort out the coverage for the various actions. The parties ultimately filed a host of dispositive motions. In the court's subsequent opinion, it took the court more than six pages just to describe Benefytt's and the various insurers' respective positions. Suffice it to say that the parties' positions were varied.

The Relevant Policy Language

The primary policy provides the following in the event of multiple claims:

More than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to constitute a single Claim shall be deemed to constitute a single Claim and shall be deemed to have been made at the earliest of the following dates:

1. *The date on which the earliest Claim involving the same Wrongful Act or Interrelated Wrongful Acts is first made; or*
2. *The date on which the Claim involving the same Wrongful Act or Interrelated Wrongful Act shall be deemed to have been made …*

The term "Wrongful Act" is defined as "any actual or alleged act, error, omission, misstatement, misleading statement, neglect or breach of duty."

The term "Interrelated Wrongful Acts" is defined as "Wrongful Acts which have as a common nexus of any fact, circumstance, situation, event, transaction or series of facts, circumstances, situations, events, or transaction."

The Court's Opinion

In an opinion published as revised and corrected on January 6, 2025, Delaware Superior Court Judge Paul R. Wallace ruled that the Keippel action falls within the 2018-2019 policy period and that the Belin claim falls outside the policy period of both of the insurance programs, and also is not interrelated with any other covered claim.

Much of the Court's analysis is particular to the specific facts and circumstances involved, particularly the various claims made dates and the dates of various claims notices and notices of circumstances. Judge Wallace did make one preliminary determination that, as discussed below, I believe is particularly important – that is, he held, in reliance on a choice of law provision in the primary policy that New York law governed the determination of the coverage issues.

The key issues for the court to decide were the proper policy-period placement for the Keippel and Balin actions, and whether they are interrelated to prior actions.

Judge Wallace first determined that the Keippel action, which was first filed during the policy period of the 2018-2019 program, was not interrelated with any of the previously filed actions. Based on a "side-by-side examination" of the Keippel actions and the prior actions, Judge Wallace said that the Keippel action "does not share a sufficient factual nexus" with the previously filed actions, adding that "mere allegations about a company's general misconduct that may be related to another action isn't enough."

In rejecting the interrelatedness argument with respect to the Keippel claim, Judge Wallace paid particular attention to the word "any "in the interrelatedness definition. He cited New York authority to the effect that "it is immaterial that one claim may involve additional facts or allegations because all that is required is 'any' common fact, circumstance, etc." However, he then commented that "That said, the claims do need 'numerous logically connected facts and circumstances' to be interrelated, and that they shouldn't be deemed interrelated when their relation to each other is "tenuous at best."

In concluding that the Belin claim was not made during the policy period of either of the two programs, Judge Wallace noted that the initial complaint, which was filed during the policy period of the 2018-2019 program, did not name an insured person as a defendant. While the initial complaint alleged supposed wrongful acts by Kosloske, he was not named as a defendant in the action until the complaint was amended after the 2018-2019 policy had expired, nor was any relief sought from him in the original complaint.

Judge Wallace also held that the Belin complaint was not interrelated with any of the other actions. In reaching this conclusion he noted that the ties between the Belin action and the other complaints were "just too feeble." The alleged wrongful acts were separated by multiple years and involve different transactions.

There must be, Judge Wallace said “a reasonable limit when interpreting the term ‘any’ as used in the interrelated coverage action.” To say that transactions “that were years apart and are the bases of different class actions and different causes of action are a ‘series of casually or logically connected facts’” as would be required for them to be interrelated “is to say too much.” While there are “general allegations of wrongdoing over a long period of time that indeed share similarities or even complement each other,” the court “cannot say these bestrewn claims rise to the required level of interrelatedness.”

Discussion

As I have discussed at length in prior posts (for example, here), interrelatedness questions are among the most vexing of all insurance coverage issues. Anyone who has tried to sort through the cases has quickly concluded that the cases are all over the map. The problem is that “relatedness” is such an elusive concept – what is that makes any two things “related”? The more you try to think about it, the more it recedes away from you.

In the end, the only way to try to summarize the various cases is to say that they are often a reflection of the specific facts involved, and the specific policy language at issue.

In addition, another thing you can say about the various interrelatedness cases is that the various outcomes must also be understood within the context of the specific law that the court has applied.

And in that regard, I think it is important that in this case Judge Wallace, sitting in a Delaware court, applied New York law, due to the choice of law provision in the primary policy. To be sure, as Geoffrey Fehling of the Hunton Andrews and Kurth law firm noted in his *LinkedIn* post about this case earlier this week (here), given the uncertainty of related claims analysis under Delaware law, the outcome of this case may well have been the same under Delaware law – but, he also noted, “states have very different bodies of case law influencing the analysis.”

I don’t know either whether the application of New York law alone is sufficient to explain the outcome, but the fact is that, particularly with respect to the issues surrounding the Belin claim, the court’s determinations were consistent with the insurers’ interests and contrary to the policyholder’s interest – a noteworthy development given the general disposition of the Delaware courts in favor of policyholders generally.

There is a lot more that might be said about the court’s various holdings in this case, but the one issue I want to focus on is what the Judge Wallace said about the word “any.” What he said was even though the word “any” on its own lacks limitation, there nevertheless must be a “reasonable limit when interpreting the word ‘any’ as used in the interrelated coverage provision.” So, even though there were “general allegations of wrongdoing over a long period of time that indeed share similarities or even complement each other,” that is not enough.

The court he said, “cannot say these bestrewn claims rise to the required level of interrelatedness.” This “reasonable limit” analysis with respect to the work “any” is an interesting one in the larger context of interrelatedness case law.

There is one further thing to keep in mind when it comes to interrelatedness issues. That is, neither insurers nor policyholders always want the same thing from a relatedness determination. For example. sometimes a policyholder will want multiple claims to be found unrelated, so that multiple policy programs can be accessed; other times a policyholder will want to have multiple claims found to be related so that only one retention applies. This variability of interests is yet another reason why the interrelatedness decisions are so hard to map, as different players take different positions in different cases, depending on their interests in a particular case. This observation is also a precaution against trying to label a particular ruling (like, say, this one) as policyholder-friendly or insurer-friendly. There is always the next case.

Securities Law

Jan. 15, 2025, 6:18 AM PST

Western Global Pilots Cleared for $14.5 Million Stock Plan Deal

By Jacklyn Wille

- Class members could receive gross payments of about $41,000
- Deal encompasses two agreements by different defendant groups

Pilots for Western Global Airlines LLC finalized a pair of class settlements worth $14.5 million, resolving claims that they were forced to overpay for their stake in the company through its employee stock ownership plan.

One agreement requires former Western Global shareholders to pay $7.5 million, while the other requires plan trustee Prudent Fiduciary Services LLC and its founder to pay $7 million. About 353 people covered by Western Global's ESOP are slated to receive average gross recoveries of more than $41,000 each, according to court filings.

Judge Richard G. Andrews of the US District Court for the District of Delaware granted final approval to the agreements on Tuesday. He also awarded class counsel more than $4.2 million in attorneys' fees—29% of the settlement value—and he approved $25,000 service awards for each of the two named plaintiffs.

The lawsuit challenges a 2020 transaction in which the the cargo airline's newly-created ESOP paid $510 million to acquire a 37.5% stake in the company. The transaction, which was financed entirely with a loan from the company, allegedly caused employees to overpay by as much as $188 million for the stock.

The pilots are represented by Cooch & Taylor PA, Stris & Maher LLP, Cohen Milstein Sellers & Toll PLLC, and Nichols Kaster PLLP. The defendants are variously represented by Groom Law Group, Chipman Brown Cicero & Cole LLP, Morris James LLP, and Hawkins Parnell & Young LLP.

The case is Burnett v. Prudent Fiduciary Servs. LLC , D. Del., No. 1:22-cv-00270, 1/14/25 .

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Miami Judge Approves Shaq's $11 Million Settlement to Resolve Astrals Investor Claims

law.com/therecorder/2025/01/14/miami-judge-approves-shaqs-11-million-settlement-to-resolve-astrals-investor-claims

Michael A. Mora

What You Need to Know

- A Miami federal judge approved an $11 million settlement created by basketball star Shaquille O'Neal for injured investors in the Astrals Project nonfungible tokens and GLXY tokens, which he promoted.
- Adam Moskowitz, an attorney representing the plaintiffs, said that "it is the first reported case interpreting securities laws to today’s crypto promotion claims."
- A final approval hearing has been set for April 1.

A Miami federal judge entered an order on Tuesday granting preliminary approval to an $11 million settlement that basketball legend Shaquille O'Neal has agreed to create for injured investors in the Astrals Project nonfungible tokens and GLXY tokens.

Adam Moskowitz, the managing partner at the Moskowitz Law Firm in Coconut Grove, Florida, is the lead attorney for the certified class of investors in the lawsuit against the defendants, O'Neal, Astrals LLC and the company's various subsidiaries. Moskowitz is joined by his partner Joseph M. Kaye and Jose M. Ferrer and Desiree Fernandez of Mark Migdal Hayden in Miami.

“The litigation is a very good example of where all counsel took the time and effort necessary to work through a mediator to resolve issues to benefit all parties,” Moskowitz said.

Stephen A. Best, who is among the partners at Brown Rudnick representing O'Neal, along with Christopher E. Knight, Brian D. Elias, Esther E. Galicia and Alexandra L. Tifford of Fowler White Burnett, did not immediately respond to a request for comment.

The Astrals Project is a collection of 10,000 metaverse-ready 3D avatars by artist Damien Guimoneau. These NFTs aimed to promote investment in a virtual world in which users could socialize, play and interact with other users, including O'Neal. The plaintiff class alleged that the value of Astrals' financial products was linked "almost entirely to O'Neal's celebrity status and many Astrals investors" were induced to purchase them because of his promotion.

In August, U.S. Senior District Judge Frederico A. Moreno of the U.S. District Court for the Southern District of Florida approved, in part, and denied, in part, the defendants' motion to dismiss and additional remedies. In the 24-page ruling, Moreno became the first federal

judge to directly address whether celebrity promoters can be liable for promoting these unregistered securities.
In doing so, the judge disagreed with O'Neal that the plaintiffs failed to allege that the NFTs are "securities" subject to federal securities laws. He wrote that the NFTs sold cannot be used and are currently just digital pictures that investors can view.

As a result of the question as to whether the NFTs are unregistered securities, the Astrals investments became almost worthless. And in November, the plaintiffs and O’Neal settled.

Now, Moreno has scheduled a final approval hearing for April 1.

The Astrals settlement will resolve the claims in the class action before Moreno and will be allocated to injured class members. It applies to those who "from May 24, 2022, to the date of this order, purchased Astrals NFTs and/or who, before the date of this order, purchased GLXY Token," according to the order.

In the order, Moreno approved Moskowitz to serve as lead counsel and appointed Strategic Claims Service as the claim’s administrator and escrow agent. In addition, the escrow agent is directed by Moreno to transfer the cost and attorney fee payment of $3 million to lead class counsel.

Moving forward, Moreno has set a schedule, which includes the Jan. 17 deadline for disseminating class notice and the last day to submit a claim form, which will be April 17. And Moskowitz, who is leading the litigation in several additional crypto-related actions, including in the Southern District of Florida, noted the larger significance of the case.

“It is the first reported case interpreting securities laws to today’s crypto promotion claims,” Moskowitz said. “So it is very helpful in [the] FTX and Voyager [cases].”

Read the Order:

Some attorneys suing over fires are victims themselves

DJ dailyjournal.com/articles/382873-some-attorneys-suing-over-fires-are-victims-themselves

Civil Litigation

Jan. 15, 2025

In the aftermath of devastating wildfires in Los Angeles County, several attorneys affected by the destruction are spearheading legal efforts to help their neighbors and communities recover.

A week after the start of wildfires that ravaged the communities of Altadena and the Pacific Palisades, Los Angeles County attorneys are scrambling to prepare for a massive wave of potential civil lawsuits - and for many of them, the situation is uniquely personal.

"It wasn't just fires; it was wholesale destruction of entire communities," said Alexander R. Wheeler of the Parris Law Firm, based in Lancaster.

Wheeler is one of the thousands of Pacific Palisades residents whose homes were lost to wildfire.

"As a victim of that and an evacuee of the Palisades, I've been on very little sleep, of course, investigating not just how to rebuild my life, but helping my neighbors and fellow Angelenos figure out how they can negotiate and work with their insurance companies to get their losses covered - and, as well, investigating potential lawsuits."

Wheeler said that while Parris Law Firm has yet to file any lawsuits, they are investigating possible claims related to both the Palisades and the Eaton fires. With a statutory deadline of six months to file claims against government entities, early lawsuits are likely to target third parties like Southern California Edison.

The Los Angeles Department of Water and Power was sued on Tuesday by attorneys in another firm.

Brian J. Panish of Panish Shea Ravipudi LLP in Los Angeles said multiple attorneys in his firm had lost their homes in the wildfires, noting that the firm plans to file lawsuits related to both the Palisades and Eaton Fires.

"We're investigating Palisades," Panish said in a phone call on Tuesday. "Obviously we want to do anything we can to help. You know, the fact that we lost multiple homes in our firm, and many of our friends have lost their homes -- we're trying to do whatever we can to help them also, but we haven't been able to get the cause and origin. Our experts were able to identify what we believe is the power line in Eaton that caused that problem, but as far as the Palisades Fire it's a more difficult investigation."

As of Tuesday, at least six civil lawsuits had already been filed against Edison in connection with the Eaton Fire, with several firms planning to file more, including Panish Shea Ravipudi LLP, Robertson and Associates LLP and Lieff Cabraser Heimann & Bernstein LLP.

"We do believe there are preliminary indications of utility responsibility for the Edison fire, and we are investigating further," said Lieff Cabraser attorney Lexi J. Hazam of San Francisco in a phone call on Tuesday.

In addition to a complaint against Edison for the Eaton Fire, Alexander Robertson IV of Robertson and Associates LLP in Westlake Village also filed a lawsuit against the city and its electricity utility, claiming inverse condemnation related to the Palisades Fire.

"It relates to the lack of water pressure, the lack of available water, the fact the city had drained the Santa Ynez Réservoir back almost a year ago, last February, for want of $80,000 repair to its cover," Robertson said in a phone call on Tuesday. "According to the fire chief, DWP did not inform the fire department that they had drained that reservoir, and water was not available for firefighting purposes."

The lead plaintiff in the case is Daniel M. Grigsby, chief counsel for the Los Angeles Lakers, whose house was destroyed in the fire. Robertson said the firm has spoken to more than 100 clients who wish to file additional complaints.

For Mark P. Robinson Jr. of Robinson Calcagnie Inc. in Newport Beach, who has worked for years on coordinated wildfire proceedings in Southern California, the fires have become on opportunity to practice his specialty in the service of members of the local legal community who have been impacted.

"I'm going to be involved in helping these people - that's how I feel," he said in a phone call on Tuesday. "It's time to help people, and that's the truth."

#382873

Once the LA Fires Are Extinguished, Expect the Litigation to Unfold for Years

law.com/therecorder/2025/01/13/once-the-la-fires-are-extinguished-expect-the-litigation-to-unfold-for-years

Alexander Lugo

What You Need to Know

- The historically destructive wildfires in LA are expected to elicit some potential work for insurance lawyers in the coming years.
- Litigators expect a rise in lawsuits to come within the next few years, falling primarily into two buckets.
- Regulatory lawyers are keeping an eye on whether California will make changes to how the state's insurance market works.

California's insurance market was already shedding insurers as some have opted to pull out of the state over the last few years due to wildfire risk. With financial losses estimated to reach up to $20 billion once the current Los Angeles fires settle, making it California's most expensive disaster ever, insurance lawyers are now expecting a rise in litigation and possible changes in the insurance market.

"You've got different fires with different possible causes and then you have [at least] 180,000 people subject to evacuation works, not to mention all the businesses that have been destroyed. It is the kind of thing that you anticipate a lot of litigation coming out of," Los Angeles-based McGuireWoods partner Kirk Pasich said.

Pasich focuses his practice on insurance matters, specifically representing insured parties looking to recover losses.

He says that when lawsuits start being filed as a result of wildfires, they tend to overwhelmingly fall into one of two categories. The first batch gets directed at entities that may be blamed for starting the fire.

As an example, utility provider Pacific Gas and Electric settled a lawsuit against it for $13.5 billion in 2019 after its equipment was blamed for starting several fires in Northern California that led to widespread destruction and dozens of deaths.

The other bucket of lawsuits typically gets directed at insurers from people who get claims denied, Pasich said.

But another set of lawsuits comes from an issue that typically gets overlooked in these situations.

“This may be small by comparison to people who have lost their homes. But there are business interruption claims that come out of the inability to do business and the lost profits, not just the physical damage, but your loss of business income,” Pasich said. “We may end up seeing a wave of claims filed by businesses who say, ‘Not only was my store destroyed, but I lost the revenue I would have gotten over the next year or two.' A number of concerts have been canceled and those folks lost money.”

He also used the NFL’s decision to move the Los Angeles Rams’ playoff game to Arizona as one example of lost income, in addition to businesses that had to close entirely during the chaos.

What to Expect From California's Insurance Market

Another issue that comes up after natural disasters is whether insurers could go bankrupt, which could lead to delayed and reduced payouts for victims. However, Pasich says there’s typically government programs that tend to step in and reimburse those lost damages.

Additionally, he says that whenever insurers do go bankrupt, it opens opportunities for new insurers to come into the market.

Pasich is referring to the smaller regional insurers. But for the bigger insurers, they may not face a huge risk in going bankrupt over one natural disaster because of how spread out their business is, according to chair of Greenberg Traurig’s global insurance practice Fred Karlinsky.

“Absent something very strange happening, I wouldn't think there is a situation where this causes mass type of financial ruin for any insurers or reinsurers,” Karlinsky said. “The [insurance] market is fairly healthy. One of the reasons is the regulatory requirements that insurers have on them. The other is the fact that the losses are spread out worldwide.”

Another reason is that although losses could total in the billions, insurers aren’t necessarily liable to pay out all the damages there, Karlinsky said.

“In some cases you might be seeing property values where a house there may have been worth $50 million, but it was only insured for $10 million,” he said.

But one other worry comes as insurers have been pulling out of California’s risky market for years now. Karlinsky says there might be more of that to come after the massive damage seen in Los Angeles.

“California right now is the most challenging insurance market in the U.S.,” Karlinsky, who typically represents insurers, said. “Capital goes where capital is welcome and if capital doesn't feel like the environment has an understanding of what it needs to be successful, it's

not going to continue to deploy there."
After all the losses are calculated following a disaster, insurers typically determine whether they need to raise rates to spread their risk levels, Karlinksy said. During that same period they may determine whether it's financially sensible to stay in the market at all.

In the meantime, California has been pushing for insurers to cover high-risk areas if they want to do any business in the state. In response to the recent fires, the state's insurance commissioner Ricardo Lara issued a moratorium that prevents policy cancellations and non-renewals in the affected areas for the next year.

In contrast, Florida, which has its own insurance crisis due to hurricane risk, has taken the opposite approach.

The state has instituted insurer-friendly reforms that have come in the form of preventing lawsuits against insurers who deny claims in addition to not regulating the industry too heavily. While some insurers have reentered the market in Florida, premiums have remained high as hurricanes continue causing catastrophic damage to customers who now have less power to fight for unpaid claims.

On top of no clear answers as to how to solve an insurance crisis in a disaster-prone state, California now faces the possibility of years-long litigation coming to fruition soon following the destruction left behind in California.

Those cases typically take teams of lawyers years to get through.

"The last case that went to trial for me was actually litigated last year and it was related to the Thomas fire near Montecito, California. That was in 2017 and that went to trial in 2024, so that gives you some perspective on how long these can take to resolve," Reed Smith associate Jessica Gopiao, who practices in both California and Florida, said.

California utility faces billions in claims for fire damage even if it did nothing wrong

reuters.com/business/energy/california-utility-faces-billions-claims-fire-damage-even-if-it-did-nothing-2025-01-15

Tom Hals

Charred remains of buildings are pictured following the Palisades Fire in the Pacific Palisades neighborhood in Los Angeles, California, U.S. January 15, 2025. REUTERS/Mike Blake Purchase Licensing Rights, opens new tab

- Victims sue Southern California Edison under unique legal doctrine
- Inverse condemnation allows claims without proving utility's negligence
- Wildfires expected to be costliest ever in US

Jan 15 (Reuters) - Victims of the Los Angeles wildfires, likely the costliest in U.S. history, are seizing upon a unique California legal doctrine that allows them to collect from their power utility if its equipment caused the blaze -- even if the company did nothing wrong.
Numerous lawsuits were filed this week by victims of the Eaton fire, which broke out east of the city, against Southern California Edison, a unit of Edison International (EIX.N), opens new tab. The lawsuits allege that the company's high-voltage transmission towers were the source of the devastating blaze, which was driven by dangerous high winds and lower humidity.
The Reuters Power Up newsletter provides everything you need to know about the global energy industry. Sign up here.

Edison has said that it did not detect any operating anomalies on its transmission wires in the 12 hours before the fire or up to an hour after its ignition.

"Typically when you have a fire caused by electrical infrastructure you do see a signature voltage drop or current increasing and we have not seen that in our study," Edison CEO Pedro Pizarro told Bloomberg TV. He said the company followed protocols for wildfire mitigation approved by regulators.

Authorities have said that the cause of the various fires are under investigation.

If those power lines were a substantial cause of the fire, that could be enough to recover billions of dollars in damages from the utility, even if it complied with regulations, legal experts said.

That's because in California, a legal doctrine known as "inverse condemnation," which has traditionally been used by property owners to seek compensation from the government for taking private land, has been extended by state courts to utility companies.

The courts have held that utilities that damage private property while providing public services such as electricity are liable, even if the there is no finding of negligence.

"California is very unusual in that normally this doctrine only applies to government entities," said Daniel Farber, a professor at the University of California Berkeley School of Law, where he specializes in energy and the environment.

"The plaintiffs won't have to prove (the utility) poorly maintained these transmission wires or did a shoddy job," Farber said.

Most of the destruction has been the result of two blazes -- the Palisades Fire and the Eaton Fire -- which have destroyed more than 6,000 structures and killed at least 24 people.

The cost of the disaster is expected to run into the tens of billions of dollars.

California lawmakers have created a wildfire insurance fund with access to $21 billion that is meant to ensure that Southern California Edison remains solvent and victims' claims are paid in full. Pizarro told Bloomberg TV that the fund will cap the company's exposure at $3.9 billion.

Most of the lawsuits have been brought in state court in Los Angeles by victims of the Eaton Fire, who cited eyewitness accounts of flames near the transmission towers for the source of the blaze and its alleged link to Southern California Edison, a defendant with significant assets. Reuters has not confirmed the eyewitness accounts.

The lawsuits alleged that Edison was negligent for failing to properly maintain its transmission and distribution lines but also brought a claim for inverse condemnation.

The lawsuits seek damages for lost wages, costs to rebuild and other losses that cannot be currently calculated, which will likely vastly outstrip insurance coverage. The cases will likely take years to resolve.

“The price tag of these wildfires will be something we’ve never seen before,” said plaintiffs lawyer Mikal Watts, who has previously represented wildfire victims.

Edison will review the complaints when it receives them, a company spokesman said . The company said it remains committed to supporting the communities affected and restoring power.

If the company's equipment is found to be the substantial cause of the Eaton Fire, Edison would be liable for economic losses. If plaintiffs can prove negligence then they can get damages for personal injuries and wrongful death as well, according to Gerald Singleton, who filed one of the first lawsuits.

"There are times where a utility will say that their equipment started it, but they weren't negligent. That's very rare," Singleton said.

Reporting by Tom Hals in Wilmington, Delaware; Additional reporting by Mike Scarcella; Editing by Noeleen Walder and Mark Porter

- Suggested Topics:
- Boards, Policy & Regulation

Apple, Amazon fight off $600 million UK lawsuit over alleged 'collusion'

reuters.com/technology/apple-amazon-fight-off-600-million-uk-lawsuit-over-alleged-collusion-2025-01-14

Reuters

By Reuters

January 14, 202512:13 PM PSTUpdated 21 hours ago

Item 1 of 3 People walk past an Apple store in London, Britain, January 13, 2025. REUTERS/Isabel Infantes/File Photo

[1/3]People walk past an Apple store in London, Britain, January 13, 2025. REUTERS/Isabel Infantes/File Photo Purchase Licensing Rights, opens new tab

LONDON, Jan 14 (Reuters) - Apple (AAPL.O), opens new tab and Amazon (AMZN.O), opens new tab have successfully fought off a mass lawsuit in Britain over alleged collusion between the tech giants to remove resellers of new Apple products from Amazon's website, a tribunal ruled on Tuesday.
The lawsuit was brought by consumer law academic Christine Riefa on behalf of around 36 million British consumers who had bought Apple or Beats products.

Riefa's lawyers alleged that Apple and Amazon reached an agreement in 2018 to bar the vast majority of resellers of Apple and Beats-branded products from Amazon's marketplace in the United Kingdom, reducing competition for those products.

Apple and Amazon said the case, valued at 494 million pounds ($602 million) plus interest, was without merit and asked the Competition Appeal Tribunal to refuse to let it proceed.

The tribunal ruled that the case could not continue because Riefa had not demonstrated "sufficient independence or robustness" to represent the claimant class, in relation to third-party funding for the litigation.

Riefa's lawyers did not immediately respond to a request for comment, nor did spokespeople for Apple and Amazon.

The Competition Appeal Tribunal's refusal to certify the case, an early step in such litigation, is unusual as the bar for certification is relatively low.

Reporting by Sam Tobin; Editing by Catarina Demony and Emelia Sithole-Matarise

New York City lawsuit against Exxon, BP, Shell over climate change dismissed

reuters.com/sustainability/climate-energy/new-york-city-lawsuit-against-exxon-bp-shell-over-climate-change-dismissed-2025-01-15

Jonathan Stempel

A general view of the New York City skyline after heavy rains as the remnants of Tropical Storm Ophelia bring flooding across the mid-Atlantic and Northeast, in New York City, U.S., September 29, 2023. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights, opens new tab

- New York City says its 8.3 million residents were misled
- Claims the companies engaged in 'greenwashing' rejected
- City reviewing its legal options, seeks accountability

NEW YORK, Jan 15 (Reuters) - A judge has dismissed New York City's lawsuit seeking to hold Exxon Mobil (XOM.N), opens new tab, BP (BP.L), opens new tab and Shell (SHEL.L), opens new tab liable for misleading the public about their products, and their commitment to renewable energy and fighting climate change.
In a decision on Tuesday, state Supreme Court Justice Anar Patel said the city could not claim its climate-conscious residents were sensitive to how fossil fuels cause climate change, only to then be duped by the oil companies' failure to disclose how their fossil fuel products contributed to it.

"The city cannot have it both ways," Patel wrote.

Patel found no proof the oil companies and the defendant American Petroleum Institute conducted "greenwashing" campaigns, including statements about clean energy and alternative energy, to boost sales of fossil fuel products in the city.

She also said general statements such as Exxon's claim that its fuel helps people drive "cleaner, smarter and longer" were too vague to suggest the defendants' products had nothing to do with climate change.

With about 8.3 million people, New York City said the companies falsely portrayed themselves in ads and social media as climate change leaders despite minimal investments in clean energy such as wind and solar.

It sought civil fines and an end to alleged deceptions.

Nicholas Paolucci, a spokesman for the city's law department, on Wednesday said the city is reviewing its options.

"Our complaint alleged that these defendants spent millions to mislead consumers to think that they, and their products, contribute to a clean energy future," he said. "They do not. Companies that violate the city’s consumer protection laws should be held fully accountable. New Yorkers deserve no less."

The oil companies did not immediately respond to requests for comment.

The American Petroleum Institute's general counsel Ryan Meyers said the trade group was pleased with the dismissal. "Climate policy is for Congress to debate and decide, not a patchwork of courts," he said.

Many U.S. state and local governments have sued oil companies over climate change, including the emission of carbon dioxide and other greenhouse gases.

Patel ruled one day after the U.S. Supreme Court refused to halt the city of Honolulu's own lawsuit against Exxon, BP, Shell and several other oil companies.
New York City's lawsuit began in April 2021, three weeks after a federal appeals court rejected its lawsuit seeking to hold Exxon, BP, Shell, Chevron <CVX.N> and ConocoPhillips (COP.N), opens new tab liable to pay its costs from global warming.
The case is City of New York v. Exxon Mobil Corp et al, New York State Supreme Court, New York County, No. 451071/2021.

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Reporting by Jonathan Stempel in New York. Editing by Jane Merriman and Franklin Paul

Class Action
Jan. 14, 2025, 1:50 PM PST

Parties in National PFAS Case Propose Plan to Link Damage Claims

By Pat Rizzuto

- Judge overseeing national PFAS litigation pushed for plan
- Product identification strategy would select sites by March

Plaintiffs and defendants have proposed to a federal court that's overseeing national PFAS litigation a process they would use to figure out how to link damage claims to specific chemicals or firefighting foam manufacturers.

They jointly proposed on Monday a case management order to Judge Richard M. Gergel of the US District Court for the District of South Carolina.

Gergel is managing thousands of lawsuits involving PFAS treatment, personal injury, property damage, and other claims resulting from the per- and polyfluoroalkyl substances (PFAS) in aqueous film-forming foams (AFFF), a type of fire suppressant used for decades across the country.

The proposal would focus on airports, fire training centers, or other locations where AFFF was used and that are believed to have records of what was purchased.

The strategy then calls for joint agreement by both sides by Jan. 24 on core information potential AFFF sites would need to provide. A jointly proposed selection of sites would be due by March 7, where parties would have six months of discovery to figure out whether they can sufficiently identify the products they used and the companies that made them. If a joint selection of sites can't be presented to the court by March 7, then competing proposals would be made.

During a status conference last year Gergel said both sides need to understand the effort and money required to prove specific products were used at sites or by people alleging damage or injuries, because plaintiffs must figure out which cases are worth pursuing as companies and facilities prepare "to expend significant defense costs."

The case is In Re Aqueous Film-Forming Foams Products Liability Litigation MDL 2873 , D.S.C., No. 18-02873, 1/13/25

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Sprouts Market Sued Over PFAS Found in Products Billed as Green

B bloomberglaw.com/product/blaw/bloomberglawnews/securities-law/X87QQUNG000000

Clara Hudson

Sprouts Farmers Market Inc. faces a proposed class action lawsuit alleging that the health food supermarket chain misled shoppers by marketing its disposable plates and cups as environmentally friendly.

The lawsuit, filed in a California federal court by consumer Randy Tyndall, says Sprouts and manufacturer EcoSoul, which makes Sprouts-branded cutlery, cups and more, violated California's business and consumer protection laws by promoting their products as compostable and good for the environment.

Tyndall brought the Sprouts products to a lab for testing, the suit said, uncovering that they contained "significant amounts" of per-and polyfluoroalkyl substances, known as PFAS or "forever chemicals" because they can build up in either the human body or environment and can cause health problems.

This means the cups, bowls, and other products could actually be "contaminating entire compost streams with PFAS materials that will not break down over time," the lawsuit filed Friday in the US District Court for the Eastern District of California stated.

The lawsuit is among a wave of litigation targeting companies across industries for allegedly misrepresenting the environmental benefits of their products, some of which point to PFAS testing. Earlier this month, Samsung was sued for allegedly "excessive levels" of PFAS in its smartwatch bands.

Tyndall said some of the purchased products were labeled as "PFAS free" and were marked as both plant-based and compostable.

"Consumers are willing to pay more for such products, which often cost significantly more than non-compostable disposable bags, plates, and bowls," the lawsuit said. Tyndall would not have bought the products if he had known they "contained PFAS chemicals, and thus could not break down into compostable material," the suit said.

"The concern from our client's standpoint is simply the safety of the public," said Tyndall's attorney, Richard Conway at Kahn, Soares & Conway.

The two companies did not immediately respond to requests for comment.

Tyndall is seeking an undetermined amount of compensation for the potential class.

The case is Tyndall v. Sprouts Farmers Market , E.D. Cal., No. 1:25-cv-00048, 1/10/25 .

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Jury orders Bayer to pay $100 million over PCBs in Washington school

reuters.com/legal/bayer-must-pay-100-million-latest-trial-over-pcbs-washington-school-jury-finds-2025-01-14

Brendan Pierson, Dietrich Knauth

The 120 metres high Bayer Cross, logo of German pharmaceutical and chemical maker Bayer AG, consisting of 1710 LED glass bulbs is seen outside the industrial park "Chempark" of the chemical industry in Leverkusen, Germany, September 23, 2023. REUTERS/Wolfgang Rattay/File Photo Purchase Licensing Rights, opens new tab

- Bayer argues PCB levels were safe, blames school for ignoring warnings
- Previous trials resulted in over $1.5 billion in verdicts

Jan 14 (Reuters) - A Washington jury on Tuesday ordered Bayer (BAYGn.DE), opens new tab to pay $100 million to four people who say they were sickened by toxic chemicals known as PCBs at a Seattle-area school, but found the company was not liable for injuries alleged by 11 others.
The verdict, which follows a two-month trial, is the latest in a string of trials against the chemical company over the alleged contamination at the Sky Valley Education Center in Monroe, Washington.

More than 200 students, employees and parents have said they developed cancer, thyroid conditions, neurological injuries and other health problems from polychlorinated biphenyls, or PCBs, leaking from the school's light fixtures. The chemicals were made by Monsanto, which Bayer acquired in 2018.

Monsanto said in a statement it will pursue post-trial motions, and an appeal if necessary, to overturn the verdict or reduce the "excessive" damages awarded to the four plaintiffs.

Evidence at trial showed low to non-existent level of PCBs, which could not have caused the injuries alleged, Monsanto said.

The jury concluded that Monsanto intentionally concealed information about PCBs. It awarded $25 million in compensatory damages and $75 million in punitive damages.

"Every case is different and the juries are clearly working very hard to try to get things right for the generational harm caused by PCBs," said Henry Jones, an attorney for the plaintiffs.

Verdicts in previous trials over the alleged contamination at the school, which have involved different groups of plaintiffs, have totaled more than $1.5 billion, though some have been reduced or overturned. The remaining judgments are also the subject of appeals, Monsanto said.

Last year, a verdict for $185 million in favor of three teachers and a teacher's spouse was overturned on appeal in favor of Monsanto on multiple grounds.

The state appeals court agreed with Bayer that the trial court wrongly applied the laws of Missouri, where Monsanto was based, allowing the claims to be filed decades after the company stopped producing PCBs in 1977. The company said Washington law should apply instead, and it would block the plaintiffs' claims as filed too late.

Washington's highest court is expected to hear an appeal of that ruling.

In August, an $857 million verdict was slashed to $438 million, after a judge found it included excessive punitive damages.
Bayer acquired Monsanto for $63 billion in 2018. Since then, lawsuits over PCBs, and more significantly over claims that the weedkiller Roundup caused cancer, have weighed heavily on the company's shares.
PCBs were once used widely to insulate electrical equipment, and were also used in such products as carbonless copy paper, caulking, floor finish and paint. They were outlawed by the U.S. government in 1979 after being linked to cancer and other health problems. Monsanto produced PCBs from 1935 to 1977.

Plaintiffs have said Monsanto knew of the dangers of PCBs for decades, but concealed them from the public and from government regulators.

Bayer has argued plaintiffs have failed to prove their injuries were caused by PCBs, and that the levels found in the school were deemed safe by the Environmental Protection Agency. It has also said the school ignored warnings from government officials that the light fixtures in the aging building needed to be retrofitted.

Reporting By Brendan Pierson and Dietrich Knauth in New York; Editing by Alexia Garamfalvi, Lisa Shumaker, Lincoln Feast and Christian Schmollinger

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Legal practice during the Trump administration: strategies for lawyers of color

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Kim Mallett

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

January 15, 2025 - As we enter the new year, it's time to gaze into our crystal balls and predict what's ahead under the new administration. Am Law 100 firms, known for their sophisticated practices in regulatory, transactional, and litigation areas, are likely to see increased opportunities as demand grows in response to shifting governmental priorities.

While forecasting is not an exact science, unlike weather predictions using Doppler radar — we can make informed guesses based on statements and signals from members of the incoming administration and corresponding conversations with firm management.

Reflections on white-collar practices under the Biden administration

At the beginning of the Biden administration, many believed white-collar practices would thrive due to the expected heightened focus on corporate accountability and enforcement. However, four years later, a mix of factors prevented this anticipated boom from materializing.

One significant reason was the Department of Justice's diverted attention to urgent matters arising from the global pandemic. Cybersecurity and pandemic-related fraud consumed substantial resources, drawing focus away from the resource-intensive investigations typical of white-collar cases. Additionally, the expectation of heightened scrutiny led many corporations to self-regulate by strengthening compliance programs and proactively avoiding potential violations. This trend reduced the number of prosecutable cases as businesses focused on adhering to regulations.

What's ahead for white-collar practices and beyond?

With the incoming administration, a shift in priorities is expected. Like the previous Trump administration, there may be reduced emphasis on enforcing certain regulatory actions, particularly in corporate fraud, environmental violations, and financial misconduct.

If this policy materializes, it could lead to fewer investigations and prosecutions, lessening the need for white-collar defense. However, white-collar practices are highly sensitive to policy shifts, and unexpected events — such as high-profile corporate scandals or regulatory overhauls — could reignite demand.

Here is a completely unscientific list of practice areas that appear to be on the rise.

Private credit

The financial sector was highly promoted in the previous Trump administration. If the anticipated reduction in regulatory burdens on lenders and investors materializes, the activity of companies seeking to take advantage of fewer regulations in deal structuring could spur on private credit activity; thus, the demand for private credit lawyers would continue to grow.

PE/M&A

With an expected increase in M&A activity through deregulation, tax reforms, and continued low interest rates, PE firms may increase leveraged buyouts — which in turn will rely on more private credit. A favorable environment for business growth, financing, and transactions could lead to an increase in deal work, which would lead to more work for PE/M&A lawyers.

Energy

Lawyers specializing in energy will possibly see changes from the current landscape as the incoming administration seeks to dismantle regulations and increase exploration for oil and gas, particularly on federal and previously restricted lands.

ESG

If the incoming administration scales back or dismantles financial and environmental regulations that are currently in place this could lead to a reduction in the burden for compliance on companies, thus limiting the areas of ESG enforcement. Such steps would thereby create new opportunities for lawyers to help their clients navigate the emerging challenges in an evolving regulatory landscape.

Scaling back disclosure requirements will weaken the SECs rules pertaining to climate related financial risks especially for public companies. On its face this may create less work for ESG lawyers in terms of helping their clients comply with currently mandatory rules of disclosure. However, there could be a path for ESG lawyers to find work with clients whose companies are interested in voluntarily maintaining or improving their environmental footprint to meet investor and consumer expectations. This would assist businesses in aligning their social strategies with shareholder interest, particularly in a market that increasingly values social responsibility.

With fewer regulatory requirements there will still be strong investor demand for good governance practices. ESG lawyers may focus more on advising clients on adopting best governance practices to attract capital and prevent shareholder activism.

Finance and banking

The incoming administration is telegraphing rollbacks of financial regulations, corporate tax reforms, and loosened lending restrictions; consequently, economic growth will be stimulated, which could in turn lead to increased borrowing and an even more active financial market. Subsequently, increased opportunities for financial institutions to increase lending, investment, and M&A would lead to more work, particularly for finance and banking lawyers.

Tax

Significant changes to corporate tax laws are apparent. Changes to the corporate tax rates, deductions or rules governing international tax corporations will require highly skilled experts to help navigate the new rules to ensure compliance and optimize companies' tax strategies.

International arbitration/trade

With signaling of trade wars with China or a more confrontational trade style, international arbitration lawyers will likely be in demand. Increased trade disputes over tariffs, trade barriers, intellectual property, and market access could be fertile ground for IA lawyers looking to sustain or grow their practice.

Lawyers with experience appearing before the World Trade Organization who are adept at navigating trade disputes, international trade agreement enforcement, and IP and tech in this new environment will be especially sought after.

Strategies for lawyers of color

The Trump administration's proposed changes will be felt across various practice areas; however, they offer both opportunities and challenges for law firm partners who are members of underrepresented minorities.

While there may be increased work in certain sectors (especially energy, M&A, and tax), minority partners may still encounter barriers to accessing high-profile work due to systemic biases, closed networks, and their lack of support of senior leadership. Additionally, the shift in focus away from issues like diversity and social justice could make it harder for minority partners to leverage the full potential of these changes, despite the increase in business opportunities.

First-generation law firm partners and those who are members of underrepresented minorities will require some creative thinking as the new landscape unfolds and they consider how best to navigate it while growing their practices. Here are several approaches they can take to adapt and thrive by leveraging transferable skills and exploring new opportunities.

Expand into related practice areas

For litigators — consider specializing in corporate compliance, advising companies on regulatory matters, risk mitigation, and ethics policies, which could become steady revenue streams.

A strategic pivot to focus on data privacy and cybersecurity, addressing growing concerns about AI misuse, cybercrime, and data breaches could also help to strengthen your practice and broaden your expertise.

Find a sponsor at your firm

If you have not already connected with a senior partner or someone of similar seniority who has the ear of firm management, I recommend doing so now. Building a relationship with a sponsor will provide you with support in case things slow down and will also give you the flexibility to pivot if that becomes necessary. See "How a sponsor can help you move up the ranks at a law firm, opens new tab," Reuters Legal News, Oct. 2, 2024.

Pursue pro bono or public interest work

Depending on your firm's policy on pro-bono work, this might be the perfect time to engage in impactful cases such as criminal justice reform or civil rights advocacy, which also broaden experience and professional networks.

Enhance client and business development skills

As a recruiter, it is always my advice to partners that they find ways to build relationships through networking, thought leadership, and active participation in industry associations.

Leverage diversity initiatives

Many firms still have programs aimed at fostering relationships with lawyers from diverse backgrounds. This may be the time to explore these programs at your firm if you have not already done so.

Focus on cross-border work

Foster pre-existing relationships with colleagues in offices outside of the US. If applicable, explore opportunities in international arbitration or fraud investigations, leveraging the interconnected global market.

Develop a niche expertise

Whether you are a litigator or a corporate lawyer you can stand out by specializing in emerging areas like ESG, health care, or cryptocurrency regulations. Additionally, understanding how to integrate niche areas into your practice, when applicable, could help you establish your expertise in an emerging field.

Engage in professional development

Stay current with certifications and training in relevant fields such as fraud examination or privacy law.

Join professional networks

Collaborate with organizations like the National Bar Association, the National Asian Pacific American Bar Association, the Hispanic National Bar Associate, the National LGBTQ+ Bar Association, the National Association of Women Lawyers, and the Minority Corporate Counsel Association for networking and mentorship opportunities.

Conclusion

The evolving legal market, while challenging, offers many opportunities for those who adapt proactively. Embracing diversity and inclusion initiatives, fostering relationships with clients who prioritize these values, and developing strong business acumen, will ensure that first generation partners can not only survive but thrive during these changes. By diversifying skills and staying attuned to industry shifts, lawyers of color can position themselves for success in this dynamic environment.

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Securities Law

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US Companies Face Pressure Around Global ESG Disclosure Mandates

- *Clifford Chance attorneys assess global ESG requirements*
- *US companies should prep for disclosures and litigation*

The global outlook for ESG is at a crossroads. The re-election of Donald Trump and Republican sweep of Congress signal that significant retrenchment lies ahead. At the same time, the EU is moving ahead with efforts to legally compel the largest corporations—including multinationals that operate in Europe—to report and act on environmental, social, and governance impacts across their value chains.

These conflicting trends present a regulatory dilemma for companies operating across jurisdictions, who potentially face conflicting regulatory requirements and disparate political views about the utility and efficacy of ESG.

Nonetheless, many considerations and principles that underlie ESG will remain critical to corporate management, with respect not only to risk assessment and compliance but also to value creation and protection. Companies will continue to vigilantly monitor legal environmental and social developments and will have no option but to adhere where regulations apply.

Key stakeholders such as shareholders, investors, customers, and employees will continue to exert pressure to conduct business in a way that makes money and also reflects their respective values.

While the regulatory and political dilemma may exist, the principles that have brought ESG into the mainstream over the past few years will continue to have fundamental importance. Watchdogs will vigilantly look for any case of greenwashing, eager to challenge companies on claims that can't be backed up by action.

Companies will face increasing scrutiny of what they do and what they say as they address the impact of environmental and social issues on their business. Against this politicized and increasingly litigious backdrop, it may seem tempting to retreat not only from public mission statements, but also from higher-profile, attention-grabbing initiatives.

Faced with a difficult environment, many US companies already have announced steps in that direction, especially with respect to diversity, equity, and inclusion measures.

However, global disclosure and compliance systems will continue to require companies to publicly articulate their strategies and to make progress toward sustainability and social goals. In particular, companies will continue to face legal obligations to disclose their greenhouse gas emissions, net zero transition plans, and detailed information about their sustainability impacts in the coming years.

For example, while the Securities and Exchange Commission's climate disclosure rule likely is dead after the election, comparable disclosure rules will begin to take effect globally in 2025. The EU's Corporate Sustainability Reporting Directive requires each EU member state to enact domestic law requiring companies above a certain size to report on a range of ESG criteria, including climate change mitigation efforts.

The CSRD applies to multinational companies with operations in the EU, generating a new wave of ESG disclosures for US companies that meet its thresholds. California's new disclosure statutes are poised to require companies doing business in California to disclose their greenhouse gas emissions and climate-related financial risk as soon as 2026. And US securities law will continue to require disclosure of matters material to investors.

In addition, the EU has finalized the Corporate Sustainability Due Diligence Directive to compel its largest companies to implement sweeping human rights and environmental due diligence practices. This legislation, too, will apply to US multinationals, a development acknowledged by lawmakers.

The EU has several directives that require companies to focus and report on topics relating to diversity, including board diversity, pay transparency, and human capital. Faced with this array of mandatory disclosure regimes, multinational companies will not have the option to be silent.

An inevitable consequence of these mandatory disclosures will be a massive increase in the quantity of information that companies make available to the public. Mandatory disclosure is intended to provide information to investors and consumers, and to force the disclosing companies to take action to improve on their metrics. At the same time, this information also will be a goldmine for those looking to expose discrepancies in sustainability-related claims.

In the US and globally, nongovernmental organizations and plaintiffs' lawyers are more than willing to impose scrutiny and press litigation to further their respective missions. And governmental enforcers who are more skeptical of ESG measures will be all too ready to expose those that appear unfounded or misleading.

Complete withdrawal from public disclosures is likely not an option, so companies may be better served by taking stock. In addition, companies can scrutinize their own public positions, and embrace those that are consistent with their missions and have a sound basis.

Companies may need to thread a needle, anticipating that critics on one side will claim that their decarbonization measures or diversity initiatives are inadequate, while critics on the other side will challenge perceived fossil fuel boycotts and reverse discrimination.

But the silver lining of the increased scrutiny, especially scrutiny from multiple directions, may be that companies move away from gauzy statements, and focus on substantial measures they can commit to.

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Supreme Court May Limit Federal Prosecutions Over 'Misleading' but True Statements

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Jimmy Hoover

Federal Deposit Insurance Corp. building in Washington. Photo: Diego M. Radzinschi/ALM

The justices seem inclined to exclude "misleading" but true statements from a federal law prohibiting "false" statements to the Federal Deposit Insurance Corp.

January 14, 2025 at 05:14 PM

By Jimmy Hoover

The U.S. Supreme Court suggested Tuesday that a federal appeals court misstated the law when it upheld a former Chicago alderman’s conviction for making "false" statements to the Federal Deposit Insurance Corp. when his defense was that the statements were merely misleading.

However, the court also indicated that Patrick Daley Thompson's conviction will ultimately stand because the jury was instructed to determine as a preliminary matter that his statements were in fact false.

Thompson, a grandson of former Chicago Mayor Richard J. Daley and nephew of ex-Mayor Richard M. Daley, is challenging his conviction under a law criminalizing making a "false statement" to influence the FDIC.

Thompson, who allegedly lied to the FDIC about his outstanding bank loans, argues that his statements were merely "misleading", and not covered under the law, 18 U.S.C. § 1014. Below, the U.S. Court of Appeals for the Seventh Circuit held that misleading statements can also be prosecuted under the statute, deepening a circuit split the Supreme Court agreed to resolve.

"Many false statements are misleading. And many misleading statements are not true. But that does not mean 'false' and 'misleading' are synonyms," Thompson's attorney, Chris Gair, told the justices on Tuesday.

That argument appeared to find favor with Justice Neil Gorsuch.

"We didn't take this case to resolve it on the facts," Gorsuch said. "We took it to resolve a legal question, and the legal question is whether, as the Seventh Circuit held, this statute permits a conviction for not just false statements but misleading ones. And that is a gloss that the Seventh Circuit put on the statute."

While other justices recognized the distinction between misleading and false statements, what seemed to give some of them pause during the hearing was that Thompson, in their view, didn't just mislead the FDIC but made actual statements that were untrue and thus "false."

According to prosecutors, Thompson took out loans totaling $219,000 between 2011 and 2014 from Washington Federal Bank for Savings. The Chicago bank failed in 2017, and the FDIC was appointed receiver.

As the FDIC's contractors sought to collect his outstanding balance of $269,120, Thompson "deliberately told FDIC collectors that he had borrowed less than half of that amount and asserted a nonexistent purpose for his borrowing," the federal government told the Supreme Court.

Calling the contractor's service line, Thompson allegedly said he "ha[d] no idea where the 269 number comes from" and insisted, “I mean, I borrowed the money, I owe the money—but I borrowed $100. ... I think it was $110,000 dollars.”

To be sure, prosecutors acknowledge that Thompson originally did borrow $110,000 to make an equity contribution to a law firm he was joining, but said that his statement was false in the context of disputing his total loan balance, which included a several additional loans.

"I'm totally confused OK?" said Justice Sonia Sotomayor. "I'm quoting him: 'I have no idea. The numbers you sent me shows that I have a loan for $269,000. I borrowed a hundred thousand.' ... That's literally false. He borrowed more than he said he did."

Justice Elena Kagan used an analogy the court has invoked before to describe how Thompson's statements were false. In that scenario, someone says they've entered a store five times when they've really entered it 50 times.

"I mean, that's true, in the course of entering the store 50 times, you entered it five times," Kagan said. "But it's obviously false if what the purport of the statement is is I entered it five times rather than 50 times."

At the same time, however, Kagan acknowledged a difference between "misleading" true statements and those that are false in context. She hypothesized a statement about a particularly inept surgeon.

"A doctor's trying to convince a patient to have a particular surgery, and he says: 'I've done 100 of these surgeries,'" Kagan said.

"Turns out that 99 of the patients have died," she added. "He's now misled the patient, correct? But he hasn't said anything false."

Kagan then suggested to an attorney for the federal government that the court clarify that the law applies only to false statements and not misleading ones which are otherwise true.

"Why not just say that and instruct the Seventh Circuit, and anybody else who may not have a correct understanding of this, that there is this gap?" she asked Caroline Flynn, an assistant to the U.S. solicitor general.

"Yeah, I would not resist this court explaining that," Flynn answered. "I just am only resisting the possibility that you could say this statute does not criminalize misleading representations, full stop, without explaining that falsity by context counts."

The Supreme Court in recent years has curbed nonviolent federal prosecutions in a number of areas.

This past term, the court held that a federal bribery law doesn't cover "gratuities" paid to government officials after an action, such as a contract award, has taken place. The Supreme Court has previously rejected novel prosecutorial theories in the infamous "Bridgegate" case about the politically motivated closure of the George Washington Bridge, and set aside the conviction of former Virginia Gov. Bob McDonnell.

The court also recently held that prosecutors could not use a federal obstruction statute to charge a rioter who entered the U.S. Capitol during the Jan. 6, 2021, attack.

Several justices seemed to suggest on Tuesday that, even if the court remands Thompson's case to the Seventh Circuit, he is unlikely to succeed on his argument that his statements were merely misleading. That's particularly true because the jury was instructed to determine whether his statements were false, not simply misleading.

So, by the telling of several court members, the proper inquiry on appeal would be whether a rational juror would have concluded that Thompson's statements were false.

"You don't dispute that you've got a tough row to hoe with the standard," Gorsuch said.

"It's definitely a tough row to hoe whenever you're asking a district court to find that no rational jury could have found something," Gair responded. "But there's a lot of evidence from which we can make a solid argument, an argument that I believe is correct."

The Supreme Court is expected to render its decision by July in *Patrick Thompson v. United States*, No. 23-1095.

Securities Law News
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Matt Levine's Money Stuff: Maybe ESG Is Illegal Now

By Matt Levine

Opinion

ESG

The way US federal law works is that there are only a few federal judges in the Fort Worth Division of the US District Court for the Northern District of Texas, and they are extremely conservative. The best-known is Judge Reed O'Connor, " who critics say has been a subject of 'forum shopping' by conservative plaintiffs seeking a sympathetic court in challenges to federal policies." So if you have a novel, conservative legal theory, what you do is you file a lawsuit in the Fort Worth federal courthouse, and then you probably get assigned to Judge O'Connor, and he probably endorses your novel legal theory. Then maybe the other side appeals, to the US Court of Appeals for the Fifth Circuit and perhaps eventually to the US Supreme Court, but these days those courts are also quite receptive to novel, conservative legal theories, so your chances are good.

Environmental, social and governance (ESG) investing is quite controversial now, with a lot of conservative critics. And so Judge O'Connor was naturally asked to declare that it is a violation of fiduciary duty for an investment manager to consider ESG factors in making investment decisions, and last Friday he did that. Here is the opinion. It is hard to know how seriously to take this — it could be appealed, etc. — but in general the political winds do seem to be shifting against ESG, so it's possible that this is right and ESG is now sort of illegal.

The case involves the 401(k) retirement savings plan of American Airlines Group Inc. American runs its 401(k) plan to allow its employees to save for retirement, and it has fiduciary duties to run the plan in the best interests of its beneficiaries. It offers employees a menu of investment options in the plan, including several index funds managed by BlackRock Inc. A pilot brought a class action complaint arguing that BlackRock does ESG, that ESG is not in the best interests of investors, and that American violated its fiduciary duty to its beneficiaries by letting BlackRock do ESG. Judge O'Connor agreed.

As far as I can tell, zero percent of American's 401(k) assets were in ESG funds. They were in regular index funds that bought all the stocks in, say, the S&P 500 index in proportion to their index weights: They did not exclude any fossil-fuel companies or make any investing decisions based on ESG factors. Instead, the complaint was that BlackRock "pursues a pervasive ESG agenda that 'covertly converts the [retirement] [p]lan's core index portfolios to ESG funds.'" If you just run an index fund, but in your heart you are *thinking* about ESG — if you talk publicly about climate change, or vote your shares in favor of climate initiatives — that's also illegal.

I want to discuss two main aspects of the decision, one that is pretty wild and one that is perhaps more compelling.

First, the wild part. Judge O'Connor *defines* ESG to mean caring about environmental, social or governance factors for reasons other than trying to improve returns to investors:

It is important to be clear about what ESG investing actually is. The evidence and expert testimony revealed that an investment strategy assumes an ESG label when it is aimed at, in whole or in part, bringing about certain types of societal change. ...

Investing that aims to reduce material risks or increase return for the exclusive purpose of obtaining a financial benefit is *not* ESG investing. Consideration of material risk-and-return factors is no different than the standard investing process when both are focused on financial ends. …

ESG investing is a strategy that considers or pursues a non-pecuniary interest as *an end* itself rather than as a means to some financial end.

I think that virtually 100% of ESG investors would disagree with this: ESG investing is, in the standard formulation, consideration of ESG factors *because* you think that they are material to long-term risk-adjusted financial returns. "The world will transition away from fossil fuels, so we want energy companies to have a plan for that transition," that sort of thing. Obviously not everyone believes that that is actually what ESG investors are up to; Judge O'Connor does not:

Simply describing an ESG consideration as a material financial consideration is not enough. There must be a sound basis for characterizing something as a financial benefit. Otherwise, anything could qualify as a financial interest and can serve as pretext for non-pecuniary interests.

Sure. And then he cites a lot of statements by BlackRock about climate change, social responsibility, etc., largely (not entirely) omitting the parts of those statements where BlackRock asserts that those factors are likely to influence long-term returns. He just doesn't believe it; it can't be true. "Often times, BlackRock couched its ESG investing in language that superficially pledged allegiance to an economic interest. But BlackRock never gave more than lip service to show how." And:

The emblematic example of this is BlackRock pressuring energy companies into reducing greenhouse gas emissions and otherwise complying with a particular worldview of what it means to be a responsible company that “makes a positive contribution to society” and “benefit[s] . . . the communities in which they operate.” But what is especially problematic about this stance is revealed by the inherent conflict between an energy company that derives its profits from fossil fuels and BlackRock’s climate change expectations. Indeed, reducing greenhouse gas emissions is fatal to generating profits if fossil fuels will increase profits. This is precisely the case with Exxon: production of fossil fuels made it the leading oil company in the world. It is not possible to square this circle to conclude that BlackRock’s investment strategy “maximiz[ed] the financial benefits” to the Plan. …

This is evidence of disloyalty because it does not make any rational economic sense for a shareholder (or an investment manager on behalf of shareholders) to encourage an energy company like Exxon to act in a manner that directly undermines the company’s profits. Just as it would not make rational economic sense to act in a way that pressured Microsoft to sell less of what makes it so profitable: software and services. Or JP Morgan Chase reducing the quantity of profitable financial services. Or American providing fewer flights that it could profitably sell.

What strange examples. There is a large academic literature specifically arguing that big diversified shareholders like BlackRock pressure big airlines like American *to provide fewer flights than they could profitably sell*, to maximize the overall profits of the airline industry and, thus, the financial returns to those big diversified shareholders. “ Should index funds be illegal,” is my shorthand for this argument, and it is most specifically about airlines cutting flights to reduce competition and increase overall profits to their shareholders, particularly BlackRock funds. “It does not make any rational economic sense for a shareholder … to encourage … American [to provide] fewer flights,” the judge asserts confidently, but meanwhile actual economists are out there saying “ahh shareholders are encouraging American to provide fewer flights, so that they can increase their returns.”

That is probably a minority view, though. What about encouraging energy companies to cut production? Well! Well! Well! Do I have news for Judge O’Connor! We talked last month about a theory that index fund managers, specifically including BlackRock, have pressured coal companies to cut their production of coal, for environmental reasons but also because those production cuts “produced cartel-level profits for” their index funds. Much like in the previous paragraph, the theory is that diversified investors like BlackRock own big stakes in every coal company, so if they can get *all* of the coal companies to cut production, that will reduce the supply of coal, raise prices, and lead to monopoly profits for the big coal miners, who all have the same owners. But whereas in the previous paragraph I was citing (somewhat quirky) economists, here I am citing *the official position of the state of Texas*. Texas sued BlackRock (and other big investment firms) for *using ESG to increase shareholder returns*. Texas said, in a court filing:

As demand for the electricity Americans need to heat their homes and power their businesses has gone up, the supply of the coal used to generate that electricity has been artificially depressed—and the price has skyrocketed. Defendants have reaped the rewards of higher returns, higher fees, and higher profits …

That was an antitrust complaint, so it argues that this is bad, but as a matter of maximizing shareholder returns, “higher returns, higher fees and higher profits” are good. It is the official position of the state of Texas that ESG increases shareholder returns. Separately it is also Texas’s official position that ESG reduces returns, but there’s no obligation for the anti-ESG movement to be consistent.

It’s a strange result. A giant investment manager, with trillions of dollars under management on behalf of many sophisticated clients, with thousands of employees who are paid well and have long experience in evaluating investments, claims that it considers ESG factors because they are material to its investors’ long-term risk-adjusted financial returns. The investors, with their own money on the line, mostly seem to agree: BlackRock is the biggest money manager in the world because it has convinced the most people to give it their money. And on the other hand one judge says “lol no those factors are fake.” There is no evidence that BlackRock is lying, that its claims that ESG factors are financially important are pretextual. That’s just what the judge thinks, and he gets to decide.

The result is apparently that investors are not allowed to consider risks if those risks are politically disfavored. If you base your investment decisions on reading financial statements or drawing lines on stock charts or tracking sunspots, a judge will not demand that you *prove* that those techniques lead to higher returns. But if you base your investment decisions on a theory like “climate change will lead to more forest fires that will be bad for insurance companies,” a judge will suspect that you are lying and demand that you prove it. Some kinds of risk analysis are left to the business judgment of professional investment managers. But some, now, are not.

I do want to talk about another aspect of Judge O’Connor’s decision, though. The judge found that American violated its fiduciary duty of loyalty to its beneficiaries. The point is not just “ESG is a bad way to invest”; it’s that American chose to invest its 401(k) plan in a bad way, because it had some conflict of interest, some hidden agenda, some reason to put its own interests above those of its beneficiaries.

What’s the conflict? It’s easy enough to see how you could tell a disloyalty story about *BlackRock*. “BlackRock’s executives like diversity and hate carbon emissions, so they put their personal social and political preferences above returns to their clients,” fine. But the pilot didn’t sue BlackRock; he sued American. What’s American’s conflict?

Well, BlackRock worked for American: American’s pension managers hired BlackRock to manage their 401(k) funds. But American also worked for BlackRock: BlackRock’s funds are American’s third-biggest shareholder, with more than 8% of the stock, and “also financed approximately $400 million of American’s corporate debt at a time when American was experiencing financing difficulties.” American’s managers, who selected BlackRock to manage the 401(k) and oversaw its work, were also well aware that they were working for BlackRock:

Defendants’ own personnel put it best when describing this “significant relationship [with] BlackRock” and “this whole ESG thing” as “circular.” It is no wonder Defendants repeatedly attempted to signal alignment with BlackRock.

You sometimes used to hear this theory, about investment managers and corporations, going the other way: "Big asset managers like BlackRock tend to support corporate management in proxy voting, because they want to win the business of managing those companies' pension funds." Here the theory is that, because BlackRock was one of American's biggest shareholders, American had to defer to BlackRock and couldn't be too critical of its 401(k) management performance.

And what BlackRock wanted was ESG-iness:

For example, as a large company who consumes copious amount of fossil fuels, American was potentially susceptible to a proxy fight of its own by failing to comply with BlackRock's climate-related demands. Defendants were not only aware, but also discussed, [BlackRock Chief Executive Officer Larry] Fink's letters outlining BlackRock's ESG expectations for companies of its size and describing the potential consequences that such companies would likely face should they fail to meet these demands. When [American's Managing Director of Asset Management Ken] Menezes pointed out one of Fink's letters in an email, he also noted that BlackRock manages "over $10 billion" of Plan assets. The only plausible explanation for supplying such context would be to underscore the importance of BlackRock and suggest there is value in meeting BlackRock's climate demands. This motivation to please BlackRock became even clearer during [American Treasurer Meghan] Montana's testimony. Montana noted that a failure to signal that American was actively complying with ESG disclosure requirements, for example, would potentially undermine the company's ability to obtain billions of dollars in essential loans from BlackRock.

This all strikes me as plausible. There was a time, not all that long ago, when public companies really did have to worry about ESG activism from big shareholders, particularly BlackRock. In 2021, Exxon *lost a proxy fight* , and several directors had to leave its board, arguably because investors like BlackRock were dissatisfied with its ESG performance.

If you worked in the management of a big gas-guzzling airline, in 2021, you really might have given some thought to "how can we make BlackRock think we are doing good ESG stuff?" (That was, after all, the *point* of BlackRock's ESG activism, to push corporate managers to do ESG stuff.) Doing things like cutting emissions or using cleaner jet fuel would be the most straightforward approach, but I suppose hiring BlackRock to run your 401(k) plan and sending them nice emails saying "we agree with all the ESG stuff you're doing" could help too. It is possible that, in 2021, corporate managers might have been afraid to be too critical of ESG. Now it's the opposite.

Oh Robinhood

One of the main things that a stock brokerage firm does is keep lists. The famous Grayson Moorhead Securities commercial had it right. "We will make a list of our clients, and how much money each of them has given us to invest. We will keep this list in a safe place. If we have time, we will make a copy of the list, in case something happens to the first list." Timeless principles, still relevant today.

If anything, now there are many more such requirements. You have to keep a list of your clients' money somewhere safe; you should not accidentally delete it, or let hackers steal it. You have to know who your customers are, and make sure they are not using your brokerage for money laundering. You have to keep track of your clients' trades, and report them to regulators when requested. You have to keep copies of some customer correspondence and other information. More recently, the US Securities and Exchange Commission has started to insist that you have all of your written business conversations on "official channels" (work email, etc.), not "unofficial channels" (WhatsApp, texting from your personal phone). And there are rules about short selling, requiring you to borrow shares before selling them short, so you have to keep track of whether your clients are long or short.

Robinhood Markets Inc. is a charming stock brokerage firm in many respects, but, uh, let's say that it comes from a different world than Grayson Moorhead. Robinhood got its start as a new kind of brokerage, one whose appeal was things like "you can trade on your phone" and "there is confetti when you do a trade," fun entertaining stuff, not boring traditional principles like "we will keep this list in a safe place." There is a sort of loosey-goosey sensibility that is probably helpful for some sorts of marketing, but displeasing to the SEC.

And so we have talked over the years about various ways that Robinhood has found to get in trouble: for website crashes, for misrepresenting payment for order flow, for briefly offering fake bank accounts, for not having enough capital to handle meme stock demand. None of these things strike me as particularly evil. They strike me as mostly sort of hapless, the growing pains of a young brokerage firm. Anyway here is a US Securities and Exchange Commission enforcement action against Robinhood for ... I think I count eight different list-keeping violations?

The Securities and Exchange Commission [yesterday] announced that broker-dealers Robinhood Securities LLC and Robinhood Financial LLC (collectively, Robinhood) have agreed to pay $45 million in combined civil penalties to settle a range of SEC charges arising from their brokerage operations.

A little of everything: "Robinhood failed to timely investigate suspicious transactions," "Robinhood failed to implement adequate policies and procedures designed to protect their customers from the risk of identity theft," "Robinhood failed to adequately address known risks posed by a cybersecurity vulnerability related to remote access to their systems," "Robinhood had longstanding failures to maintain and preserve electronic communications," "Robinhood failed to maintain copies of core operational databases in a manner that ensured legally required records were protected from deletion or modification for the required length of time" (don't delete the list!), "Robinhood failed to maintain some of their communications with their brokerage customers as legally required," "Robinhood Securities failed to provide complete and accurate securities trading information, known as blue sheet data, to the SEC," and "in connection with its stock lending and fractional share trading programs, Robinhood Securities failed to comply with Regulation SHO, the regulatory framework designed to address abusive short selling practices." None of it seems all that bad, honestly, but there is a lot of it.

Elsewhere in recordkeeping

At this point I've said all I have to say about the SEC's cell-phone enforcement push, but here's another batch:

> The Securities and Exchange Commission [yesterday] announced charges against nine investment advisers and three broker-dealers for failures by the firms and their personnel to maintain and preserve electronic communications, in violation of recordkeeping provisions of the federal securities laws.

Yesterday's targets include big private equity firms (Blackstone, KKR, Apollo, Carlyle and TPG), as well as Charles Schwab, Santander and PJT Partners.

I am putting this here for completeness, but I don't want to talk about it. Instead let's talk about something else. We have occasionally discussed the SEC's fiscal year-end, which is Sept. 30. There is a paper in the Journal of Accounting and Economics about "the SEC's September spike," finding that the SEC rushes to complete enforcement actions in September, so that those actions can be on its list of accomplishments for the year. This is often *good* for the targets of these enforcement actions: If the SEC is working on a case against you, you can get a discount for agreeing to settle in September rather than waiting until the new fiscal year in October.

It is now Jan. 14. The SEC's fiscal year-end is quite a long way away. But things will be very different at the SEC in a week. A lot of the current SEC's enforcement priorities will no longer be priorities under the new Trump administration. Some of this is about politically charged stuff — *crypto* enforcement seems like it will be less of a priority, and there will be fewer greenwashing cases and maybe more greenhushing cases — but most of it probably isn't. There is a general business triumphalism, a broad deregulatory push, a particular distaste for "regulation by enforcement," all of which suggest that cases like *this* will tend to wither away. I doubt Donald Trump cares about whether private equity investors should be allowed to text each other about work from their personal cell phones, but enforcement actions like this don't really fit with the vibes of 2025.

I do wonder what that means for incentives. If the SEC is rushing to wrap up a case against you in the next week, you might expect them to offer a big discount for settling, though that is not obvious here. (Blackstone paid $12 million.) Getting a settlement this week much more effectively sends a signal like "securities laws do not allow private equity employees to text about work" than waiting until next week, when the SEC might just forget all about this.

On the other hand, just *bringing* a case — just filing a formal public complaint in court, without a settlement — probably binds the SEC a little bit. If it brings a lawsuit this week, the SEC is somewhat unlikely to abandon it next week; Jan. 20 is not an absolute cut-off. But if the SEC wants to make any more big regulatory moves, time is running out.

Sister-in-law insider trading

One more SEC case from yesterday. Occasionally this column delves into anthropology, or at least, the anthropology of insider trading, or at least, jokes about the anthropology of insider trading. I once wrote:

Anthropologists find that in many cultures the uncle relationship is special and profound, freighted with tradition. It is sometimes the responsibility of the uncle to educate his nephew in the society's values, or to conduct his initiation rites. In modern American society, on the other hand, the brother-in-law relationship seems to be particularly special. The brother-in-law's role is to insider trade on his brother-in-law's information. … There are as many different brother-in-law relationships as there are brothers-in-law, each with its own special characteristics, but they all traditionally involve insider trading.

But what about sisters-in-law? This one was new to me:

The Securities and Exchange Commission [yesterday] charged Alfred V. Tobia, Jr., the former president and chief investment officer (CIO) of one public company and a member of the board of another, and his sister-in-law, Elizabeth Lee, with insider trading that resulted in more than $428,000 in illegal profits. The defendants have agreed to pay more than $1.36 million to settle the charges.

What is the role of the sister-in-law in insider trading? Well! "Since approximately 2013," says the SEC, "Lee's primary means of support has been the income from the stocks she owns and the proceeds of stock sales," and "most of Lee's stock investments have been based on recommendations or other information she obtained from Tobia." So he was more or less responsible for her finances, and you can see how he might have been tempted to give her some insider tips. For one thing, it's more efficient to tip her off about a few mergers than it is to constantly give her well-researched legal stock advice. For example:

On August 12, 2021, at 8:42 a.m., Lee texted Tobia, "Can u advise a stock that pays a nice dividend?"

Tobia responded by texting "No," and a few minutes later texted, "I have another name" and "Will call."

And then he allegedly called her with a tip about a public company that his employer was looking to acquire, and she then bought the stock. She just wanted a nice dividend! But he was busy! He was working on a merger! He didn't have time to research dividend stocks for her. He had another idea.

Video games

If you keep your money in a bank, the bank is heavily regulated. The bank has pretty strict obligations to keep track of your money and not lose it, and to have good information security so nobody can steal it. The bank will probably use your money for its own investing purposes, but those investments are required to be prudent, and there are capital and liquidity requirements to minimize the risk that the bank won't be able to give you back your money when you ask for it. And there is deposit insurance, so if the bank *does* lose your money you can get it back anyway.

If instead you put all of your money into the online currency of a video game … I don't *think* that there are too many federal rules regulating the video game's information security regimes, capital or liquidity buffers, etc.? I confess I am not an expert here, and this is neither legal nor financial nor gaming advice, but it seems right. And so if your favorite video game lets you deposit real US dollars to buy in-game gold ducats and keep them in the Goblin Bank, and the company that makes that game takes all the ducats in the Goblin Bank (kidding: all the dollars it got for ducats) and loses them day-trading single-day options (in real life), and then you try to spend your ducats in the game and/or withdraw them for dollars, and the company is like "sorry bro, ducats are gone," then … (1) that seems like a weird but somehow plausible business model for a video game company these days, (2) probably financial regulators aren't going to stop them before they do it and (3) probably the Federal Deposit Insurance Corp. isn't going to bail you out after they do it.

The natural conclusion from this, to me, is "don't keep your money in the Goblin Bank in a video game," which frankly strikes me as bulletproof, but I suppose I am out of touch with today's financial and gaming world. Another possibility is "well of course US financial regulators should supervise video games":

The federal consumer watchdog agency on Friday proposed a rule to give virtual video game currencies protections similar to those of real-world bank accounts.

The move acknowledges the explosion in new forms of in-game currency, in which players convert dollars to other units that can be reverted back to money or traded with other users. The government's new interpretation would apply financial protections so players can receive refunds or compensation for unauthorized transactions, similar to how banks are required to respond to claims of fraudulent activity.

The regulator involved here is the Consumer Financial Protection Bureau, so the proposals involve things like disputing fraudulent transactions. Not deposit insurance, or capital requirements. Give it time though. Also here is a CFPB consultative document with the unfortunate title "LFG (Looking for gamers): CFPB wants to hear about your video game loot."

Things happen

China Weighs Sale of TikTok US to Musk as a Possible Option. At Charles Schwab, a Fresh Start After a Close Call. Prediction-Markets Venue Kalshi Appoints Donald Trump Jr. as Adviser. The 'terrifying' crackdown on mining companies in Africa's coup belt. US oil group under pressure to exit Russia after Biden administration widens sanctions. China Reins In Its Once-Freewheeling Finance Sector With Purges and Pay Cuts. FTC Prepares to Sue Largest U.S. Apartment Landlord Over Hidden Fees. Klarna seeks to offload US 'pay in 4' loans. Qantas Delays Flights Amid Falling Debris From SpaceX Rockets. CFA Level 1 Pass Rate Falls to 43%, Still Above Historic Average. Ozempic partly to blame for wine bar closure, says owner. Balance of Power Shifts Back Toward Bosses. "'I feel liberated,' said a top banker. 'We can say [slurs] without the fear of getting cancelled ... it's a new dawn.'"

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- 1. I almost wrote “there is one federal judge” in the division, “and he is extremely conservative,” which was roughly true in 2018 when Judge Reed O’Connor first became famous as a favorite of conservative legal entrepreneurs. But Donald Trump appointed another judge to the division in 2019, and there are two senior (part-time) judges.
- 2. We talked last month about Azoria Partners’ proposed “meritocracy” exchange-traded fund, which will specifically avoid companies with diversity, equity and inclusion initiatives. Like any ESG fund manager, Azoria says that this will maximize profits; the theory is that “woke” investors endorse DEI at the expense of profits, and Azoria will maximize profits by avoiding DEI. But will courts demand that Azoria prove that it increases returns?
- 3. Though Vanguard Group is an even bigger American shareholder, and also offers index funds. It’s not clear how competition among asset managers interacts with this theory. To be fair, BlackRock at least used to be a lot more vocal about engagement and ESG than Vanguard, so it probably did make sense for managers to be a bit more afraid of BlackRock even if Vanguard owned more shares.
- 4. Not necessarily the “undermine the company’s ability to obtain loans” bit, but the general sense of “BlackRock, as a shareholder, might make life unpleasant for companies if they were not sufficiently ESG.”
- 5. To be clear, from Saturday Night Live. Not a real commercial or firm.
- 6. This is a shorthand, but really you have to “ get a locate,” that is, have reasonable basis to believe you can borrow them. And there are exceptions from that for market makers.
- 7. That’s a big discount relative to the $200 million that JPMorgan Chase & Co. paid in 2021, but it’s not apples-to-apples: JPMorgan has many more employees and is more intensively regulated than an alternative asset manager. I don’t have any great intuition for what the “standard” fine here might be, or whether $12 million is a big discount. Though Schwab (which is paying $10 million) said “we are pleased to resolve this immaterial matter,” ouch.

Securities Law
Jan. 15, 2025, 6:57 AM PST

Belgium's Bankers Now Have to Swear They'll Act Honestly

By Levin Stamm

Thousands of Belgian bankers will now have to promise to be honest on the job as the country tries to shore up public trust in its financial industry.

With new rules taking effect on Wednesday, executives and key personnel at banks have six months to take the oath in the presence of officials from Belgium's Financial Services and Markets Authority, the regulator said in Brussels. Other staff will make the pledge to managers at their own firms and an even wider number of employees will be subject to the requirement from July next year.

European bankers saw their reputation tarnished after the 2008 credit crunch as taxpayers had to rescue several firms, including Dexia and Fortis in Belgium, that faced losses so large they threatened the financial system. Like other European countries, Belgium has sought to tighten its oversight of bankers' conduct.

The oath Belgian bankers will have to take:

"I commit myself to act honestly and with integrity, as well as competently and professionally, in all circumstances while performing my professional activities, taking into account the interests of clients and treating them fairly. I have taken note of the specific rules established by the King in this regard."

Febelfin, the lobby group for Belgium's financial industry, called the oath a "positive development" in a statement and said it "contributes to strengthening trust in the banking sector."

The largest banks in Belgium are the local unit of BNP Paribas SA, KBC Group NV, Belfius Bank SA and an ING Groep NV division. As many as 60% of staff at financial institutions will be subject to the oath, according to the lobby, which said the number of affected bankers is in the thousands.

The FSMA can sanction bankers who don't take or who violate their oath, including by banning them from the industry for as long as three years.

Belgium's move follows similar rules for Dutch bankers from about a decade ago.

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Nicholas Comfort

Securities Law News

Jan. 15, 2025, 5:05 AM PST

Musk Accused by SEC of Cheating Twitter Holders Out of Millions

By Nicola M. White and Chris Dolmetsch

- Agency alleges billionaire ignored disclosure deadline in 2022
- Musk's lawyer says he did 'nothing wrong' and SEC has no case

Elon Musk cheated Twitter shareholders out of more than $150 million by waiting too long to disclose his growing stake in the company as he prepared a takeover bid, the US Securities and Exchange Commission claimed in a lawsuit filed days before the Trump administration takes over.

The agency's complaint, which was immediately disputed by a lawyer for Musk, accuses the billionaire of failing to promptly report that he had amassed more than 5% of the social-media platform's stock in early 2022 — a revelation that would have sent the stock's price up.

"Because Musk failed to timely disclose his beneficial ownership, he was able to make these purchases from the unsuspecting public at artificially low prices," the regulator said in its civil suit filed in federal court in Washington, DC. "Investors who sold Twitter common stock during this period did so at artificially low prices and thus suffered substantial economic harm."

Alex Spiro, a lawyer for Musk, said the action is "an admission" that the SEC cannot bring an "actual case," because Musk "has done nothing wrong and everyone sees this sham for what it is."

"The SEC's multi-year campaign of harassment against Mr. Musk culminated in the filing of a single-count ticky tak complaint against Mr. Musk under Section 13(d) for an alleged administrative failure to file a single form — an offense that, even if proven, carries a nominal penalty," Spiro said in a statement.

Trump Supporter

Musk, the world's richest person, has become one of Donald Trump's biggest supporters and closest advisers in recent months. The president-elect has tasked Musk, along with **Vivek Ramaswamy**, with a broad government cost-cutting initiative. Musk has also joined the president-elect in conversations with foreign officials.

Elon Musk, left, with Vivek Ramaswamy on Capitol Hill in Washington, DC on Dec. 5.
Photographer: Al Drago/Bloomberg

It's unclear what Musk's ties to Trump and a change in leadership at the SEC will mean for the case. Trump has tapped **Paul Atkins**, a former SEC commissioner and critic of onerous penalties, to helm the agency.

The regulator has been probing Musk's investment in Twitter since 2022, pressing him to explain why he hadn't disclosed his stake within the correct timeline.

SEC attorneys in December asked Musk to pay more than $200 million to settle the allegations that he failed to properly disclose his Twitter investment, according to a letter by his lawyers sent to the agency last month and reviewed by Bloomberg News.

In the letter, Spiro said the SEC is seeking the relief but isn't accusing Musk of acting willfully or with the intent to mislead investors.

The SEC declined to comment.

‘Improper and Punitive’

Spiro called the SEC’s proposed penalty “inherently improper and punitive.” Spiro said in cases of similar violations by other individuals, the agency has sought a “reasonable” penalty of typically $100,000 or less.

Alex Spiro
Photographer: Marlena Sloss/Bloomberg

Musk in December had publicly previewed that regulators were investigating him, posting a letter by Spiro on X that said the agency had “reopened” a probe into his brain-computer interface company, Neuralink Corp.

The letter also said the agency was getting ready to take action against him over his investment in Twitter. It said SEC staff the day before had issued a “settlement demand that required Mr. Musk within 48 hours to either accept a monetary payment or face charges on numerous accounts.”

Musk has had a strained relationship with the SEC, which sued him for securities fraud in 2018 after he tweeted that he had “funding secured” to take electric carmaker Tesla Inc. private, leading to a surge in the company’s shares. Musk agreed to a settlement in the case, with the billionaire and Tesla each paying a $20 million penalty and Musk stepping down as the company’s chairman.

'Twitter Sitter'

The Supreme Court later rejected an appeal from Musk in his "Twitter sitter" case, leaving in place a deal to have an in-house attorney pre-approve social media posts about Tesla.

By March 2022, Musk had acquired beneficial ownership of more than 9% of Twitter's outstanding common stock. This triggered reporting requirements due within 10 days of the purchase. Musk filed the report 11 days later, making the company's stock price surge by 27% from the day before, according to the lawsuit.

The complaint alleges that Musk repeatedly ignored advice to disclose his stake, after he passed the 5% threshold.

The SEC asked the court to direct Musk to pay a civil penalty and return profits, which the agency claims he reaped unjustly from his stock purchases.

Musk also faces investor litigation accusing him of hiding his acquisition of Twitter shares.

The case is Securities and Exchange Commission v. Musk, 25-cv-00105, US District Court, District of Columbia (Washington).

(Updates with context on pending changes in SEC leadership in seventh paragraph)

--With assistance from Malathi Nayak.

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SEC: Elon Musk misled Twitter investors during 2022 stock buy

courthousenews.com/sec-elon-musk-misled-twitter-investors-during-stock-buy-in-2022

Ryan Knappenberger

According to the Securities and Exchange Commission, Musk's failure to timely file a beneficial ownership report allowed him to acquire over 9% of Twitter's common stock at artificially low prices and ultimately acquire control of the social media giant.

FILE - Elon Musk speaks before Republican presidential nominee former President Donald Trump at a campaign rally at Madison Square Garden, Oct. 27, 2024, in New York. (AP Photo/Evan Vucci, File)

WASHINGTON (CN) — The Securities and Exchange Commission sued billionaire Elon Musk on Tuesday, claiming he failed to properly disclose his purchase of Twitter stocks in 2022 — allowing him to underpay by at least $150 million.

The suit, brought in the U.S. District Court for the District of Columbia, comes in the waning days of SEC chair Gary Gensler's term and sets up an early battle over the commission's independence under President-elect Donald Trump's nominee Paul Atkins.

The conduct described in the lawsuit occurred between March 14 and April 4, 2022, just 10 days before Musk officially offered to buy the company outright for $44 billion. In July 2022 he tried to back out of the purchase, but Twitter sued to force the deal through.

Musk officially purchased Twitter in October 2022, then later changed the company's name to X, a title he has tried to popularize since the 1990s when he co-founded an online bank called X.com that later merged with PayPal's parent company, where he again tried to rebrand the company as X.

According to the SEC, after Musk acquired more than 5% of the outstanding shares of Twitter's common stock on March 14 — the threshold at which Musk acquired "beneficial ownership" in the company — he failed to report the acquisition for 21 days.

Musk's misrepresentations allowed him to continue purchasing shares at artificially low prices until disclosing on April 4 that he had acquired over 9% of Twitter's stock. Later that day, Twitter's stock price jumped over 27% compared to its closing price on April 3.

During those 11 days, Musk spent more than $500 million acquiring additional stocks, which he otherwise would have paid over $650 million had he disclosed his purchases and investment purpose. As result, investors who sold Twitter stock during that period suffered significant economic harm, the SEC says.

The commission requires the regulatory filings to allow investors in the marketplace to monitor moves made by large investors and for potential takeover bids. The beneficial ownership threshold grants a shareholder voting and investment power in a company.

Musk did not directly address the lawsuit in a post on X, but instead replied to a post by Billy Markus, the creator of the meme cryptocurrency “Dogecoin,” who questioned the SEC’s assertion that Musk bought the shares at artificially low prices.

“Totally broken organization,” Musk said in his reply. “They spend their time on shit like this when there are so many actual crimes that go unpunished.”

The lawsuit comes as Musk has positioned himself as a close adviser to Trump, first appearing with the president-elect throughout the campaign cycle then being tapped to co-lead an advisory panel, called the Department of Government Efficiency (or “DOGE”) with Vivek Ramaswamy.

According to the commission, Musk was fully aware that public knowledge of his stock buys would cause Twitter’s common stock price to substantially increase, so he intentionally ignored the advice of a broker Musk tasked with purchasing large blocks of shares that he obtain legal advice as to his securities obligations.

After the initial purchases, between Jan. 31, 2022, and Feb. 28, 2022, Musk instructed the broker to continue purchasing shares up to and beyond the 5% threshold. On March 14, the broker purchased approximately 2.8 million shares, pushing Musk beyond the 5% mark, which gave him until March 24 to report his acquisition.

By March 24, Musk continued purchasing shares until he held more than 7% of the outstanding Twitter common stock.

The next day, Musk purchased almost 3.5 million shares at $38.20 per share, bringing his total to 8% of all shares by the end of March 25.

According to the SEC, Musk then privately informed a member of Twitter’s board of directors on March 27 that he owned at least 7% of the company’s stock.

Over the next five days, Musk purchased an additional 9.7 million shares, before his wealth manager consulted an attorney on April 1 regarding Musk’s disclosure obligations. On April 3, Musk was formally offered a seat on Twitter’s board of directors. He finally filed a beneficial ownership report on April 4, 11 days late and reflecting 9% — more than the threshold 5%.

The SEC wants a federal judge to determine whether Musk violated the law, and if so, enjoin him from further violations, order he disgorge his “unjust enrichment” and pay a civil penalty. The SEC seeks a jury trial in the case.

US SEC sues Elon Musk over late disclosure of Twitter stake

reuters.com/legal/us-sec-sues-elon-musk-over-late-disclosure-twitter-stake-2025-01-14

Jonathan Stempel

- SEC says Musk profited at other investors' expense
- Musk's lawyer says billionaire did nothing wrong
- Musk has suggested disclosure delay was a mistake

Jan 14 (Reuters) - Elon Musk was sued on Tuesday by the U.S. Securities and Exchange Commission, which accused the world's richest person of waiting too long to disclose in 2022 he had amassed a large stake in Twitter, the social media company he later bought.

In a complaint filed in Washington, D.C. federal court, the SEC said Musk violated federal securities law by waiting 11 days too long to disclose his initial purchase of 5% of Twitter's common shares.

An SEC rule requires investors to disclose within 10 calendar days, or by March 24, 2022 in Musk's case, when they cross a 5% ownership threshold.

The SEC said that at the expense of unsuspecting investors, Musk instead bought more than $500 million of Twitter shares at artificially low prices before finally revealing his purchases on April 4, 2022, by which time he owned a 9.2% stake.

Tuesday's lawsuit seeks to force Musk to pay a civil fine and disgorge profits he didn't deserve.

Musk eventually purchased Twitter for $44 billion in October 2022, and renamed it X.

Alex Spiro, a lawyer for Musk, in an email called the SEC lawsuit the culmination of the regulator's "multi-year campaign of harassment" against his client.

"Today's action is an admission by the SEC that they cannot bring an actual case," he said. "Mr. Musk has done nothing wrong and everyone sees this sham for what it is."

Spiro added that the lawsuit addresses a mere "alleged administrative failure to file a single form--an offense that, even if proven, carries a nominal penalty."

OTHER LAWSUITS OVER TWITTER PURCHASES

Tesla CEO and X owner Elon Musk listens as US President-elect Donald Trump speaks during a meeting with House Republicans at the Hyatt Regency hotel in Washington, DC, U.S. on November 13, 2024. ALLISON ROBBERT/Pool via REUTERS/File Photo Purchase Licensing Rights, opens new tab

Musk, an adviser to U.S. President-elect Donald Trump, is worth $417 billion according to Forbes magazine, through businesses such as the electric car maker Tesla (TSLA.O), opens new tab and rocket company SpaceX.
He is worth nearly twice as much as Amazon.com (AMZN.O), opens new tab founder Jeff Bezos, the world's second-richest person at $232 billion, Forbes said.
The SEC sued Musk six days before Trump's Jan. 20 inauguration.

SEC Chair Gary Gensler is stepping down that day, and Paul Atkins, who Trump nominated to succeed him, is expected to review many of Gensler's rules and enforcement actions.

Musk has also been sued in Manhattan federal court by former Twitter shareholders over the late disclosure.

In that case, Musk has said it was implausible to believe he wanted to defraud other shareholders, and that "all indications" were that his delay was a mistake.

Musk has long feuded with the SEC, including after it sued him in 2018 over his Twitter posts about possibly taking Tesla private and having secured funding to do so.

He settled that lawsuit by paying a $20 million civil fine, agreeing to have Tesla lawyers review some Twitter posts in advance, and giving up his role as Tesla's chairman.

The SEC also sought sanctions from Musk after he missed court-ordered testimony last September for the Twitter probe, so he could attend the launch of SpaceX's Polaris Dawn mission at Florida's Cape Canaveral.

A federal judge in San Francisco rejected that request, because Musk later testified and agreed to pay the SEC's travel costs.

The case is SEC v Musk, U.S. District Court, District of Columbia, No. 25-00105.

Reporting by Jonathan Stempel in New York; Additional reporting by Chris Prentice; Editing by Stephen Coates

News from Bloomberg Terminal
Jan. 14, 2025, 3:48 PM PST

SEC Sues Musk for Failure to Disclose Growing Twitter Stake

- Agency alleges billionaire ignored disclosure deadline in 2022
- Musk's lawyer says he did 'nothing wrong' and SEC has no case

By Nicola M. White

(Bloomberg) --

The Securities and Exchange Commission sued Elon Musk, alleging that the billionaire waited to disclose his acquisition of Twitter Inc. shares in order to build his position at lower prices.

The agency claims in a complaint filed Tuesday in federal court in Washington, DC, that the billionaire deliberately ignored a deadline to publicly disclose that he acquired more than a 5% stake in the company early in 2022, several months before he completed his acquisition of the social media platform.

Alex Spiro, a lawyer for Musk, said the action is "an admission" that the SEC cannot bring an "actual case," because Musk "has done nothing wrong and everyone sees this sham for what it is."

"As the SEC retreats and leaves office, the SEC's multi-year campaign of harassment against Mr. Musk culminated in the filing of a single-count ticky tak complaint against Mr. Musk under Section 13(d) for an alleged administrative failure to file a single form - an offense that, even if proven, carries a nominal penalty," Spiro said in a statement.

Trump Supporter

Musk, the world's richest person, has become one of Donald Trump's biggest supporters and closest advisors in recent months. The president-elect has tasked Musk, along with Vivek Ramaswamy, with a broad government cost-cutting initiative; the mega-billionaire has also joined the president-elect in conversations with foreign officials.

The regulator has been probing Musk's investment in Twitter since 2022, sending a missive to him to explain why he hadn't disclosed his stake in Twitter within the correct timeline.

By keeping his purchase quiet, Musk was able to buy shares at "artificially low prices," allowing him to underpay for at least $150 million worth of stock, the SEC said in the complaint.

By March 2022, Musk had acquired beneficial ownership of more than 9% of the company's outstanding common stock. This triggered reporting requirements due within 10 days of the purchase. Musk filed the report 11 days later, making the company's stock price surge by 27% from the day before, according to the lawsuit.

Civil Penalty

The SEC asked the court to direct Musk to pay a civil penalty and return profits, which the agency claims he reaped unjustly from his stock purchases. The agency declined to comment beyond the suit.

Musk also faces investor litigation accusing him of hiding his acquisition of Twitter shares.

The case is Securities and Exchange Commission v. Musk, 25-cv-00105, US District Court, District of Columbia (Washington).

(Updates with allegations in suit starting in seventh paragraph.)

--With assistance from Chris Dolmetsch and Malathi Nayak.

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Securities Law
Jan. 14, 2025, 12:34 PM PST

SEC Probes B. Riley Loan to Founder, Franchise Group Deals (2)

By Donal Griffin

- B. Riley, founder Riley got more SEC subpoenas in November
- SEC looking at Riley's personal loan, B. Riley deals with FRG

B. Riley Financial Inc.received more demands for information from federal regulators about its dealings with now-bankrupt Franchise Group as well as a personal loan for co-founder and Chairman **Bryant Riley**.

The Los Angeles-based investment firm and Riley each received additional subpoenas in November from the US Securities and Exchange Commission seeking documents and information about Franchise Group, or FRG, the retail company that was once one of its biggest investments before its collapse last year, according to a long-delayed second-quarter filing . The agency also wants to know more about Riley's pledge of B. Riley shares as collateral for a personal loan, the Tuesday filing shows.

B. Riley previously received SEC subpoenas in July for information about its dealings with ex-FRG chief executive Brian Kahn, part of a long-running probe that has rocked B. Riley and helped push its shares to their lowest in more than a decade. Bryant Riley, who founded the company in 1997 and built it into one of the biggest US investment firms beyond Wall Street, has been forced to sell assets and raise cash to ease creditors' concerns.

The firm and Riley "are responding to the subpoenas and are fully cooperating with the SEC," according to the filing. The company said the subpoenas don't mean the SEC has determined any violations of law have occurred.

Teaming Up

Shares in B. Riley rose 15% by mid-afternoon in New York trading after the company's overdue quarterly filing gave investors their first formal look at the firm's performance in more than half a year. The data included a net loss of more than $435 million for the three months ended June 30. The shares through Monday had plunged more than 80% in the past 12 months, trading at one point for less than $4 each.

B. Riley said in a statement it had $257 million in cash at year-end, which includes enough to pay off a batch of senior notes in February, and that it expected to have enough liquidity for at least the next 12 months. Its overdue third-quarter report will be filed "in the near future," the firm said.

"With our balance sheet in a stronger position, we expect to once again invest in our core financial services businesses," Riley said in the statement . "We have maintained strong net capital levels in our broker dealer and believe we are well-positioned to capitalize on the expected recovery in the small- and mid-cap equity markets."

The firm still faces fallout from the ill-fated buyout of Franchise Group and its subsequent bankruptcy. B. Riley and Kahn — a longstanding client and friend of Bryant Riley's — teamed up in 2023 to take FRG private in a $2.8 billion deal. The transaction soon came under pressure as earnings deteriorated and as Kahn was tagged as an unindicted co-conspirator by authorities in the collapse of an unrelated hedge fund called Prophecy Asset Management . That led to a fraud conviction for one of the fund's executives.

Internal Inquiries

Kahn has said he didn't do anything wrong, that he wasn't aware of any fraud at Prophecy and that he was among those who lost money in the collapse. But federal investigations into his role have spilled over into his dealings with B. Riley and its chairman, who have said internal probes found they "had no involvement with, or knowledge of, any alleged misconduct concerning Mr. Kahn or any of his affiliates."

FRG filed for Chapter 11 bankruptcy in November, a move that led to hundreds of millions of dollars of losses for B. Riley.

Read More: B. Riley Chairman Is 'Personally Sick' as FRG Goes Bankrupt

The disclosure of the federal subpoenas comes shortly after both Kahn and B. Riley were sent subpoenas on Dec. 31 in the bankruptcy case, court records show. The official committee of unsecured FRG creditors demanded "documents, information, or objects or to permit inspection of premises."

Kahn sent responses and objections, according to court papers filed Monday, which didn't detail the contents. An attorney for Kahn didn't provide a comment, and B. Riley didn't have an immediate comment.

Kahn Loan

One of the bigger financial setbacks to arise from the FRG deal was a loan that B. Riley made to Kahn for about $200 million, which was secured against FRG shares. With that company's collapse into bankruptcy wiping out equity holders, the value of the remaining collateral for this debt has now dwindled to only about $2 million, the filing shows.

The company acknowledged Bryant Riley's informal offer in August to take the company private , and repeated that the matter was referred to a special committee of independent directors. But it didn't name the members or say whether negotiations had taken place in the intervening five months.

Riley had said his bid might be financed with debt or equity but didn't identify the potential backers. The filing reiterated that there's no assurance that a definitive offer will be received.

B. Riley also said it's no longer considered a well-known seasoned issuer, so "accessing capital markets could take longer and cost more than would otherwise be the case."

(Updates with bankruptcy court subpoenas in the 11th paragraph.)

--With assistance from **David Voreacos**.

US sues KKR for allegedly avoiding antitrust scrutiny

reuters.com/legal/us-sues-kkr-allegedly-avoiding-antitrust-scruitiny-2025-01-14

Reuters

By Reuters

January 14, 202511:57 AM PSTUpdated 19 hours ago
Trading information for KKR & Co is displayed on a screen on the floor of the New York Stock Exchange (NYSE) in New York, U.S., August 23, 2018. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights, opens new tab

WASHINGTON, Jan 14 (Reuters) - The U.S. filed a civil lawsuit on Tuesday against private equity firm KKR & Co (KKR.N), opens new tab, "for repeatedly flouting the premerger antitrust review process," alleging the company avoided antitrust scrutiny for at least 16 deals from 2021 to 2022.
“Through document omissions, alterations, and failures to report deals, KKR threatened the integrity of the (Antitrust) Division’s premerger reviews and, in some cases, obscured the market impact of its deals and serial acquisitions,” said Justice Department official Doha Mekki.

In a related lawsuit filed against the DOJ in federal court in Washington on Tuesday, KKR said, “After a sweeping investigation that has spanned nearly three years — with which KKR fully cooperated — the purported filing ‘errors’ the Antitrust Division has identified are trivial.”

“Not a single alleged ‘error’ was material to or interfered with any merger review,” KKR added.

Reporting by Susan Heavey; Editing by Doina Chiacu and Rod Nickel

FTC Launches Inquiry of Single-Family Rental Home 'Mega Investors,' Issues PBM Report

law.com/nationallawjournal/2025/01/15/ftc-launches-inquiry-of-single-family-rental-home-mega-investors-issues-pbm-report

Chris O'Malley

Federal Trade Commission building in Washington, D.C. Photo: Diego M. Radzinschi/ALM

News
"While this information is theoretically available to the public, institutional owners' holdings are challenging to identify due to complicated, indirect ownership structures involving opaquely named subsidiary entities," said FTC attorney Tamar Katz.

January 15, 2025 at 01:09 PM

By Chris O'Malley

The original version of this story was published on Corporate Counsel

The Federal Trade Commission has launched an inquiry into institutional investor ownership of single-family rental homes, citing concerns about market concentration and rising rents.

At its open monthly meeting Tuesday, the FTC also discussed a newly released second interim report on pharmacy benefit managers for allegedly marking up so-called specialty drugs dispensed at their pharmacies.

FTC Chair Lina Khan said the commission conducted public listening sessions last year in Atlanta, Dallas and other cities where so-called "mega investors" have snapped up single-family houses for rent.

"In recent years Americans have increasingly faced a shortage of affordable housing and found themselves paying soaring rents," Khan said. "Enforcers and policymakers on both sides of the aisle have raised alarm bells about large institutional investors buying up available rental properties and potentially increasing rents in local housing markets."

The FTC said it believes about 32 large investors now own about 440,000 rental homes.

Among these investors is Blackstone Inc., which owns 63,000 single-family homes through its holdings Home Partners of America and Tricon Residential, according to a joint study last year by the Institute for Policy Studies and Popular Democracy.

Blackstone did not immediately reply to a request for comment.

Institutional investors began to snap up large quantities of foreclosed single-family rental units in the wake of the 2008 foreclosure crisis, said FTC attorney Tamar Katz.

"As the inventory of foreclosed homes shrank, mega investors began a spate of mergers and acquisitions, resulting in industry consolidation," Katz said.

As these giant investors gobble up large swaths of houses in certain markets they allegedly gain the market concentration that allows them to jack up rents. In addition, it appears in some markets these investors have taken so many houses off the market that it has raised prices for home buyers, as well, the commission said.

The FTC will ask these so-called mega investors to produce information about their corporate structure, including pricing strategies and information on what they paid for homes and rental prices, Katz said.

"While this information is theoretically available to the public, institutional owners' holdings are challenging to identify due to complicated, indirect ownership structures involving opaquely named subsidiary entities," Katz added.

The FTC on Tuesday also received public comment on a second interim staff report on prescription drug middlemen.

The study—authorized by the three Democratic and two Republican commissioners—involved pharmacy benefit management firms Express Scripts, OptumRx and Caremark.

In a 45-page administrative complaint last September the FTC alleged the three big PBMs engaged in anti-competitive and unfair rebate practices that artificially inflated the price of insulin.

The commission said the three PBMs marked-up numerous "specialty" drugs—those for treating complex or chronic conditions—dispensed at their affiliated pharmacies by up to "thousands of percent."

Connecticut-based Cigna owns Express Scripts, Minnesota-based United Health owns OptumRx and Rhode Island-based CVS owns Caremark.

The holding companies have broadly denied wrongdoing in a suit they filed against the FTC last November in the U.S. District Court for the Eastern District of Missouri.

The PBM's 41-page lawsuit says allowing the FTC's case to play out as an administrative proceeding overseen by an administrative law judge "would subvert bedrock constitutional principles of accountability and fairness in an attempt to transform significant aspects of an entire industry by regulatory fiat."

Moreover they allege that Khan and her two fellow Democratic commissioners—Rebecca Kelly Slaughter and Alvaro Bedoya—have demonized PBMs, depicting them of carrying out "illegal rebate schemes" that are effectively "bribes."

The commission would "upend present-day drug rebate contracts, forcing PBMs to revamp their entire contracting framework and countless contracts with drug manufacturers, health plan sponsors and other private parties," the suit alleges.

At Tuesday's commission meeting Akerman LLP partner Austin Ownbey, representing the PBM trade group Pharmaceutical Care Management Association, said PBMs "are the only entities in the drug supply chain dedicated to lowering the cost of prescription drugs."

Ownbey said it is unheard of for the FTC to release a second interim report.

"PCMA has significant concerns that a second interim report regarding specialty drugs is unlikely to be anything other than a piece of advocacy without substantiating evidence," he added.

A previous FTC study released in July found pharmacies affiliated with the three big PBMs received 68% of the dispensing revenue generated by specialty drugs—compared with 54% in 2016.

During the FTC hearing, representatives from independent pharmacies said the practices are endangering their businesses and hurting patients. A father testified that his son died as a result the pricing practices.

"How is it that these three large PBMs have become so bloated?" asked Colleen Shields, founder and CEO of Annapolis, Maryland-based work injury pharmacy RescueMeds.

Michael Hogue, CEO of the American Pharmacists Association, said the PBM industry created the term "specialty drugs" and each lists different drugs on that roster.

"It all depends on rebates and kickbacks," Hogue said.

The FTC study is likely to inform future regulatory actions and some in Congress have also expressed interest in curbing PBM pricing schemes.

Securities Law News

Jan. 14, 2025, 11:46 AM PST; Updated: Jan. 14, 2025, 12:55 PM PST

SEC Accountant Who Set off SPAC Restatement Wave to Retire (1)

By Amanda Iacone

The SEC's top accountant Paul Munter whose guidance targeted crypto assets and led to hundreds of restatements during the SPAC boom said Tuesday that he would retire after more than five active years at the Wall Street regulator.

Munter will step down as chief accountant to the Securities and Exchange Commission on Jan. 24, just a few days after the inauguration of incoming President Donald Trump, the SEC said. He joins several commission leaders who have left or announced their departures ahead of the administration change.

His boss SEC Chair Gary Gensler has said he will step down from his seat on Jan. 20. Trump has picked Paul Atkins, a former commissioner who is expected to be more receptive to the crypto industry, to take the helm of the SEC.

Under Munter's leadership, the SEC issued accounting guidance for special purpose acquisition companies—shell companies that offer a short-cut to a public listing—which sparked a wave of restatements and ground the boom in blank-check companies to a halt. His office also crafted crypto accounting guidance that Congress attempted to overturn and could be in limbo under the incoming Republican administration.

Munter repeatedly admonished auditors about risks that could undermine their objectivity and independence. He told audit firms not to put profits over their role as a watchdog and encouraged firms to claw back the pay of top leaders for audit failures.

He backed efforts by the US audit board to modernize its aging rule book and urged the Financial Accounting Standards Board to focus its efforts on meeting the needs of investors with smaller, faster rule-writing projects.

In nearly two dozen statements and speeches, he addressed private equity investments in public accounting firms, financial statement corrections, and cash flows.

Munter stepped in as acting chief accountant for two years before he was named to the post in 2023. He joined the commission in 2019 after retiring from Big Four accounting firm KPMG LLP. Before his SEC work, Munter had been known primarily as an academic and had taught accounting at the University of Colorado Boulder.

(Updates with additional reporting throughout.)

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Securities Law News

Jan. 14, 2025, 10:28 AM PST

Crypto Accounting Guide Update Aims to Ease Corporate Compliance

By Jorja Siemons

The American Institute of Certified Public Accountants has made substantial updates to its digital assets guidance to help those who prepare and audit companies' financial statements navigate first-ever US cryptocurrency accounting rules.

The resource reflects changes the Financial Accounting Standards Board made to US accounting standards with its landmark rules that address how companies need to recognize and measure the digital currencies they own, a Tuesday press release said. The updated guide provides a new definition for digital assets and answers questions about the rules' scope and implementation.

- Companies like MicroStrategy Inc. have bought significant amounts of Bitcoin and other cryptocurrencies, but they previously lacked specific rules on how to account for them.
- FASB's 2023 rules require companies to measure their crypto assets at fair value, or the current market price, with changes recorded in net income.
- The rules take effect for public and private companies with fiscal years that begin after Dec. 15, 2024—meaning this year for calendar year-end companies. Early adoption was allowed.

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Securities Law News

Jan. 15, 2025, 2:00 AM PST

Coinbase Ruling Will Let Trump's SEC Clarify Its Crypto Stance

By Ben Miller

Deep Dive

- Third Circuit orders SEC to justify rejecting crypto rulemaking
- Incoming agency leader has new opportunity to reverse course

The SEC's days of policing the cryptocurrency industry without formal rules are waning after a federal appeals court instructed the agency to provide a better rationale for rejecting Coinbase Global Inc.'s request for crypto-specific rulemaking.

The cryptocurrency exchange on Jan. 13 got a nod from the US Court of Appeals for the Third Circuit in its bid to force the Securities and Exchange Commission to clarify when and how federal securities laws apply to digital assets, though the judges stopped short of explicitly ordering the agency to write a rule.

As Chair Gary Gensler and several Democratic commissioners prepare to depart the agency, the rare court-ordered reappraisal of Coinbase's petition provides a forum for the incoming SEC administration to clearly lay out digital asset policy, securities lawyers and compliance consultants said.

"The decision, while not explicitly giving an answer of what to do, it certainly comes down in favor of Coinbase because it could have very easily said, 'We agree with the SEC. The agency can handle this on its own, leave them alone,'" said Walter Van Dorn, a partner at Seward & Kissel LLP and a former SEC lawyer. "They sent them back to do their homework, so they must have had some inkling that there was some validity to the argument Coinbase was making."

President-elect Donald Trump's pick to lead the SEC, former Commissioner Paul Atkins, will likely be responsible for addressing Coinbase's looming petition as Gensler, a longtime crypto skeptic, plans to step down Jan. 20.

"Probably one of the first things on his list is to clean up the crypto mess," Van Dorn said of Atkins. "So this is almost like a gift to him, handing it to him on a silver platter, giving him a roadmap of how to do it."

The Third Circuit's ruling also comes as the new Republican-led Congress vows quick action on legislation to clarify crypto regulation.

"We're reviewing the decision and will determine next steps as appropriate," an SEC spokesperson said.

Forcing the Issue

Coinbase first filed its petition in July 2022 calling on the SEC to adopt digital asset trading rules and brought a challenge at the Third Circuit in December 2023 after the agency denied the exchange's petition. The exchange has argued that existing securities regulations, such as a requirement that securities be "held and used" only by "a securities dealer, bank, or other qualified custodian," are incompatible with digital assets used on blockchain networks.

The outcome will now likely land on the desk of the next SEC administration, tasked with justifying or disavowing the Gensler-era approach to crypto regulation.

"The crypto industry is asking for more clarity to ensure compliance and not operate in a regulatory gray area," said Cynthia Kelly, a senior compliance consultant at STP Investment Services.

The Third Circuit aligned with Coinbase in deciding that the SEC didn't do enough to justify its rejection, paving the way for potential rulemaking on the horizon, according to Paul Grewal, the exchange's chief legal officer.

"I think we are going to get a rule in short order," he said. "The reign of regulation by enforcement by Gary Gensler is coming to an end, and I have absolute confidence in the incoming leadership, primarily that Atkins is going to be fair and apply balance to the questions that concern Coinbase and crypto more generally."

The SEC stepping away from Gensler's approach would signal to exchanges like Coinbase and other digital asset businesses "not to worry if they make one foot fault or move in the wrong direction that they're going to be hit with an enforcement action," said Carlo di Florio, president of ACA Group, a financial services compliance firm.

Agency Challenges

The Third Circuit's ruling, which sent the SEC a clear mandate to justify its crypto regulation stance, offered a rare instance of a plaintiff successfully challenging an agency's lack of rulemaking.

There's been no shortage of other suits challenging Biden-era rules, especially since last year's *Loper Bright Enterprises v. Raimondo* ruling from the US Supreme Court did away with the *Chevron* doctrine, under which courts had to defer to reasonable agency interpretations of ambiguous statutes. But those legal challenges often take aim at rules that have already been proposed or adopted, highlighting issues with the notice-and-comment process or legal conflicts arising from the content of a rule.

After the Coinbase ruling, industry players can be more confident knowing how courts will “answer the call” to handle agency grievances, according to Grewal.

“I absolutely expect that court litigation will be far less necessary, and that Coinbase can get out of the business of having to turn to court so frequently,” he said. “No one wants to see these issues resolved by judges when rulemaking and legislation can provide far more comprehensive solutions.”

A different approach from an Atkins-run SEC could change the agency’s legal dynamics with regulated industries like crypto if those groups perceive an increased opportunity for input and dialogue, possibly stemming the tide of litigation challenging the agency, according to di Florio.

Atkins has “always been concerned about the agency overreaching its authority, and I think he is going to conduct the agency in a way that minimizes the likelihood that the industry feels it needs to go to court to challenge rules,” di Florio said.

The case is Coinbase Inc. v. SEC , 3d Cir., No. 23-3202, 1/13/25 .

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Crypto Co.'s Lax Compliance Enabled Hackers, Suit Says

By **Aislinn Keely**

Law360 (January 14, 2025, 8:59 PM EST) -- A proposed class action in California federal court accused digital asset exchange OKX of flouting U.S. laws and allowing criminals to launder stolen funds through its platform, including $725,000 worth of crypto looted from the crypto investor leading the suit.

Alister Watt of North Carolina said in a Monday complaint that an investigation revealed a "material portion" of his stolen crypto was sent to an account at OKX.com after he suffered a 2023 hack, and the business entities behind the crypto exchange should be on the hook for failing to apply required anti-money laundering procedures that would have caught the criminal in his case and others.

The suit accuses OKCoin USA Inc., OKX Group, OKCoin Europe Ltd. and Aux Cayes Fintech Co. Ltd. of violating the Bank Secrecy Act by failing to maintain an anti-money laundering program and disregarding rules around know-your-customer procedures "all in a deliberate and calculated effort to profit from the U.S. market." It brings RICO claims, as well as claims the firm aided and abetted the conversion of stolen funds.

"Defendants' willful disregard of these important laws and regulations turned the OKX Platform into a magnet and hub for criminals, users from sanctioned jurisdictions, terrorists, and other bad actors – becoming a critical part of their efforts to launder crypto which was stolen or obtained by other unlawful means," said Watt.

The suit also accused the platform of offering U.S. customers services through OKX.com, even though only its stateside arm, OKX US, was licensed to serve American users.

"In connection with those efforts, Defendants held out OKX US's purported compliance with U.S. laws and regulations as a distraction for U.S. regulators so that OKX.com could target lucrative U.S.-based customers," said the complaint.

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

Without proper know-your-customer information, it's challenging to uncover who is behind blockchain transactions, both in Watt's case of stolen funds and others, said the complaint. According to Watt, OKX.com "acted as a depository" for millions of dollars in stolen crypto, including his and other members of the proposed class, defined as U.S. users whose crypto was taken from a non-OKX wallet and transferred to an account on the platform.

"But for Defendants' scheme, Plaintiff and the Class would not have had their crypto stolen and then laundered at OKX.com so that the crypto was no longer traceable on the blockchain," said the suit.

Watt is requesting damages be measured "at a minimum" by the dollar value of funds laundered through OKX after they were taken from the proposed class through illegal conduct like hacks, ransomware and theft, the suit said.

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

Watt is represented by Eric I Niehaus of Robbins Geller Rudman & Dowd LLP.

Counsel information for OKX was not immediately available.

The case is Watt v. OKCoin USA Inc. et al., case number 4:25-cv-00368, in the U.S. District Court for the Northern District of California.

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TikTok Moderation Co.'s $5.5M Investor Deal Gets Initial OK

By **Katryna Perera**

Law360 (January 14, 2025, 8:02 PM EST) -- A Florida federal judge on Tuesday gave the first green light to a $5.5 million deal between TikTok content moderation company Teleperformance and a pension fund, resolving claims that investors were harmed after investigative reports were published claiming that Teleperformance was working its staff into the ground and forcing them to watch harmful content with no support.

U.S. District Judge Cecilia M. Altonaga issued an **order** granting preliminary approval to the settlement, saying it is fair, reasonable and adequate and resulted from informed, extensive arm's-length negotiations.

She added that the proposed deal eliminates the risks of continued litigation, does not provide "excessive compensation" to lead counsel and does not provide undue preferential treatment to any class members.

According to the plaintiffs' motion for preliminary approval, filed last week, class counsel from Robbins Geller Rudman & Dowd LLP intends to seek attorney fees of no more than one-third of the settlement fund, or approximately $1.8 million, and $200,000 in litigation costs. Additionally, lead plaintiffs, the City of Warren General Employees' Retirement System and the City of Westland Police and Fire Retirement System, will seek service awards of no more than $10,000.

Judge Altonaga also certified a class for settlement purposes that includes all individuals who purchased or acquired Teleperformance American depositary receipts between Feb. 20, 2020, and Nov. 9, 2022.

The settlement comes after Teleperformance failed to get the class action tossed last year when Judge Altonaga **ruled** that the suit pled actionable misstatements and omissions, showed scienter and sufficiently alleged loss causation.

The operative complaint alleged that two investigative articles published by U.S. news publications during the class period revealed that Teleperformance "subjected its content moderation employees to extremely inappropriate — and potentially criminal — working conditions."

This was in direct contradiction to statements Teleperformance's top brass had made, the pension funds said, and it caused share price declines.

The plaintiffs cited two drops in the price of Teleperformance's American depositary receipts. The first of these occurred in early August 2022, when the share price dropped from $168.69 a share to just under $160.94 after the publication of a Forbes article about the company's alleged content moderation practices.

The second drop occurred the following November, when Time published an exposé and the share price fell from $132.32 to $107.77, according to court filings.

Teleperformance provides content moderation and other services for social media companies, including TikTok.

According to court filings, the first article, published by Forbes in August 2022, revealed that

Teleperformance's content moderators "were shown sexually exploitative images of children as part of their training, and their training materials included a 'widely accessible' document containing hundreds of images of naked or abused children."

Teleperformance responded to the article and said an internal audit had found no evidence of the use of or access to such images in training, but the pension funds claimed the information in the Forbes article was corroborated by a confidential witness who worked as a content moderator for the company.

The second article, published by Time in October 2022, revealed that Teleperformance's content moderators were "exposed to egregious content that had an adverse effect on their well-being."

"It also discussed the inadequacy of Teleperformance's mental health support, employee monitoring, and alleged union-busting tactics," court filings stated. Teleperformance again denied the claims.

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

The pension funds are represented by Stephen R. Astley, Sabrina E. Tirabassi, Luke Goveas, Alex Kaplan and Theodore J. Pintar of Robbins Geller Rudman & Dowd LLP and Thomas C. Michaud of Vanoverbeke Michaud & Timmony PC.

Teleperformance and the other defendants are represented by Martin B. Goldberg and Benjamin R. Shiekman of Lash Goldberg Fineberg LLP and Michele D. Johnson, Colleen C. Smith, Christopher S. Turner and Donald Lee Thompson of Latham & Watkins LLP.

The case is City of Warren General Employees' System v. Teleperformance SE et al., case number 1:23-cv-24580, in the U.S. District Court for the Southern District of Florida.

--Editing by Jay Jackson Jr.

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Wells Fargo Fights To Drop Officers From Investors' Bias Suit

By **Bonnie Eslinger**

Law360 (January 14, 2025, 11:30 PM EST) -- Wells Fargo & Co. urged a California federal judge Tuesday to free three executives from a derivative lawsuit filed by shareholders claiming the bank's leadership failed to address the company's discriminatory lending and hiring practices, saying there are no allegations that explain why a presuit demand to the board would have been futile.

During a San Francisco hearing before U.S. District Judge Trina Thompson, a lawyer for Wells Fargo argued that the second amended complaint still doesn't show why the investors felt there was no point in approaching Wells Fargo's board of directors with concerns related to the three executives before taking the matter into court.

The operative 170-page complaint filed in October lodges claims against 14 current and former bank directors, along with four officers. The motion to dismiss seeks to dismiss three of those four from the suit: Senior Executive Vice President and Chief Operating Officer Scott Powell; Carly Sanchez, a senior executive in human resources at Wells Fargo who served as vice president of talent acquisition and diversity recruiting from 2013 to 2022; and Senior Executive Vice President and CEO of Consumer Lending Kleber Santos.

In a letter to the parties before Tuesday's hearing Judge Thompson noted that the new allegations regarding demand futility addressed several counts, but breach of fiduciary duty.

The officer defendants oversight of discriminatory lending and discriminatory hiring practices will implicate a different set of facts than the breach of duty claim against the board of director defendants also named in the litigation, the judge underscored.

A lawyer for the three executives, Leonid Traps of Sullivan & Cromwell LLP, said for that reason the count should be forfeited.

Traps also argued that the allegations against the officers are not congruous with the claims against the directors, as the shareholders contend.

"The directors and officers are obviously different people," Traps said. "They make different statements on different dates, and critically, they knew different things."

The lawyer also argued that the plaintiffs had not alleged that a majority of the board "is somehow beholden to the officers," so they can't say that a demand would have been futile.

There are no new facts in the latest version of the suit, just arguments saying that a demand would have been futile because the claims applied the same to both the directors and the executives, Traps told the court.

"Nothing prevented plaintiffs from first making the demand, at least on these claims against the officers," Traps said. "They did not. They never gave the directors an opportunity."

A lawyer for the plaintiffs, Gia Jung of Cotchett Pitre & Mccarthy LLP, told the court the latest version of their complaint addressed the pleading deficiencies the judge highlighted in her last motion-to-dismiss order.

"Demand utility is a simple question." Jung said. "Would a demand on the board be futile as to the officer defendants here? The answer is unequivocally yes."

The discriminatory hiring statements that the court has already found to be actionable against the board members "completely overlap" to the executives and are nearly identical to statements the officers made that underlie the securities claims against them, Jung said.

They board members would not be able to independently investigate and claims against the officers because that would implicate their own liability, Jung said.

"A demand on the board as to the alleged claims against the officer defendants would be futile, because the board would be conflicted," the lawyer said.

The motion to dismiss does not include CEO Charles Scharf.

The new complaint, however, drops two officers from the litigation: Senior Executive Vice President and Chief Financial Officer Michael Santomassimo and Vice President and Co-CEO of Corporate & Investment Banking Jonathan Weiss.

The proposed class action claims stems from reporting by the New York Times in 2022 that some bank employees were faking interviews for positions that had already been filled in order to meet a company target on diversity led to an 8.6% price decline in Wells Fargo's stock price.

A consolidated amended stockholder derivative complaint filed in 2024 alleges breaches of fiduciary duty and related causes of action over claims the board failed to "meaningfully monitor Wells Fargo's discriminatory lending and hiring practices."

During **an August hearing**, a lawyer for Wells Fargo argued that its board has worked to address the concerns, which surfaced in media reports back in 2022.

Christopher Viapiano of Sullivan & Cromwell LLP said the lawsuit failed to plead specific facts showing that a majority of board of directors didn't act on the allegations or faced the likelihood of liability due to their alleged lack of oversight over Wells Fargo's mortgage refinancing and minority hiring practices.

"The standard is that the directors have to try in good faith to put in place an information system," Viapiano said, adding that evidence in the plaintiffs' hands "show that the directors tried in good faith to put in such a system."

Lesley Weaver of Bleichmar Fonti & Auld LLP told the court during that August hearing that for years the board did little to monitor the bank's fair lending or diverse employment search requirements and called the claims of oversight nothing more than "lip service" when "what's happening internally is active discrimination."

Wells Fargo and its executives are represented by Brendan Cullen, Sverker Hogberg, Christopher Viapiano and Leonid Traps of Sullivan & Cromwell LLP.

The proposed investor class is represented by Lesley E. Weaver, Nancy A. Kulesa and Derrick B. Farrell of Bleichmar Fonti & Auld LLP, Marlon E. Kimpson, William S. Norton, Joshua C. Littlejohn, Meredith B. Weatherby and Vanessa A. Davis of Motley Rice LLC, Mark C. Molumphy, Tyson Redenbarger, Gia Jung of Cotchett Pitre & Mccarthy LLP and Francis A. Bottini Jr., Albert Y. Chang and Anne B. Beste of Bottini & Bottini Inc.

The case is In Re: Wells Fargo & Co. Hiring Practices Derivative Litigation, case number 3:22-cv-05173, in the U.S. District Court for the Northern District of California.

--Additional reporting by Hannah Albarazi, Lauren Berg and Hailey Konnath. Editing by Jay Jackson Jr.

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TripAdvisor, Class Flip Nevada Move Positions In Del. Appeal

By **Jeff Montgomery**

Law360 (January 14, 2025, 6:45 PM EST) -- Attorneys for the boards and controller of TripAdvisor and Liberty TripAdvisor have asked Delaware's Supreme Court to keep alive their appeal from a lower court's refusal to toss a suit challenging their reincorporation in Nevada, despite a call for dismissal by class attorneys who had previously opposed both the deal and appeal.

The rare, tactical turnabout followed TripAdvisor's announcement in December that it planned to absorb Liberty TripAdvisor in a $435 million merger under terms that would end TripAdvisor Chairman and Liberty TripAdvisor President and CEO Greg Maffei's status as controller.

"The announcement of the proposed [merger] transaction did not moot the issues presented by this appeal. The court granted this interlocutory appeal to clarify the standard of review applicable to directors' decisions to reincorporate in another state. Respectfully, it should still do so," attorneys for the company said in an opposition to dismissal filed with the court on Monday.

TripAdvisor is the world's largest travel guidance platform. Maffei holds a controlling stake in Liberty TripAdvisor, which operates only to hold a controlling stake in TripAdvisor.

Vice Chancellor J. Travis Laster in February 2024 refused to block the companies' reincorporation in Nevada, but kept alive minority stockholder damage claims alleging the vote was unfair and tainted by controller clout.

Class attorneys originally argued that elimination of Maffei's controller status could nullify the central claim in the Court of Chancery suit filed in April 2023 that survived a dismissal motion in February 2024, followed by a mid-case appeal to Delaware's Supreme Court a month later.

"Because TripAdvisor is acquiring Liberty TripAdvisor and will no longer be a controlled corporation, the benefit to Maffei of being able to extract greater private benefits of control after [Nevada] redomestication — and the concomitant harm to minority stockholders — no longer exists," a brief filed by the stockholders on Jan. 3 said.

Attorneys for Maffei and the companies argued that the proposed merger was only recently announced and remains subject to a stockholder vote, among other points. They added that, "if the stockholders want to exit, the proper course would be to seek voluntary dismissal with prejudice" of the Chancery Court case.

"Of course, this would not provide the opportunity for a 'mootness fee,' which plaintiffs' motion makes clear they intend to seek," the companies' attorneys wrote.

Attorneys for the stockholders acknowledged in a footnote to their dismissal motion that they intend to ask the Court of Chancery to maintain jurisdiction over any mootness fee request.

Attorneys for the class said the plaintiffs originally brought their suit because the redomestication in Nevada would provide greater, uncompensated benefits of control to Maffei and opportunities to monetize that control by sale of his stake or by engaging in a conflicted controller transaction.

"The proposed transaction that plaintiffs claim triggered mootness has only been announced; it is still subject to a stockholder vote and other closing conditions," attorneys for the companies told the justices Monday.

"Moreover, plaintiffs expressly and repeatedly alleged in the complaint, and the Court of Chancery held, that the conversions provide all of the directors, not just the alleged controller, with non-ratable benefits from reducing the directors' potential litigation exposure," the companies' opposition brief added.

The shifting positions emerged as Delaware's courts and the state grapple with a number of corporate moves or threats to relocate in favor of jurisdictions that give more deference to directors and management in stockholder actions. At the front of that group is Tesla and SpaceX founder Elon Musk's announced decision to reincorporate in Texas.

Counsel for the TripAdvisor and plaintiff parties didn't immediately respond to requests for comment Tuesday.

Liberty TripAdvisor Holdings Inc. and its directors and officers are represented by Kevin R. Shannon, J. Matthew Belger, Jaclyn C. Levy, Christopher D. Renaud and Justin T. Hymes of Potter Anderson & Corroon LLP, and Matthew W. Close, Jonathan B. Waxman, Abby F. Rudzin and Asher Rivner of O'Melveny & Myers LLP.

Tripadvisor and its directors and officers are represented by Bradley R. Aronstam and S. Michael Sirkin of Ross Aronstam & Moritz LLP, and John A. Neuwirth, Evert J. Christensen and Stefania D. Venzia of Weil Gotshal & Manges LLP.

Tripadvisor and Liberty TripAdvisor stockholders Dennis Palkon and Herbert Williamson are represented by Gregory V. Varallo, Andrew E. Blumberg, Mae Oberste, Daniel E. Meyer and Jeroen van Kwawegen of Bernstein Litowitz Berger & Grossmann LLP, Kimberly A. Evans, Lindsay K. Faccenda, Irene R. Lax and Robert Erikson of Block & Leviton LLP, and Jeremy Friedman, David Tejtel, Christopher Windover and Lindsay LaMarca of Friedman Oster & Tejtel PLLC.

The case is Gregory Maffei, Tripadvisor Inc. and Liberty TripAdvisor Holdings Inc. v. Dennis Palkon and Herbert Williamson, case number 125,2024, in the Supreme Court of the State of Delaware.

The case under appeal is 2023-0449, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.

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DXC Says Investor Suit Shows Integration Problems, Not Fraud

By **Sydney Price**

Law360 (January 14, 2025, 6:47 PM EST) -- DXC Technology has asked a Virginia federal court to toss a shareholder suit alleging the information technology giant overhyped efforts to reduce restructuring and integration costs after acquiring several companies, arguing hindsight critiques from the current CEO do not establish securities fraud.

The suit, most recently amended in December after consolidation, says DXC and its executives made misleading statements regarding the company's ability to integrate the business systems of the numerous companies it has acquired over the past several years.

The complaint alleges that in 2024, DXC's new CEO, Raul Fernandez, who is not a defendant in the suit, admitted that previous restructurings did not set a fully integrated baseline for profitable growth because the systems acquired over time were "never integrated, never deduped," and acknowledged that the company was "not [a] fully functional organization."

DXC stock prices plunged from $19.88 to $16.52 per share as the news broke, according to the suit.

In a Friday motion to dismiss, the DXC defendants said they "did their best" to restructure the company amid the complex transactions and that Fernandez's analysis of these efforts do not suggest fraud.

"The notion that DXC officers would secretly jettison the company's disclosed goal of integrating its component businesses — merely to boost financial metrics temporarily, but without trying to enrich themselves along the way — is not even plausible, much less convincing," the motion states.

The defendants say a new CEO highlighting areas for continued improvement is "a tale as old as time."

"Any new chief executive will reassess the status quo and bring new priorities, emphasis and direction," the motion states. "There is no strong inference of scienter."

The suit's individual defendants include its former CEO, Michael Salvino, who exited the company on Dec. 20, 2023. News of his departure caused stock prices to plunge 12%, from $25.03 to $21.99 per share, according to the suit.

DXC also argues its purchase of $1 billion of its own stock during the class period — which runs from May 26, 2021, through May 16, 2024 — only further "undercuts any inference of scienter."

"Indeed, it would not be economically logical for DXC to execute such a substantial repurchase of its own stock at allegedly inflated prices," the motion states. "Yet that is what plaintiff speculates defendants risked their jobs and reputations to do, with zero indication they stood to gain anything by it. That does not add up."

Additionally, DXC says its $8 million **2023 settlement** with the U.S. Securities and Exchange Commission regarding its allegedly negligent accounting practices before the start of the class period "has no bearing whatsoever" on whether DXC management misrepresented their actual integration and restructuring efforts during the class period, and that its mention in the investors' suit is irrelevant.

"If anything, the SEC settlement cuts against a finding of scienter, as the bizarre scheme plaintiff alleges would have been even more foolish following SEC scrutiny," the motion states.

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

The investors are represented by Susan R. Podolsky of Law Offices of Susan R. Podolsky and Jennifer L. Joost, Richard A. Russo Jr., Austin W. Manning, Lyndsey B. Campbell of Kessler Topaz Meltzer & Check LLP.

DXC and the individual defendants are represented by Stephen P. Barry, Jamie L. Wine, Kevin M. McDonough, Melange T. Gavin and Nicholas Rosellini of Latham & Watkins LLP.

The case is In re DXC Technology Company Securities Litigation, case number 1:24-cv-01351, in the U.S. District Court for the Eastern District of Virginia.

--Editing by Drashti Mehta.