

Special Reports

Leading Commercial Litigators 2025

Feb. 5, 2025

The annual supplement honoring the top performing bet-the-company litigators across the country.



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Robbins Geller Rudman
& Dowd



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Wisner Baum



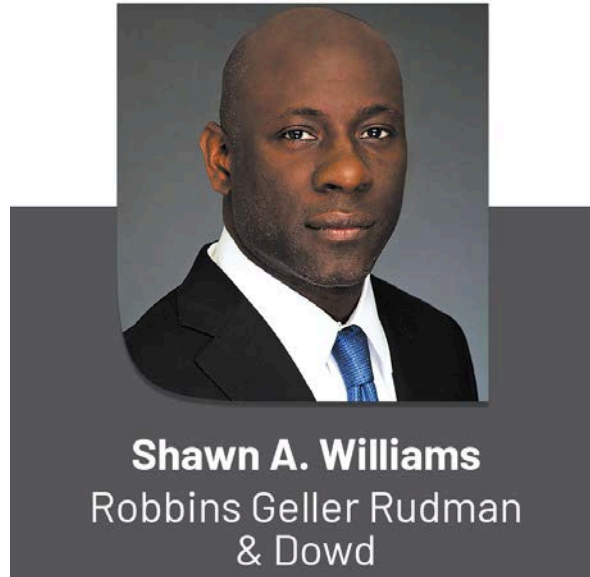
California's new arbitration
amendment is a legal tangle
waiting to be unwound



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San Francisco • Litigation

Shawn Williams is a founding partner of Robbins, Geller Rudman & Dowd and serves as managing partner of the firm's San Francisco office. He is also a member of the firm's management committee. Specializing in complex commercial litigation with a focus on securities litigation, Williams has served as lead counsel in numerous precedent-setting actions, recovering billions of dollars for investors and consumers.

One of his landmark cases was against Facebook, which was among the first under the Illinois Biometric Information Privacy Act to be litigated through summary judgment on the eve of trial. In re Facebook Biometric Information Privacy Litigation, 3:15-cv-03747 (N.D. Cal., Aug. 17, 2015).

Williams said the Facebook case was an introduction into the details of machine learning algorithms that underpin artificial intelligence.

He added that the matter also presented some significant law and technology questions that were central to whether the claim could proceed and proceed as a class action. The first was whether the alleged violation of BIPA, the collection of biometric data without consent, was a concrete privacy interest that, if violated, would equate to an "injury in fact" and confer standing under Article III.

"The second [issue] was whether Illinois statute was intended to have extraterritorial effect which raised factual questions of where the violation occurred, when plaintiffs use Facebook in Illinois or when the facial recognition technology created face templates potentially on servers outside of Illinois," Williams said. "These issues were ultimately resolved in favor of our clients in Ninth Circuit and key to the outcome that we achieved."

This case resulted in a then-record recovery of \$650 million for consumers.

Since the spring of 2019, Williams, along with his firm, represented Apple investors in a securities fraud class action case under the Exchange Act of 1934. In re Apple Inc. Securities Litigation, 4:19-cv-02033 (N.D. Cal., filed April 16, 2019).

After five years of litigation, they achieved a \$490 million settlement, marking the third-largest securities class action recovery ever in the Northern District of California and the fifth-largest in the Ninth Circuit.

Despite the settled nature of much of the law, litigating against Apple was far from routine, Williams said, requiring meticulous preparation for trial against one of the world's most beloved companies and its transformational product, the iPhone.

"While Apple was a more traditional securities case, where much of the law was settled, litigating against Apple is far from routine," he said, adding: "I learned a lot preparing this case for trial and from our mock juries about effective trial presentations involving popular companies."

#383416

Securities Law

Feb. 5, 2025, 9:03 AM PST

AI Module Supplier Monolithic Sued Over Nvidia Exit, 30% SelloffBy [Martina Barash](#)

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** [No. 2:25-cv-00220](#) (Bloomberg Law subscription)

Monolithic Power Systems Inc. touted the quality of its electrical components for artificial intelligence hardware despite flaws that led its largest customer, Nvidia Corp., to abandon it, an investor alleges.

As a result of disappointing financial results and an “explosive” analyst report, “the price of Monolithic stock declined more than 30% from its Class Period high of more than \$959 per share to approximately \$647 per share” on Nov. 11, 2024, according to the complaint. An employee retirement fund for Waterford Township, Mich., filed the proposed class action Tuesday in the US District Court for the Western District of Washington for a period covering stock purchases from Feb. 8 through Nov. 8, 2024.



Monolithic’s power management modules convert voltages to the appropriate wattage needed for a particular electrical system, according to the complaint. Their use in graphic processing units led to sales growth alongside the expansion of the artificial intelligence industry, which depends on GPUs, the fund says.

“Unbeknownst to investors, however, Monolithic’s power management solutions were suffering from significant performance and quality control issues, which, in turn, negatively impacted the GPUs they powered like those supplied by Nvidia,” the retirement fund says. Contrary to Monolithic’s representations that it had resolved quality issues with components for Nvidia, “Monolithic in fact failed to rectify known product defects that had impaired the performance of Nvidia’s products,” it says.

Monolithic revealed a revenue slowdown on Oct. 30, 2024, followed by analyst comments about a delayed Nvidia product and the Nov. 11 Edgewater Research report "revealing that Nvidia had canceled half of its outstanding Monolithic orders and intended to eliminate Monolithic as a supplier" for its most advanced GPU variant, and that "Nvidia had decided to pivot to Monolithic's competitors as its 'primary suppliers,'" the fund says.

The proposed class consists of hundreds or thousands of members, according to the complaint.

The retirement fund seeks damages, rescission, and injunctive relief on its securities fraud claims.

Monolithic didn't immediately respond to a request for comment sent through its web portal.

Keller Rohrbach LLP, Robbins Geller Rudman & Dowd LLP, and AsherKelly represent the fund.

The case is Waterford Twp. Gen. Emps. Ret. Sys. v. Monolithic Power Sys. Inc. , W.D. Wash., No. 2:25-cv-00220, complaint 2/4/25 .

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Carvana Must Face Investors' Trimmed Class Action Fraud Claims

By Ben Miller

- Judge won't reconsider order allowing some claims to proceed
- Shareholders allege car seller misled them on growth model

Online used car retailer Carvana Co., along with its top executives and underwriters, will have to defend allegations that they misrepresented the company's growth prospects after an Arizona federal judge declined to reconsider his previous order allowing proposed class action claims to proceed.

Shareholders can continue to pursue claims that Carvana failed to disclose mounting costs and the complexity of its operations, misleading them on the sustainability of its growth model before the company disclosed declining car sales in late 2022, Judge Michael Liburdi in the US District Court for the District of Arizona said in a Monday order denying Carvana's bid for reconsideration.

The latest ruling comes just a month after the car retailer drew critiques from now-disbanded short seller Hindenburg Research alleging that a firm owned by Carvana CEO Ernest Garcia III's father fueled the company's turnaround.

"The Court already considered and rejected the very arguments Defendants regurgitate here," Liburdi said. The judge only partially granted a prior motion to dismiss filed by Carvana and its executives, ruling on Dec. 16 that several fraud claims against the company, its executives, and Ernest Garcia II shouldn't be tossed.

He also allowed claims to proceed against Carvana's underwriters—units of Citigroup Inc. and JPMorgan Chase & Co.

Liburdi in February 2024 dismissed a previous iteration of the proposed class action, but provided the shareholders a month to clarify the "impermissible puzzle pleading" in question.

The shareholders' amended complaint lacks sufficient facts to allege that certain executives knowingly misrepresented the company's prospects, defendants argued in their motion for Liburdi to reconsider his December order. The complaint also failed to assert a motive for an alleged "pump and dump" scheme, defendants had argued in the motion for reconsideration, which the court on Monday deemed unnecessary for securities fraud claims to move forward.

Carvana declined to comment. JPMorgan and Citigroup spokespeople didn't immediately respond to requests for comment.

Latham & Watkins and Fennemore Craig PC represent Carvana and its executives. Paul Weiss Rifkind Wharton & Garrison LLP and Fennemore Craig PC represent underwriters Citigroup Global Markets Inc. and J.P. Morgan Securities LLC. DLA Piper LLP and Greenberg Traurig LLP represent Ernest Garcia II. Robbins Geller Rudman & Dowd LLP and Bonnett Fairbourn Friedman & Balint PC represent the shareholder plaintiffs and proposed class.

The case is In re Carvana Co. Sec. Litig. , D. Ariz., No. 2:22-cv-02126, 2/3/25 .

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Walgreens Boots Alliance Hit with Opioid-Related Securities Suit

[dandodiary.com/2025/02/articles/securities-litigation/walgreens-boots-alliance-hit-with-opioid-related-securities-suit/](https://www.dandodiary.com/2025/02/articles/securities-litigation/walgreens-boots-alliance-hit-with-opioid-related-securities-suit/)

February 5, 2025

The D&O Diary
Walgreens Boots Alliance
Hit with Opioid-Related
Securities Suit



By Kevin LaCroix on February 5, 2025

Posted in Securities Litigation

The filing of Opioid-related securities litigation is not a new development; indeed, more than six years ago, I published a post in which I noted the outbreak at the time of a number of opioid-related securities suits against opioid drug companies. Now, in the latest opioid-related securities suits to be filed, and in the wake of the U.S. Department of Justice's filing of a False Claims Act complaint against the company, a plaintiff shareholder has filed an opioid-related securities class action lawsuit against Walgreens Boots Alliance. A copy of the January 30, 2025, complaint can be found [here](#).

Background

Walgreens is a health and retail pharmacy company operating in the U.S., U.K, and other countries. In connection with its sale of prescription drugs in the U.S., Walgreens is subject to the Controlled Substances Act (CSA). As the opioid crisis has developed and evolved in the U.S., and in response to the opioid crisis, Walgreens, according to the subsequently filed securities complaint, described itself as a "leader in providing education, and resources, as well as implementing best-in-class policies and procedures, to help combat opioid misuse and abuse."

Notwithstanding these representations, the complaint alleges, the company has been the subject of multiple legal proceedings in connection with its alleged contributions to the U.S. opioid epidemic. Among other things, in 2013, the company entered an agreement with the DOJ in which the company acknowledged its failure to comply with the CSA. In more recent years, the company has entered a number of civil settlements to resolve claims that it has mishandled prescriptions for opioid painkillers. The company has also made a number of commitments to implement measures designed to detect and prevent the diversion of controlled substances, including of opioids.

On January 17, 2025, the U.S. Department of Justice announced that it had filed a civil complaint alleging that Walgreens had “dispensed millions of unlawful prescriptions in violation of the [CSA] and sought reimbursement for many of the prescriptions from various federal health care programs in violation of the False Claims Act.” The company’s share price fell over 12% on this news.

The Lawsuit

On January 30, 2025, a plaintiff shareholder filed a securities class action lawsuit in the Northern District of Illinois against Walgreens and certain of its directors and officers. The complaint purports to be filed on behalf of investors who purchased the company’s securities between April 2, 2020, and January 16, 2025.

The complaint alleges that during the class period the defendants made false or misleading statements or failed to disclose that: “(i) contrary to the Company’s purported commitment to improved regulatory compliance, Walgreens continued to engage in widespread violations of federal law governing the dispensation of prescription medication and reimbursement for the same; (ii) the foregoing conduct, when revealed, would subject Walgreens to a heightened risk of further regulatory scrutiny, civil liability, and reputational harm; (iii) Walgreens’ revenues from the sale of prescription medications were unsustainable to the extent that they derived from unlawful conduct; and (iv) as a result, the Company’s public statements were materially false and misleading at all relevant times.”

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

Discussion

As I noted at the outset, over the years there have been a number of opioid-related securities class action lawsuits filed. Some of them have even resulted in significant settlements (as discussed for example here).

However, the most significant opioid-related D&O claims have not been securities class action lawsuits; rather, the most significant opioid-related D&O claims have been derivative suits. As I have noted on this site, there have been very significant settlements in opioid-related derivative lawsuits. For example, as discussed here, in October 2024, Walmart settled an opioid-related shareholder derivative lawsuit for \$123 million. As discussed here, the opioid related derivative suit filed against the board of McKesson settled for \$175 million, one of the largest derivative settlements ever. Similarly, as discussed here, the opioid-related derivative suit pending against Cardinal Health settled for \$124 million.

There have in fact been earlier opioid-related D&O lawsuits filed against retail pharmacy operations like Walgreens. For example, as discussed here, in March 2023, a plaintiff shareholder filed an opioid-related securities class action lawsuit against Rite Aid. And, as discussed here, in January 2021, a plaintiff shareholder filed an opioid-related securities class action lawsuit against Wal-Mart, based on allegations similar to those alleged in the shareholder derivative lawsuit, the settlement of which is noted above. Interestingly, the Rite Aid and Wal-Mart lawsuits, like the one just filed against Walgreens, came shortly after the U.S. Department of Justice had filed a False Claims Act complaint against the companies.

All of that said, it is noteworthy that this lawsuit represents yet another D&O claim arising out of the opioid crisis and that it is arising at this late date. While the real action on the opioid crisis is elsewhere, this lawsuit, like the other D&O claims that have preceded it, is a reminder that the ongoing opioid crisis does represent a D&O risk for companies whose operations became associated with opioids. This new lawsuit is also a reminder that though the opioid crisis is now many years old, the potential D&O risk associated with the crisis continues.

As I noted at the time when the Wal-Mart lawsuit was filed: “It does seem to me that the accountability process associated with the opioid crisis is continuing to spread outward, from the manufacturers, to the distributors, and now to the dispensing pharmacists – and in that regard, it seems as if the process has let to Walmart simply because of its size. Looked at from a distance, it does appear as if opioids have as their own special quality a sort of reverse-Midas touch, in which everything they touch turns to dross (and if this were not a family-oriented publication I would use a stronger word than ‘dross’). The baleful effect of opioids seems to spell the ruination of everything and everyone who becomes involved with the drugs.”

[Securities Law](#)

Feb. 5, 2025, 8:59 AM PST

Investors Sue Drug Maker GSK Over Zantac Cancer Link LiabilityBy [Gillian R. Brassil](#)

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- **COURT:** E.D. Pa.
 - **TRACK DOCKET:** [No. 2:25-cv-00618](#) (Bloomberg Law subscription)

Global pharmaceutical company GSK Plc allegedly deceived investors when it concealed for decades an internal study implicating a link between the heartburn drug Zantac and cancer, a proposed class action says.

The London-based pharmaceutical giant buried unpublished data for four decades that connected Zantac to a cancer-causing compound before pulling it from shelves, Roofers Local No. 149 Pension Fund said in its complaint filed in the US District Court for the Eastern District of Pennsylvania on Tuesday. The alleged deceit led to a pair of American depository receipt tumbles in 2022, the complaint says.

Deutsche Bank in August 2022 reported the possibility that Zantac distributors could incur the risk of liability. "Whereas GSK claimed repeatedly to investors that the scientific research did not support a correlation between Zantac and cancer, meaning that the Company did not face significant liability, the Deutsche Bank report forecasted that the total liability could be between \$5 billion and \$10 billion," the fund says.

After this news, the price of GSK ADRs dipped more than 10% over multiple days, the complaint says. When GSK admitted to research analysts that its liability exposure was between \$1-and-\$10 billion on Aug. 15, its ADR price slipped an additional 3%—ADRs each represent two shares of common stock on the New York Stock Exchange.



More than 400 million GSK ADRs, as of Feb. 23, 2024, were outstanding, owned by hundreds or thousands of investors, the complaint says. "All told, these disclosures erased nearly \$2.3 billion in shareholder value," the fund says.

GSK agreed in October 2024 to pay up to \$2.2 billion to settle about 80,000 lawsuits without admitting liability, comprising approximately 93% of Zantac-related cases against the company. That settlement amount "fell squarely in that range" of the 2022 estimate, the fund says.

GSK predecessor Glaxo began selling Zantac, the brand name for ranitidine, in the early 1980s; it was the world's best-selling drug by 1987, generating billions of dollars for the company, the complaint said.

Glaxo scientist Richard Tanner in 1982 found that when ranitidine interacted with nitrites, a common element in many foods, it created 232,000 nanograms of the highly carcinogenic compound called N-nitrosodimethylamine, or NDMA. The US Food and Drug Administration later said that 96 nanograms of NDMA was the acceptable daily limit, the complaint said, which was less than 0.05% of what the researcher had found in the drug.

An independent lab in 2019 reported finding NDMA in every batch with Zantac and notified the FDA, the fund said. GSK issued a voluntary recall that year, and in 2020, the FDA requested manufacturers cease selling the antacid and generic versions.

The proposed class would consist of purchasers of ADRs from Feb. 5, 2020, through Aug. 14, 2022. The complaint alleges violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 and US Securities and Exchange Commission Rule 10b-5.

The fund seeks equitable/injunctive relief; compensatory damages; and costs and expenses—including attorneys' and expert fees. It also requests a jury trial.

GSK didn't immediately respond to an email seeking comment.

Bernstein Litowitz Berger & Grossmann LLP; Kessler Topaz Meltzer & Check LLP; and AsherKelly PLLC represent the fund.

The case is Roofers Local No. 149 Pension Fund v. GSK PLC , E.D. Pa., No. 2:25-cv-00618, complaint filed 2/4/25 .

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Smith & Wesson Board Hit With Investor Suit Over AR-15 Marketing

By Isaiah Poritz

- **COURT:** D. Nev.
- **TRACK DOCKET:** [No. 2:25-cv-00236](#) (Bloomberg Law subscription)

The board of directors for gun manufacturer Smith & Wesson Brands Inc. was sued by shareholders Tuesday who accused them of exposing the company to significant liability through its manufacturing and sale of AR-15 style rifles used in mass shootings.

The shareholders, a group of activist Catholic nuns, accuse the company's board and senior management team of continuing to "willfully ignore the winds of change and the exponential increase in the number of mass murders" Smith & Wesson has facilitated through its marketing practices.

The complaint, filed in the US District Court for the District of Nevada, comes after the same shareholders brought a similar suit in Nevada state court where they faced procedural hurdles. They ultimately dismissed the suit, but refiled in federal court.

"Much like the day of reckoning faced by purveyors of opioids who flooded the market with dangerous and deadly products," the company's board members "place their own personal interests, greed, biases, beliefs, and political concerns" over those of the company and its shareholders, the suit said.

The board also made materially false statements about the legal merits of the state court action, the suit said, and the company made misleading statements about the risks it faces from continuing to market AR-15 rifles.

The derivative shareholder suit seeks a court ruling finding the board of directors violated their fiduciary duties and are liable for the costs associated with Smith & Wesson's allegedly illegal marketing conduct.

Although gun makers generally have legal immunity from suits over mass shooting events under federal law, manufacturers in recent years have reached settlements over their marketing practices. Remington Arms reached a \$73 million settlement with families of the victims of the Sandy Hook school shooting in 2012.

The case is Adrian Dominican Sisters v. Smith & Wesson Brands Inc. , D. Nev., No. 2:25-cv-00236, 2/4/25 .

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Memecoin Suits Test Trump's SEC on Pivot in Crypto Enforcement

By Gillian R. Brassil

Deep Dive

- Memecoin suits encounter shifting views on crypto at SEC
- Trump hints softer crypto rules as his memecoin price fluxes

Securities lawsuits targeting memecoins are testing how digital asset losses should be litigated as President Donald Trump's administration signals a softer approach to crypto.

A string of securities lawsuits filed over the past couple of months turn on whether memecoin trades should be treated as security transactions. Speculative and volatile—even when compared to other digital assets—memecoins are crypto tokens that gain traction through internet popularity and collect buyers by tapping into their fear of missing out.

Two lawsuits brought since December go after Hawk Tuah memecoin promoters, named for the so-called “Hawk Tuah Girl” Haliey Welch. Two target pump.fun, a Solana-blockchain based memecoin platform. The first, filed in the US District Court for the Southern District of New York on Jan. 16, cites the Peanut the Squirrel memecoin and the second last week aims at all the platform's tokens. Former Olympic gold-medalist Caitlyn Jenner and her business partner were sued over promoting her memecoin, \$JENNER, in November.

“Memecoins really don't fit within the statutory definition of a security because there is no expectation of profit or that other people are going to be doing some kind of work or project to make the token more valuable,” said Howard Fischer, a partner at Moses & Singer LLP and a former Securities and Exchange Commission senior trial counsel. Under a traditional analysis, most crypto would be considered a security, he said.

That's where context matters, said Andrew Verstein, a UCLA Law professor and faculty co-director of the Lowell Milken Institute for Business Law and Policy. Like collectible baseball cards, people often buy memecoins for fun without an expectation of returns based on what the promoter is marketing, he said.

When the seller isn't promising returns, then it's probably not a security, he said. "Whereas if they actually go on the news and tout how they're going to make money for you, and they tell you about the great trading environment they've constructed that's going to make the value go up and up, then it's likely to be a security and subject to normal securities rules and laws."

Crypto trading's status has divided courts and led to highly-watched decisions, including in a nuanced 2023 one with Ripple Labs Inc. and its XRP token in which a federal judge said that selling through secondary trading platforms didn't constitute securities transactions while direct sales to institutional investors were.

Citing the XRP litigation differential, Burwick Law partner Max Burwick compared context to the napkin test in contract law.

"So in that same way, no digital asset, in and of itself, is a security or a commodity or any other asset subject to regulation: It's what happens with the facts that are surrounding that particular asset that change the legal categorization," he said. The duo of Burwick's firm and Wolf Popper LLP have represented plaintiffs in four of these lawsuits since December.

Crypto-Friendly Administration

There could be a rise in memecoin litigation because sellers might expect a friendlier environment under Trump, potentially leading to increased abuse that attracts lawsuits, Verstein said.

Trump, who launched his own \$TRUMP memecoin in January, is embracing crypto in a turnaround from the Biden administration SEC, which brought numerous enforcement actions against crypto platforms to the industry's chagrin, said Jack M. Graves, who teaches at Syracuse University College of Law.

"I think there was a logic to it—[Chair Gary] Gensler didn't want to get caught up in trying to regulate, didn't want to get caught up on political question doctrine," he said.

In week one, Trump issued an executive order for a crypto working group and potential digital asset stockpile. The SEC under Acting Chairman Mark T. Uyeda announced a task force to build a crypto-specific regulatory pathway on day two of the administration. The commissioner leading the task force, Hester Peirce, had been skeptical about the previous SEC crypto enforcement agenda.

"I think that the dissents of Commissioners Uyeda and Peirce in many of these crypto enforcement actions make clear that the current majority of the SEC doesn't approve of the way in which the enforcement power was used against crypto firms," said Mark Perlow, a partner at Dechert LLP and former senior counsel in both the SEC's Office of the General Counsel and the Division of Enforcement.

The SEC declined to comment. The White House didn't respond to emails seeking comment.

Broadly, the number of crypto-related securities class action filings have declined from 2023 to 2024, according to Cornerstone Research. Questions about crypto transactions' status remain before courts, including whether the Second Circuit should accept an interlocutory appeal from Coinbase Inc., the largest crypto platform in the US, as it fends off an SEC suit started under the previous administration.

Trump's memecoin ballooned to all time highs ahead of the Jan. 20 inauguration, only to collapse soon after. On Tuesday, Trump's memecoin was trading at about 76% below its peak while Melania Trump's \$MELANIA memecoin was down from its height by 87%, according to data tracked by CoinGecko as of early afternoon Eastern Time.

"The irony of all of this is that the president has said this is going to be a very friendly administration for the crypto industry," Fischer said. "And yet by him and his wife issuing a memecoin which has seen tremendous volatility in a little over a week, what they've in fact done is create a lot of bad press for digital assets as a permanent asset class."

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Wynn Resorts, Investors Get Final Nod for \$70 Million Settlement

By Martina Barash

Wynn Resorts Ltd.'s \$70 million settlement of a securities fraud class action related to sexual misconduct allegations against founder Steve Wynn warrants final approval, a federal court ruled.

Attorneys' fees amounting to one-third of the settlement amount—more than \$23 million—are also reasonable, Judge Cristina D. Silva said in an order docketed Monday in the US District Court for the District of Nevada.

- The investors alleged that the company and certain former executives knew or recklessly disregarded allegations of sexual misconduct against Steve Wynn and made material misrepresentations to investors
- The settlement was reached at an advanced stage of litigation and drew no objections, the investors said in seeking final approval for the deal
- Silva approved more than \$1.1 million in litigation expenses incurred by counsel for the investors

Pomerantz LLP is lead counsel for the investors. Snell & Wilmer LLP and Kirkland & Ellis LLP represent Wynn Resorts.

The case is *Ferris v. Wynn Resorts Ltd.*, D. Nev., No. 18-cv-479, docketed 2/3/25.

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Delaware Court Deals Blow to Alexion in Securities Insurance Row

By Olivia Alafriz

- Shareholder suit 'related' to SEC investigation, court says
- Delaware's high court reverses lower court coverage ruling

A securities class action against Alexion Pharmaceuticals Inc. was "related" to an SEC investigation and should have been covered under an initial tranche of directors and officers insurance, Delaware's high court ruled, handing a loss to the pharmaceutical company.

"The securities class action—in the words of the policy—arose out of the circumstances disclosed by Alexion to its first tower insurers" regarding the federal probe, the Delaware Supreme Court said in a Tuesday opinion. It reversed a lower court's finding that the "second tower" insurers—units of Somp Holdings Inc., Swiss Re AG, and Hartford Financial Services Group Inc.—owed coverage.

Litigation over insurance coverage for related claims is common because fact patterns in such cases often vary widely and insurers and policyholders each stand to benefit from different interpretations.

Alexion, a unit of AstraZeneca Plc, had two D&O insurance programs relevant to the litigation. The first provided \$85 million in coverage for claims made from June 2014 to June 2015, and the second offered \$105 million for claims made from June 2015 to June 2017.

Alexion notified the first tower of insurers when it received a Securities and Exchange Commission subpoena during the first policy period. It then notified the second group of insurers shortly after it was hit with the shareholder class action in 2016.

The pharmaceutical company settled with the SEC for about \$21.5 million in 2020 over alleged Foreign Corrupt Practices Act violations, and settled the class action for \$125 million in 2023 over alleged unethical sales practices.

In its opinion Tuesday, the high court noted that Alexion had the incentive to pursue coverage under the second-layer program because the limits were higher.

Alexion sued some carriers from both groups in the Delaware Superior Court, seeking a declaratory ruling that the shareholder suit was a claim first made during the second policy period. In court proceedings, it argued the suit was unrelated to the SEC investigation.

The lower court, applying a “meaningful linkage” standard, concluded the class action was only loosely connected to the SEC investigation and therefore should be covered under the second tower.

The second tower insurers—Endurance Assurance Corp., Swiss Re Corporate Solutions America Insurance Corp., and Navigators Insurance Co.—appealed the lower court’s ruling, and prevailed with the Delaware Supreme Court.

“Although we agree with the Superior Court that ‘meaningful linkage’ is the appropriate standard of comparison, we disagree with its conclusion that ‘the link between the securities action and the prior incident is tangential, not meaningful,’” Delaware’s high court concluded.

The high court said the class action and SEC investigation were related because both involved the same alleged wrongdoing—including Alexion’s grant-making to patient advocacy groups in Brazil and other countries. Additionally, the opinion noted, the class action explicitly referred to the federal subpoena and investigation.

“Because both the SEC investigation and the Securities Class Action involve the same conduct, it does not matter whether the SEC and the stockholder plaintiffs are different parties, asserted different theories of liabilities, or sought different relief,” the court said. “It is the common underlying wrongful acts that control.”

Ross Aronstam & Moritz LLP and Kennedys CMK LLP represent Endurance. Phillips McLaughlin & Hall PA and Skarzynski Marick & Black LLP represent Swiss Re. Bodell Bove and BatesCarey LLP represent Navigators. McCarter & English LLP and Cohen Ziffer Frenchman & McKenna represent Alexion.

The case is *In Re Alexion Pharmaceuticals Inc. Insurance Appeals*, Del., Nos. 154,2024 and 157,2024, 2/4/25.

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ISCO Stock Plan Battle Won't Be Arbitrated as Judge Reconsiders

By Jacklyn Wille

- Recent Sixth Circuit case law on ERISA arbitration at issue
- Lawsuit challenges stock sale timing, purchase price

ISCO Industries Inc. workers challenging a forced stock buyback in their employee stock ownership plan convinced a Kentucky federal judge to rethink her decision ordering much of the dispute into arbitration

The judge on Monday vacated her 2022 decision forcing claims against ISCO and former executives into arbitration, saying the case is governed by the US Court of Appeals for the Sixth Circuit's intervening decision in *Parker v. Tenneco Inc.* In *Parker*, the Sixth Circuit declined to enforce a benefit plan's arbitration clause because it limited the rights guaranteed to plan participants under the Employee Retirement Income Security Act, including the right to proceed in a representative capacity on behalf of the plan or vindicate losses suffered by the plan as a whole.

"Under *Parker*, because both claims are brought on behalf of the members of the plan, the individual arbitration agreements in both the employment agreement and ESOP are unenforceable because if they were enforceable, they would bar effective vindication of statutory rights," Judge Rebecca Grady Jennings of the US District Court for the Western District of Kentucky said.

In a prior opinion, Jennings declined to reconsider her arbitration ruling in light of an earlier Sixth Circuit decision involving arbitration of ERISA claims.

The proposed class action challenges a 2018 transaction in which the ISCO plan was terminated through a \$96.6 million stock sale to the company's top executives and trusts affiliated with their families. The defendants manipulated the transaction's timing and purchase price so that participants would miss out on gains from the company's "record-breaking financial results" in 2018 and 2019, according to the lawsuit.

Jennings also rejected the defendants' other arguments in favor of dismissal.

The stock plan participants are represented by Kaplan Johnson Abate & Bird LLP.

ISCO and the executives are represented by Steptoe LLP and Frost Brown Todd LLP.

The case is *Best v. James*, 2025 BL 34130, W.D. Ky., No. 3:20-cv-00299, 2/3/25.

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Litigation

Feb. 5, 2025, 7:24 AM PST

Monster Beverage 401(k) Investors Can Try Again in Fee ChallengeBy Jacklyn Wille

- **Judge allows amended complaint with new factual allegations**
- **Retirement plan's administrative fees, investments at issue**

Participants in Monster Beverage Corp.'s \$213 million 401(k) plan can amend their complaint to better explain their standing to sue and the company's potential breaches of duties, a California federal judge said.

Judge John W. Holcomb on Tuesday denied the beverage maker's motion to dismiss without prejudice, saying he's "loath to adjudicate" serial dismissal requests. Holcomb gave the participants, who requested an opportunity to add factual allegations supporting their case, a Feb. 21 deadline for filing an amended complaint.

The seven-month-old lawsuit accuses Monster of mismanaging its employees' retirement plan by overpaying for administrative services and failing to weed out pricey and badly performing investment options. Monster sought to have the case dismissed, saying it was based on "fundamentally flawed" generalizations and a "scattershot of conclusions based on improper comparisons."

The lawsuit, led by plan participants Richard Hollien, Josh McCormick, and Charles Whittelsey, is pending in the US District Court for the Central District of California. The participants filed—and then voluntarily dismissed—a substantially similar lawsuit in the Southern District of California a few days before initiating the instant case.

Hundreds of employers have faced proposed class actions challenging their retirement plan fees over the past few years, with recently targeted employers including Tyson Foods Inc., Whole Foods Market Inc., AmerisourceBergen Corp., Cedars-Sinai Medical Center Inc., Pfizer Inc., and Jack Henry & Associates Inc.

Shook, Hardy & Bacon LLP represents Monster. Tower Legal Group, Muhic Law, and Wade Kilpela Slade LLP represent the participants.

The case is *Hollien v. Monster Beverage Corp.*, C.D. Cal., No. 8:24-cv-01467, 2/4/25.

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

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Shell Oil Retirement Plan Fee Class Action Advances Toward Trial

By Jacklyn Wille

- Judge certifies class, declines to resolve case without trial
- Earlier ruling rejected novel theory of liability under ERISA

Former employees accusing Shell Oil Co. of mismanaging their 401(k) plan by overpaying for administrative services and taking fees from plan assets are heading toward trial as a certified class.

Judge Jeffrey V. Brown of the US District Court for the Southern District of Texas on Monday adopted a pair of recommendations from a federal magistrate judge who said the case should be certified as a class action and that Shell should have to face trial on the remaining claims leveled against it. The class covers more than 10,000 participants in the oil and gas company's 401(k) plan since January 2014.

The lawsuit takes aim at the fees the Shell plan paid for recordkeeping and managed account services, along with various plan investment options and Shell's alleged practice of paying itself with plan assets. Brown previously dismissed claims against certain Fidelity entities that provided administrative services to the plan.

In that 2021 decision, Brown declined to endorse a novel legal theory under the Employee Retirement Income Security Act that would impose liability on parties that use 401(k) participants' confidential personal data to market them unrelated products and services.

In 2023, Magistrate Judge Andrew M. Edison recommended that the case go to trial, saying it turns on "hotly disputed" factual questions like whether the plan's recordkeeping fees were reasonable and whether Shell properly monitored the fees charged for managed account services. Edison also recommended that the workers' motion for partial summary judgment, which sought to establish liability on a single claim, be denied because it wouldn't simplify the trial or save time.

Schlichter Bogard LLP and Jones Granger represent the employees. Mayer Brown LLP represents Shell.

The case is *Harmon v. Shell Oil Co.*, 2025 BL 33863, S.D. Tex., No. 3:20-cv-00021, 2/3/25.

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

Critical Mass With Law.com's Amanda Bronstad: 700+ Residents Near Ohio Derailment File New Suit, Is the FAA to Blame for Last Month's Air Disasters?

[law.com/2025/02/05/critical-mass-with-lawcoms-amanda-bronstad-700-residents-near-ohio-derailment-file-new-suit-is-the-faa-to-blame-for-last-months-air-disasters](https://www.law.com/2025/02/05/critical-mass-with-lawcoms-amanda-bronstad-700-residents-near-ohio-derailment-file-new-suit-is-the-faa-to-blame-for-last-months-air-disasters)

Amanda Bronstad



Welcome to **Law.com Class Actions: Critical Mass**, a weekly briefing for class action and mass tort attorneys.

This week: A new lawsuit targets **Norfolk Southern** and several government entities over the 2023 train derailment in Ohio. Air crashes on Jan. 29 and Jan. 31 have put the limelight on the **Federal Aviation Administration**, with lawsuits possible. Find out who **Wyndham Hotels & Resorts** has retained in a raft of sexual trafficking lawsuits in New Jersey.

I'm Amanda Bronstad. Feel free to reach out to me with your input. My email is abronstad@alm.com. Follow me on LinkedIn or X: [@abronstadlaw](#).

Objectors Must Post \$850K Bond: 'A Guardrail, Not a Barrier'

Two years after a **Norfolk Southern** train derailed in East Palestine, Ohio, more than 700 residents in the area filed a new lawsuit.

Monday's lawsuit, in Ohio's **Franklin County Court of Common Pleas**, comes about four months after a federal judge in Ohio granted final approval to a \$600 million class action settlement with Norfolk over the derailment, caused by a defective wheel bearing, and subsequent controlled burn of five rail cars containing vinyl chloride, a toxic chemical. The suit names many of the same owners and operators of the train cars, plus government entities such as the Village of East Palestine and school districts in East Palestine and

Columbiana County. Lawyers who brought the suit also filed administrative claims under the **Federal Tort Claims Act** with the **U.S. Environmental Protection Agency** and the **Centers for Disease Control and Prevention**.

Plaintiffs' lawyer Kristina Baehr (**Just Well Law**), who filed the suit with **Bressman Law** and the **Keenan Law Firm**, told me: *"The local authorities were not part of the original class action, and the local authorities were absolutely part of the mayhem that resulted in the derailment."*

Many of the plaintiffs in the new suit opted out of the class action settlement, she said.

Meanwhile, several objectors plan to appeal the settlement's approval. On Jan. 16, however, **U.S. District Judge Benita Pearson**, ordered them to pay \$850,000 in appeal bonds. She wrote:

"An appeal bond, in this case, is a guardrail, not a barrier...Rather, the court finds an appeal bond in the amount requested an appropriate response to the costly circumstances the appeals trigger."



Robert A. Clifford of Clifford Law Firm. Courtesy photo

FAA Safety Suggestions: 'Something's Got to Be Done'

Two aircraft disasters on the East Coast have lawyers eyeing the **FAA**, which may have played roles in both: A Jan. 29 incident involving an **American Airlines** passenger jet and **U.S. Army** helicopter near Washington D.C., and a Jan. 31 crash of a medical Lear jet in Philadelphia.

In the first incident, an American Airlines regional jet made by **Bombardier** collided with a **Black Hawk** helicopter, killing all 67 on board both aircraft. President Donald Trump has blamed the crash on diversity and inclusion efforts involving air traffic controllers. The second incident, which killed six people on board the aircraft, owned and operated by **Jet Rescue Air Ambulance**, also killed one and injured 24 others on the ground in Philadelphia.

Bob Clifford (**Clifford Law Offices**) said some experts question the FAA's role in allowing foreign operators, such as the one in Philadelphia, that have poor compliance with U.S. safety standards. As to the Washington D.C. crash, Clifford called on the FAA to suspend all helicopters in **Ronald Reagan Washington International Airport's** air space. He said there was "plenty of blame to go around," but he anticipated lawsuits against American Airlines and administration claims to be filed against the FAA, which is in charge of air traffic control. Clifford noted that the FAA has reportedly failed to act on more than 1,000 safety recommendations, telling me:

"That does not surprise me at all, but the number is staggering. Something's got to be done about that. We need to send Elon Musk to find out how FAA was operating."

LaQuinta

Who Got the Work?

David Sager (**DLA Piper**) is representing **Wyndham Hotels & Resorts** in lawsuits in New Jersey's federal courts alleging human trafficking occurred at its motels. Wyndham, which is based in Parsippany-Troy Hills, faces at least 10 pending suits and settled another with similar claims on Jan. 2. On Jan. 30, **U.S. District Judge Susan Wigenton** refused to dismiss a case brought under the **Trafficking Victims Protection Reauthorization Act** by plaintiff M.J.J., who alleges she was forced to engage in commercial sex acts at franchise motels **Super 8** and **La Quinta** in San Bernardino, California.

Here's what else is happening:

Roundup Return: A special master in the multidistrict litigation alleging **Monsanto's Roundup** pesticide caused non-Hodgkin lymphoma has recommended that lead counsel receive none of the estimated \$24 million in common benefit funds, which should be returned to other lawyers who settled their cases. The recommendation, which **U.S. District Judge Vince Chhabria** approved on Jan. 15, drew objections from liaison counsel Lori Andrus (**Andrus Anderson**) and co-lead counsel Aimee Wagstaff (**Wagstaff Law Firm**), Robin Greenwald (**Weitz & Luxenberg**) and David Dickens (**The Miller Firm**), who called the decision "insulting."

Georgia Reforms: Two weeks after his State of the State address, **Georgia Gov. Brian Kemp** announced a tort reform package on Jan. 30. Some of the package's focus are on reducing attorney fees, introducing seat belt evidence in jury trials and forcing third-party litigation funding to be transparent. Plaintiffs' lawyers are skeptical about the tort reform's goal of reducing insurance rates.

Philly Verdicts: Philadelphia had more verdicts in 2024 worth eight figures or more than in any single year dating back to 2017. That's according to **Law.com's Aleeza Furman**, who calculated 12 verdicts of \$10 million or higher last year. Median damages in 2024 also jumped to \$192,664, compared to a range of \$92,000 to \$100,000 from 2021 to 2023.

Thanks for reading Critical Mass! I'll be back next week.

NCAA \$2.5B settlement biased against women, challengers say

[dailyjournal.com/articles/383434-ncaa-2-5b-settlement-biased-against-women-challengers-say](https://www.dailyjournal.com/articles/383434-ncaa-2-5b-settlement-biased-against-women-challengers-say)

Feb. 5, 2025

Arthur Bryant, a Title IX attorney, objects to a \$2.5B NCAA settlement, claiming it unfairly benefits male athletes, breaches federal laws, and lacks separate representation for conflicting interests



Arthur Bryant, a prominent Title IX attorney and partner at Clarkson Law Firm, said Tuesday that class counsel in a \$2.5 billion settlement in a consolidated antitrust action against the NCAA over its restrictions on players' ability to profit on their own name, image and likeness, violates the law by disproportionately awarding funds to men versus their female counter parts.

Bryant filed a joint objection along with a legal team from MoloLamken LLP on behalf of 10 female athletes in the Northern District of California on Jan. 31 seeking to halt final approval of the agreement four months after U.S. District Judge Claudia Wilken preliminarily approved the agreement on Oct. 7.

In a phone interview Tuesday, Bryant claimed that class counsel for the plaintiffs in the action violated Title IX, a federal law passed in 1972 that prevents sex discrimination by educational institutions that receive federal funding. He said the attorneys also breached federal rules of civil procedure. *In re: Collect Athlete NIL Litigation*, 4:20-cv-03919 (N.D. Cal. Filed June 15, 2020).

"The central problem in this proposed settlement is that the process was unfair as the Federal Rules of Civil Procedure and the Constitution say that class members with competing interests must have separate representation," Bryant said. "They have to have lawyers devoted to vindicating and protecting their rights, and not other class members' whose interests conflict with theirs."

Bryant added, "Class counsel actually included in the complaint an allegation that the NCAA treated the women worse than the men and discriminated against them by not promoting them anywhere near as much as the men. But they didn't pursue that claim and they agreed to win a settlement that gave women less than 10% of the \$2.5 billion. That's not adequate representation."

At the center of the three putative class actions in the consolidated action is the allegation that the NCAA and its five major conferences, violated antitrust law for decades by preventing student athletes from profiting from their name, image and likeness under the guise of protecting their amateur status while colleges across the country built a multibillion-dollar enterprise.

The lead counsel for the plaintiffs from Hagens Berman Sobol Shapiro LLP and Winston & Strawn LLP could not be reached for comment about the objections to the settlement filed in recent months. But they argued that the agreement was "revolutionary" for all parties in the motion for preliminary approval filed on July 26.

"Plaintiffs have secured a revolutionary settlement agreement with the NCAA and its five major conferences that will have a profoundly positive impact on the tens of thousands of college athletes at the hundreds of colleges and universities that play Division I sports each year," the motion stated.

The MoloLamken attorneys who filed the objections along with Bryant are: Steven F. Molo and Eric A. Posner of San Francisco; Alexandra C. Eynon and Pratik K. Raj Ghosh of New York.

In her Oct. 7 order, Wilken ruled that the settlement agreement was "fair, reasonable, and adequate" and addressed the settlement's compliance with the Federal Rules of Civil Procedure.

"This court preliminarily finds, for purposes of settlement only, that the Lawsuit meets all the prerequisites of Rule 23 of the Federal Rules of Civil Procedure," Wilken wrote. "Plaintiffs have presented sufficient information."

Bryant said Wilken's decision to grant preliminary approval was originally under the condition that Title IX claims would be brought separately, but the final settlement, he claims, immunizes some member institutions from Title IX claims.

"The settlement has changed dramatically since the judge preliminarily approved it," Bryant said. "When plaintiffs' counsel came forward with the amended settlement, they told the court that no Title IX claims were being released, but that wasn't true. The settlement actually released all of the Title IX claims, except the claim that the distribution of over 90% of the

\$2.5 billion to men violated Title IX. That claim, they said, would be released by the settlement, not just against the NCAA and the conferences which were defendants in litigation, but against all member institutions of the NCAA."

Bryant's clients, however, are not the only class members who challenged the settlement by the Jan. 31 deadline to object to or opt out of the agreement.

Among the challengers are Olivia Dunne, a Louisiana State University gymnast and the most followed player on the NCAA social media app currently; and Charles O'Bannon Jr., a former UCLA basketball player and one of the original plaintiffs to sue the NCAA for antitrust violations.

There are 67 former athletes, including NFL players, who opted out of the now challenged settlement and filed a new lawsuit on the same day. The lawsuit also challenged current restrictions on the amount of money athletes can earn. *Hill et al. v. National Collegiate Athletic Association*, 4:25-cv-01011 (N.D. Cal. filed Jan. 31, 2025).

#383434

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Litigation

Feb. 4, 2025, 3:23 PM PST

Girardi Trustee Sues Litigation Funder Over Alleged Fee Fraud

By [Randi Love](#)

- **DiNardo allegedly got co-counsel fees without client knowledge**
- **Bankruptcy can't be used to avoid claim, trustee says**

The bankruptcy trustee for Girardi Keese is suing Joseph DiNardo and his law firm over their attempt to discharge a \$7.5 million abetting fraud claim.

The lawsuit was lodged in DiNardo's own bankruptcy, which was filed in 2023 after two litigation lenders reportedly associated with him avoided a suit accusing them of helping convicted ex-lawyer Thomas Girardi engage in fraud. The fraud-aiding claim against DiNardo and his firm is debt that can't be discharged via bankruptcy, the trustee said in a Monday complaint in the US Bankruptcy Court for the Western District of New York.

Elissa D. Miller, the Chapter 7 trustee tasked with winding down the Girardi firm's estate, filed the suit as part of her effort to resolve a slew of litigation and claw back funds related to the onetime legal titan's theft of client money.

Miller opposed DiNardo's attempt to discharge her claim in his bankruptcy, which includes \$6.35 million in co-counsel fees that DiNardo and his firm allegedly received from a family's personal injury suit, the complaint said.

DiNardo and his firm "aided and abetted Girardi's criminal enterprise," she said in the complaint.

The Ruigomez family sued a California gas company following a 2010 explosion that led to a fire which burned 90% one family member's body. DiNardo and his firm were allegedly given half of what Girardi Keese received for representing them without their knowledge, the complaint said.

The DiNardo firm also didn't bill any hours, the trustee said.

Attorneys representing DiNardo and his firm didn't immediately respond to a request for comment.

DiNardo's help allegedly provided Girardi Keese "the ability to continue prosecute plaintiff actions which resulted in Girardi stealing settlement funds for his own benefit or to pay other clients whose funds Girardi had previously stolen and or used for improper purposes," the complaint said.

DiNardo in 2022 became entangled with Girardi Keese litigation stemming from families of people killed in a 2018 Lion Air plane crash. More than \$2 million in settlement funds were misappropriated by Girardi and his firm.

DiNardo was named an “investigative target” in the Lion Air litigation. His bankruptcy paused litigation against him in the case.

Girardi was convicted on four counts of wire fraud in August in the US District Court for the Central District of California. His estranged wife Erika Girardi last month convinced the California Court of Appeals, Second District that she was unaware of the theft.

Girardi Keese’s former chief financial officer Christopher Kamon agreed to plead guilty in October to helping Girardi embezzle fund from clients and the firm itself. Kamon is in plea negotiations in Illinois for other pending charges.

Jenkins, Mulligan & Gabriel LLP and Gleichenhaus, Marchese & Weishaar PC represent the trustee. Lippes Mathias LLP represents DiNardo and his firm.

The case is In re: Joseph DiNardo , Bankr. W.D.N.Y., No. 23-bk-10316, complaint 2/3/25 .

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Fox seeks deposition of litigation funder in Smartmatic defamation case

[dailyjournal.com/articles/383436-fox-seeks-deposition-of-litigation-funder-in-smartmatic-defamation-case](https://www.dailyjournal.com/articles/383436-fox-seeks-deposition-of-litigation-funder-in-smartmatic-defamation-case)

Civil Litigation

Feb. 5, 2025

LinkedIn's founder may be the first litigation funder to be deposed before a trial he has funded. Fox Corp. has filed a discovery petition seeking details on Hoffman's \$25 million funding of Smartmatic's \$2.7 billion defamation lawsuit against the broadcaster.



Photo: Shutterstock

LinkedIn founder Reid Hoffman may become the first litigation funder to sit for a deposition ahead of a potential trial that he has funded, after Fox Corp. lodged a discovery petition in their defense against voting technology company Smartmatic's defamation lawsuit.

Hoffman revealed last July that he funded Smartmatic's defamation case against Fox to the tune of \$25 million. Smartmatic seeks damages of \$2.7 billion in a case that claims Fox spread a conspiracy theory that the company rigged the 2020 U.S. presidential election.

Fox's petition claims that the "source, amount, and terms" of any litigation-funding agreement may be needed in discovery to support the broadcaster's anti-SLAPP counterclaim.

Douglas Mirell, well known for his representation of wrestler Hulk Hogan in a privacy lawsuit against the Gawker media site that was in part funded by tech billionaire Peter Thiel, said it was unusual for a litigation funder to even be identified, let alone become a third-party witness.

Mirell, a partner at Nolan Heimann LLP in Encino, suggested another reason for the petition could be to create a "chilling effect" on the broader action of litigation funding.

"It's quite unusual for a litigation funder to even be identified, much less become a third-party witness to a lawsuit," said Mirell. "I'm not familiar with any instance in which a third-party funder has sat or been required to sit for a deposition."

Smartmatic filed its defamation claims against Fox and two of President Donald Trump's former attorneys in February 2021 in the New York County Supreme Court, where the appellate division on Jan. 9 rejected Fox's motion to dismiss. *Smartmatic USA Corp. V. Fox Corp.*, 151136/21 (N.Y.C. Supreme Ct., Appeal No. 3439 Case No. 2024-01388).

The petition for Hoffman's deposition filed on Jan. 29 in Santa Clara County - where LinkedIn is headquartered - seeks to compel him to provide discovery information about his funding of the case, Smartmatic's financial position and the strength of the company's claims against Fox. *Fox Corporation et al. v Reid Hoffman*, 25CV457677 (S.C. Super. Ct., filed Jan. 29, 2025).

"Frankly, I'm somewhat baffled why such a deposition would be necessary in this or any case," Mirell commented.

"It is possible that Fox is doing this to discourage Hoffman from providing further financial support for this litigation. If this deposition is allowed to proceed, it could well have a chilling effect upon individuals who would seek to fund all sorts of litigation in the future.

"The primary rationale that Fox has proffered for this deposition - that Hoffman should produce 'information relating to Smartmatic's financial condition' - doesn't appear particularly persuasive since that is information that Fox can seek directly from Smartmatic."

Fox takes issue with comments made to the Washington Post by Hoffman's adviser, Dmitri Mehlhorn, that "if not for the slander and smears," Smartmatic "could be a \$400 million company." Fox claims he said this on behalf of Hoffman. This, Fox claims, is a "far cry" from Smartmatic's claimed damages of \$2.7 billion, which the media company has labelled "pure fantasy."

Litigation funding expert and attorney Carol Langford of San Francisco said it was a "thorny" issue because of Mehlhorn's comments about the potential valuation of Smartmatic.

"But Hoffman is not Mehlhorn," Langford said in an email. "Hoffman can invest in anything he wants, for any reason he wants as long as he isn't, for example, acting criminally.

"The court needs to provide definitive and final guidance on the issue before Hoffman should produce (any discovery). Both are making arguments, and they are broad; Fox wants all information and Hoffman will produce none. They did try to resolve it. Now, it is up to the court.

"Either way the court goes, it will be appealed," she predicted. "This means that the judge will really think about his order. This is good. Now, whether it creates bad or good law is another question. But questions like these need to be answered by courts who are not afraid to touch this electric third rail."

Attorneys for Fox, Brad Masters and Leah Hamlin of Kirkland & Ellis LLP, were contacted for comment but did not respond. Hoffman was also contacted for comment but did not respond.

#383436

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PayPal Faces New Round of Claims; This Time Alleging Its 'Honey' Browser Extension Cheated Consumers



law.com/therecorder/2025/02/05/paypal-faces-new-claims-that-its-honey-browser-extension-cheated-consumers

Kat Black

What You Need to Know

- PayPal is facing multiple class actions from online influencers for allegedly pocketing their marketing commissions via its browser extension, Honey.
- Honey purports to scour the internet for the "best" discounts and automatically apply coupons to products on e-commerce websites.
- Now, PayPal is facing two new complaints alleging it deceived consumers about offering them the most cost-effective deals.

As PayPal continues to field a barrage of class actions from content creators who contend their marketing commissions were stolen by its browser extension, Honey, it also faces new complaints from Honey customers alleging that the platform deceived them about its claim to find the best available discounts on online products.

On Jan. 29, the Law Offices of David J. Gallo submitted a pending consumer class action against both PayPal and its subsidiary, Honey Science LLC, in the Superior Court of California, County of Santa Clara. The as yet unprocessed complaint, which alleges breach of implied contract and violation of California's Unfair Competition Law, was filed on behalf of United Kingdom residents who used the Honey browser extension after Jan. 1, 2020.

PayPal, a global online payment processing company based in San Jose, California, acquired Honey—formerly known as Honey Science Corp.—in a deal valued at \$4 billion in 2020. Honey, per the document, purports to search for and apply the "best" coupon codes available for products on the more than 30,000 e-commerce websites it partners with at online checkout.

Instead, the pending suit asserts, Honey has used superlatives such as "best discount codes" and "the biggest savings" on its website—and PayPal, since acquiring the company, has adopted those same buzzwords—to create the false impression that Honey scours the internet for the most cost-effective deals. despite language in its agreements with vendor partners that appears to suggest otherwise.

"[Honey and PayPal] encouraged people to download a browser extension and to use it, and they promised that they would find the lowest publicly available prices for every item," explained David J. Gallo, who is representing the plaintiffs, in an interview.

"And they even sent people an email that says that if there's a better price, we'll find it, when they signed up for the service. And they apparently have agreements with some of the vendors that they won't show the best publicly available coupon. So if that is accurate—and we believe it is—then the consumers who used it didn't get what they were promised."

The complaint contends that Honey's FAQ page for vendors "appears to state that the 'Partner' vendors input codes to the Honey business which need not be the lowest prices available," assuring them that they retain total control over what discount codes to add to or remove from the Honey platform.

Gallo said that consumers were only alerted to the problem after a YouTube exposé titled "The Honey Influencer Scam" was posted by New Zealand content creator MegaLag on Dec. 21, 2024. The viral video accused Honey of exploiting a step called "last click attribution," which credits influencers with promoting products and driving traffic to e-commerce websites, by inserting its own pop-ups at online checkout, effectively replacing the influencers' own affiliate links and siphoning their sales commissions to PayPal.

Since then, online content creators have filed a torrent of class actions against PayPal, 15 of which were ordered to be consolidated in the U.S. District Court for the Northern District of California, San Jose, by Judge Beth Labson Freeman on Jan. 29.

Gallo said that he is not sure whether consumer lawsuits against PayPal will follow the same trajectory.

"The hurdles that a plaintiff has to get over in a case on behalf of consumers are more difficult than the hurdles that a businessperson has to overcome," he said. "So I don't know whether there will be others. ... I think it's important that someone try to help the consumers because businesspeople can take care of themselves, but there ought to be remedies for consumers in cases like this."

On Jan. 30, Aylstock, Witkin, Kreis & Overholtz filed a similar class action on behalf of consumers against PayPal and Honey in the U.S. District Court for the Northern District of Florida. The firm claimed that Honey "prioritized codes from partner merchants over better deals existing in the market" and misled customers about the allegedly "abusive practices" it committed against influencers. The plaintiffs alleged unjust enrichment, fraudulent concealment, fraudulent misrepresentation and violation of Florida's Deceptive and Unfair Trade Practices Act.

Bryan Aylstock, the firm's founder, said in an interview that he believes more consumer class actions will be filed against PayPal in the future. "There's a potential arbitration issue on the consumer side, but the arbitration agreement itself is patently unconscionable," he said. "And we don't think it'll be enforced by the courts of law. If, in fact, it is, we're happy to go to

arbitration and prove our case there. But that's not where this case belongs. It belongs in the courts and where juries can determine the scope and measure of damages for what PayPal has done to the consumer."

The Honey scandal has propelled a similar wave of litigation against other Big Tech and fintech leaders like Microsoft and Capital One Financial Corp., which are both facing a mounting slate of class actions by influencers alleging marketing commission theft via their shopping browser extensions.

Aylstock added that as the technology evolves, it's important for lawyers to continue holding Big Tech accountable for the "sleight-of-hand" actions that may initially escape consumers' notice.

"When they have that much power, they need to act responsibly. ... They need to treat everybody fairly and not use their market power to defraud the consumer, to cheat the influencer or extort the retailer," he said.

PayPal did not immediately respond to a request for comment.

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Video Game Site Sent Millions of Users' Data to Meta, Suit Says

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Cassandra Coyer

Litigation

Hands typing on a computer keyboard in an arranged photograph in London, U.K., on Wednesday, Dec. 23, 2015.

Photographer: Chris Ratcliffe/Bloomberg

Feb. 5, 2025, 7:00 AM PST

Cassandra Coyer



- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:25-cv-01011 (Bloomberg Law subscription)

A UK-based video game retailer shared millions of users' personal information and video watch history with Meta Platforms Inc.'s Facebook without their consent, a complaint said.

Focus Multimedia Ltd., which runs websites including video game retailer fanatical.com, deployed tracking technologies to collect and send customers' personally identifiable information and viewing habits to third parties without their knowledge, according to a proposed class action filed Tuesday in the US District Court for the Southern District of New York.

Named plaintiff Rudolph Marquis III, a New York resident and Focus Multimedia customer, accused the retailer of violating the Video Privacy Protection Act, which forbids video tape service providers to share customers' personally identifiable information with third parties.

Focus Multimedia didn't immediately respond to a request for comment.

Gucovschi Rozenshteyn PLLC represents Marquis and the proposed class.

The case is Marquis v. Focus Multimedia Ltd , S.D.N.Y., No. 1:25-cv-01011, complaint filed 2/4/25 .

To contact the reporter on this story: Cassandra Coyer in Washington at ccoyer@bloombergindustry.com

Meet The Attys Taking On Merck In The Gardasil Trial

By **Gianna Ferrarin**

Law360 (February 4, 2025, 10:32 PM EST) -- An attorney at a personal injury firm with ties to Robert F. Kennedy Jr., President Donald Trump's pick for the nation's top healthcare position, is on the plaintiff team leading the first jury trial against Merck & Co. over claims the company wrongfully marketed its HPV vaccine Gardasil.

This week, an attorney from Wisner Baum appeared before Los Angeles County Superior Judge Elaine Lu for the third week of jury trial proceedings over a woman's **claims** that Merck concealed information about the safety and risks of taking Gardasil.

The Los Angeles-based firm is joined by lawyers from the Lanier Law Firm and jury selection pros Lisa Blue and Robert Hirschhorn in representing the plaintiff in trial proceedings, according to **court records**.

Wisner Baum has been a focal point in confirmation hearings over Trump's nomination of Kennedy to lead the U.S. Department of Health and Human Services, with senators **digging into** whether the nominee has a continued interest in the firm's litigation against Merck. According to **financial disclosures** from Kennedy, the firm has paid him \$856,559 over the past two years in referral fees.

Though Kennedy initially indicated he would keep an interest in contingency fee cases he referred to Wisner Baum, he later reversed this position, **announcing Friday** he would hand his financial stake in any of the firm's Gardasil-related cases against Merck to an adult son.

According to Wisner Baum, the firm has not compensated Kennedy for any vaccine cases. Kennedy, likewise, told senators last week he has not received compensation from the firm over the Gardasil litigation.

In addition to the Los Angeles jury trial, Wisner Baum is also representing plaintiffs in federal **multidistrict litigation** as well as several separate California state court suits over Gardasil. According to the firm's website, there are 218 cases pending in the Gardasil MDL, which is centered in North Carolina.

The current trial against Merck, which began earlier this month, is set to run for the next six weeks.

Here, Law360 takes a look at the attorneys challenging Merck in the Gardasil trial.



Bijan Esfandiari

Wisner Baum

Bijan Esfandiari is a senior partner at Wisner Baum whose practice covers pharmaceutical product liability litigation. Esfandiari is co-lead counsel in the Gardasil MDL against Merck centered in North Carolina.

In recent years, Esfandiari has appeared before trial and appellate courts in injury cases over medical products and devices, including GlaxoSmithKline's antidepressant **Paxil**, a shock therapy device made by Somatics LLC and the antacid drug **Zantac** manufactured by numerous pharmaceutical companies.

Esfandiari notched a win in the case against Somatics last year when the California Supreme Court **ruled** that causation in failure to warn cases can be established if a plaintiff shows a prudent patient would have declined treatment upon hearing a warning.

Esfandiari has also secured key victories on the issue of federal preemption in product liability cases, including when a **precedential Maryland appeals court decision** allowed an injury suit over a Medtronic Inc. bone graft device to proceed.

Esfandiari earned his law degree from the UCLA School of Law in 2002.

 portrait of a smiling white man wearing a suit and tie

W. Mark Lanier

Lanier Law Firm

Founder of the Lanier Law Firm, Mark Lanier has a track record of big ticket wins in personal injury and product liability cases against pharmaceutical giants and other major corporations.

Lanier won the **first jury trial win** against Merck over its painkiller Vioxx, securing a \$253 million verdict in 2005 for the widow of a Texas man who died of a heart attack after using the drug for several months. That award was reduced to \$26.1 million due to Texas damage caps, according to the firm's website.

Lanier went on to play a role in the litigation that led to a **\$4.85 billion settlement** with Merck in 2007 to resolve thousands of cases over Vioxx.

Other notable wins by Lanier include a nearly **\$4.7 billion verdict** against Johnson & Johnson after a jury found in 2018 that J&J's talcum powder contained asbestos and gave cancer to 22 women. A Missouri appellate court later **reduced that verdict** to \$2.1 billion.

Lanier earned his law degree from the Texas Tech University School of Law in 1984. He is the **founder** of the Christian Trial Lawyers Association, a nonprofit that seeks to "create a network of principled attorneys to minister to others through civic-minded endeavors," according to the law firm's website.



Rachel Lanier

Lanier Law Firm

Rachel Lanier is the managing attorney of Lanier Law Firm's Los Angeles office. She currently is co-lead counsel in the Gardasil MDL along with Esfandiari and an attorney from Morgan & Morgan PA.

She has frequently collaborated with her father, Mark Lanier, on personal injury and product liability cases, serving on the plaintiff-side team in the landmark J&J talcum powder case.

She also worked alongside her father in opioids litigation against CVS, Walgreens and Walmart, securing a milestone **\$650 million trial judgment** against the companies after a jury ruled they were liable for contributing to the opioid crisis in two Ohio counties.

That win, however, is set to be reevaluated by the district court thanks to a Sixth Circuit **decision** last week finding the judgment conflicted with Ohio's product liability law.

Lanier earned her law degree from St. John's University School of Law in 2015.



Sarah Lanier

Lanier Law Firm

Sarah Lanier is an associate at Lanier Law Firm's office in Houston, Texas. She joined the firm last year after earning her law degree from the University of Texas School of Law in May, according to her LinkedIn profile.

"I am also excited to announce that I'll be joining The Lanier Law Firm this fall, where I will be able to learn from and work alongside many esteemed lawyers, including my dad and sister," she said in a LinkedIn post last year.

Sarah Lanier's practice areas include personal injury, toxic torts, mass torts, product liability and pharmaceutical liability, according to the firm's website.



Natalie Armour

Lanier Law Firm

Natalie Armour is a senior attorney at Lanier Law Firm who handles complex briefing in trial and appellate matters, according to the firm's website. Her practice spans mass tort, pharmaceutical and medical device litigation, product liability, and personal injury matters.

Armour was part of the team that jointly briefed the Missouri Court of Appeals for the Eastern District after J&J **challenged the verdict** in favor of 22 women who said its talcum powder gave them cancer, according to the firm. The U.S. Supreme Court in 2021 **refused to disturb** the \$2.1 billion verdict against J&J.

Armour has also briefed appellate matters before the Texas Supreme Court, Texas Court of Appeals, Fifth Circuit, Eighth Circuit and the Missouri Supreme Court, according to the firm's website.

Armour earned her law degree from the Texas Tech University School of Law in 2009.



Sara Abston

Lanier Law Firm

Sara Abston is an associate attorney in Lanier Law Firm's office in Houston. She joined the firm after receiving her law degree from the University of Houston Law Center in 2022.

Abston is also a member of the firm's trial team, with a focus on mass tort cases and multidistrict litigation, according to the firm's website.

"Currently, Sara assists in advocating on behalf of our nation's honorable veterans in their combat arms earplugs suits against 3M Company. She is also currently involved in representing victims suffering injuries by various pharmaceutical drugs and devices, specifically pre-mature infants, and women," the firm's website says.



Lisa Blue

Baron and Blue

Leader of the Dallas, Texas firm Baron & Blue PLLC, Lisa Blue's practice spans personal injury cases, business litigation, mesothelioma litigation and worksite accidents at oil and gas facilities, according to the firm's website.

Notable victories throughout her legal career include a \$55 million verdict for a worker diagnosed with mesothelioma after exposure to asbestos, which she won while at her late husband's firm Baron & Budd PC. According to the firm and Blue, it is the largest mesothelioma verdict in the state of Texas to date.

Blue also worked with Mark Lanier on the jury trial that led to the \$253 million verdict against Merck over the painkiller Vioxx.

In addition to her legal practice, Blue consults privately as a forensic psychologist and has co-authored books and articles on jury selection, according to her firm's website.

Blue received her law degree from the South Texas College of Law in 1980.



Robert Hirschhorn

Cathy E. Bennett & Associates

Robert Hirschhorn is an attorney and the lead consultant at Cathy Bennett & Associates, a firm that consults on jury selection and trial litigation. He has been with the firm since 1985.

Throughout his career, Hirschhorn has worked on high profile matters including the Oklahoma City bombing and the George Zimmerman murder cases.

Notable verdicts from cases he worked on in recent years include a \$60 million award to a mother who sued Mead Johnson over its **baby formula** after her infant died and a \$2.25 billion verdict against Monsanto over its weedkiller Roundup that **was later slashed** to \$404 million, according to the firm's website.

Hirschhorn also co-authored a book with Blue on jury selection published in 2021. He received his law degree from St. Mary's University School of Law in 1981.

Litigation

Feb. 5, 2025, 3:00AM PST

Farmers Ruined by PFAS Face Key Moment in Fight Against Pentagon

By Pat Rizzuto

Deep Dive

Neither Art nor Renee Schaap could bear to stay on their dairy farm in Curry County, New Mexico, in April 2022 as employees put down the last of their cattle, shooting 1,000 in the head one by one with .22 caliber bullets.

Workers dumped the carcasses into a 20-foot-deep trench the length of a football field, creating two layers of rotting corpses that emanated a “smell of death,” Renee said. The soil is riddled with the toxins that killed them.

The herd – once numbering 3,600 – had slowly been dying for years after drinking water contaminated by per- or polyfluoroalkyl substances, known as PFAS, from neighboring Cannon Air Force Base.

The animals became worthless in 2018 when tests found levels of the so-called forever chemicals in the farm’s wells that were up to 23 times higher than the federal drinking water health advisory at the time. Over a two-year period, the Schaaps dumped up to 18,000 gallons of milk a day that couldn’t be sold.

Farmers in the area tried to work with the Air Force to clean up the pollutants but were stunned in 2019 when the base sued New Mexico, saying officials didn’t have the authority to order a cleanup – a legal fight that continues. Meanwhile, a separate battle over Cannon’s culpability has become a bellwether case in national litigation over whether the federal government is liable for the contamination.

A critical hearing is set for Feb. 7 before the US District Court of South Carolina, which is managing thousands of lawsuits claiming property, personal injury and other damage from the foam known as AFFF. The US government has made three related requests to dismiss all claims.

At least 27 businesses, cities, counties, individuals and states have filed claims against the Air Force, Army or Navy under a law called the Federal Tort Claims Act, which describes when the government can be sued.

Additional claims have been filed under the Comprehensive Environmental Response, Compensation and Liability Act, the law popularly known as Superfund, which can force a federal agency to pay back costs expended for cleaning up hazardous substances from highly polluted sites – in this case either of two specific PFAS the military released. More than 580 active military installations need closer investigations as possible Superfund sites, the Pentagon found last year.

If District Judge Richard M. Gergel sides with the government, the Pentagon is off the hook. If he doesn’t accept all of the government’s arguments, litigation for some or all claims would continue.

The stakes in Curry County are high for farmers whose livelihoods are at risk. A few miles past the Schaaps' Highland Dairy sits Southwest Cheese LLC where more than 5 billion pounds of milk is processed into cheese annually and shipped all over the globe. Its presence underscores agriculture's dominant role in the area – and the potential impact on farmers and the regional economy if the water contamination isn't stopped.

The plant has been testing all incoming water for PFAS since 2019, and so far, none has been detected. But locals are concerned about the contamination spreading. Even the region's sole drinking water source – the Ogallala Aquifer – is at risk.

Meanwhile, Cannon is still contributing to the problem. Last month, New Mexico's Environment Department ordered Cannon to immediately address and pay a fine for releasing 7,300 gallons of the firefighting foam last year.



Southwest Cheese LLC turns more than 5 billion pounds of milk from New Mexico and Texas into cheese each year. Photographer: Pat Rizzuto/Bloomberg

Kevin Ferrara, a retired Air Force firefighter who served at Cannon from 1991 to 1995, says every 24-hour shift started with discharging foam across the airfield, the training areas and runways. It would ultimately get washed into a stormwater drain or the soil.

"We were told it was like soap and water," Ferrara said. "I thought it was fine until after I got out and started doing my own research."

What he's since learned, in part from past studies the Department of Defense conducted, frustrates Ferrara, an emergency service consultant who now advocates for firefighter's health and safety. "They've had decades to do the right thing," he said.

Studies have uncovered some clear warnings about AFFF, though there's also some uncertainty about other risks. In April 1978, for example, the Naval Facilities Engineering Command highlighted environmental toxicities from AFFF. The memo recommended that the Navy develop toxicity guidelines and effective treatment for the waste as well as research safer forms of fire suppressants made with other chemicals.

The Air Force has made efforts to mitigate PFAS contamination. As of last August, all AFFF was removed from vehicles at the 3,789-acre base and nearby 70,000-acre Melrose, a spokesperson said. PFAS-containing products and residuals have been collected and stored in a controlled holding area while awaiting approved disposal, it said.

Cannon has also provided water filters for three properties where PFAS contamination exceeded the advisory level set in 2016 by the Environmental Protection Agency, a base official said. The EPA doesn't regulate well water, but last year it limited the amount of two PFAS in public drinking water systems: perfluorooctanoic acid and perfluorooctane sulfonate.

The base is also building a \$73 million groundwater treatment plant that is scheduled to start operating in March. The startup has been delayed because some of the electrical components needed have been on order for more than a year, said Christopher Gierke, who oversees environmental restoration efforts at Cannon. The system will eventually be able to treat 86,000 gallons a day, he said.

But there are obstacles. Among them are the lack of approved technologies to destroy PFAS, said Brian Howard, a senior technical advisor for the Deputy Assistant Secretary of the Air Force for Environment, Safety and Infrastructure. Congress has barred the Defense Department from incinerating PFAS-containing waste until it can meet criteria that shows complete destruction, which is still in development.

Another challenge has been the EPA's steady revision of criteria used to determine how contaminated sites are. So-called screening levels are used by federal agencies, states and companies to examine sites and determine whether chemical concentrations are high enough to cause problems.

Each change meant the Air Force's contractors had to reexamine bases to determine if the newly added forms of PFAS were present and if the older ones exceeded the revised, lower standard. In 2016, the EPA had set levels for three types of PFAS. Now there are more than a dozen.



Christopher Gierke, remedial project manager for the Cannon restoration effort [left] and Deniz Brus, with Brice Environmental Services Corp. [right], a contractor working on Cannon's first pilot PFAS treatment plant bordering Art Schaap's dairy. Photographer: Pat Rizzuto/Bloomberg

Dairy farms at risk of contamination have begun filtering water on their own as they try to keep their businesses going, but it's expensive and time-consuming, eating into revenue and profits.

And farmers growing crops, along with ones that lease land for cattle to graze, are worried about the impact the toxins will have on their property values, according to Republican state Senator Pat Woods, a rancher whose great- great-grandfather came to New Mexico as a homesteader. "There's a lot of resentment. You work your whole life to pay for your place," Woods said. And now "land value is pretty shaky."

But whether local businesses can claw back the cash spent trying to mitigate the problems themselves remains to be seen.

If the court decides the government can be sued under the Federal Tort Claims Act for alleged harms done as it used and released AFFF, that would open the door to faster cleanups and damage compensation, said Ken Sansone, a senior partner with SL Environmental Law Group PC.

But one of the government's key arguments to dismiss the Schaap's and related lawsuits is that agencies' use of AFFF qualifies for what's called the discretionary function exception under that law. There were no policies or regulations applied to AFFF for most of the decades it was used, so the government maintains that it's not liable for its discretionary use of the firefighting foam.

The discretionary function exception "is the biggest hurdle to recovery of tort claims," said John McGahren, deputy chair of Morgan, Lewis & Bockius LLP's global environmental practice, which isn't involved in the multidistrict litigation.

A second key argument the government makes is that the strategy, time and approach it uses to clean up contaminated sites can't be challenged under CERCLA.

Yet barring states from challenging the length, scope or other aspects of federal Superfund PFAS investigations and cleanups would be "like letting the fox guard the henhouse," said James Kenney, secretary of the New Mexico Environment Department.

"If you're allowing the polluter to determine how the cleanup and the notification is done, you're bound to run into some problems," said Zachary Ogaz, general counsel for the department. "It is essential that the state has the authority to regulate these types of releases and these types of facilities, because we can't expect them to hold themselves accountable."

Some residents and businesses chose not to wait for a verdict to take action. Vance Dewbre, who has a five-acre property near the Schaaps, says he installed a filter for his home at a cost of about \$2,000, not counting the annual filter replacements that cost \$400.

"You fill up your faucet and wonder if it's safe to drink," he said. "That's something that 99.9% of people don't have to think about. They know it's safe. Not us."

But not everyone can afford that, so the New Mexico Environment Department has asked the legislature for \$4 million to provide public water to Curry County residents.



Art Schaap stands in the deserted lane where his cows used to be fed until they were slaughtered.

Photographer: Pat Rizzuto/Bloomberg

For now, the trench on the Schaap's land is filled with contaminated cow carcasses. They've only avoided bankruptcy because they own two smaller dairies away from Cannon's pollution. "We just want to move on and have a normal life again," Art Schaap said.

It weighs on Ferrara's mind. The former Air Force firefighter remembers the Schaap's farm being just on the other side of the fence surrounding Cannon's perimeter. "And it's not just what happened at Cannon. It's around the country," he said.

"The chain link fence didn't hold things back. It got off the base and that affects innocent people. The military has a responsibility to act in a way that holds itself accountable for that."

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Daily Journal

DJ [dailyjournal.com/articles/383275](https://www.dailyjournal.com/articles/383275)



Steve W. Berman
Hagens Berman Sobol Shapiro

Seattle • Class Actions, Antitrust & Complex Commercial Litigation

Steve W. Berman is a co-founder and the managing partner of the plaintiff-side class action firm Hagens Berman Sobol Shapiro. Working from his Seattle headquarters, he oversees offices in Berkeley, Boston, Chicago, London, Los Angeles, New York, Paris, Phoenix and San Diego.

He launched the firm in 1993. "We were eight lawyers then," he said. "We did primarily security class actions." In 1998 came the massive medical cost recovery actions against Big Tobacco, where Berman, serving as a special attorney general, represented 13 states and the firm itself brought suits on behalf of Washington State and Minnesota.

Berman devised the tactic of inducing the Liggett company, the maker of Chesterfield cigarettes, to act as a whistleblower defendant and admit that smoking causes cancer and heart disease. The resulting \$260 billion national settlement was the largest in history.

"The tobacco litigation put me on the national stage," Berman said. Hagens Berman now has 90 lawyers.

Big outcomes kept coming. Most recently, in October 2024, a federal judge in Oakland granted preliminary approval of a \$2.78 billion settlement on behalf of thousands of current and former student athletes at Division I schools who sued the National Collegiate Athletics Association. Their class action antitrust suit was designed to compensate the athletes for the

use of their name, image and likeness in what has become the multibillion-dollar college sports industry. *In re: College Athlete NIL Litigation*, 4:20-cv-03919 (N.D. Cal., filed June 15, 2020).

"The strategy in that case began 20 years ago when I filed the first case that sought to abolish limits on football scholarships," Berman said. Other suits followed against the National Collegiate Athletic Association over concussions and video game name and likeness.

When Berman and co-counsel won the Alston antitrust class action over NCAA scholarships, "the NCAA made a huge mistake and took Alston to the Supreme Court and we got a 9-0 decision in our favor." A lower court approved a \$209 million settlement for current and former NCAA athletes. *In re: National Collegiate Athletic Association Athletic Grant-In-Aid Cap Antitrust Litigation*, 4:14-md-02541 (N.D. Cal., filed July 14, 2014).

Also, in 2024, Berman achieved a \$418 million settlement on behalf of home sellers who sued real estate brokers over an anticompetitive commission conspiracy. *Gibson et al. v. National Association of Realtors et al.*, 1:19-cv-01610 (W.D. Mo., filed March 6, 2019).

"We saved people tens of billions of dollars in fees to Realtors and made a monumental change in the industry because they had rules that restricted competition," Berman said.

Currently in progress is a class action challenging Amazon.com Inc.'s alleged anticompetitive practices. A federal judge in November 2024 denied Amazon's motion to dismiss. *De Coster et al. v. Amazon.com Inc.*, 2:21-cv-00693 (W.D. Wash., filed May 26, 2021).

"People ask me, 'Are you done?'" Berman said. "Nope. I love what I do. I'm having too much fun."

#383275

Daily Journal

DJ [dailyjournal.com/articles/383295](https://www.dailyjournal.com/articles/383295)



Elizabeth J. Cabraser
Lieff Cabraser Heimann
& Bernstein

San Francisco • Complex Civil Litigation

At Lieff Cabraser Heimann & Bernstein, name partner Elizabeth J. Cabraser's expertise in complex civil litigation has led her to serve as plaintiffs' court-appointed lead, co-lead or class counsel in scores of federal multi-district and state coordinated proceedings.

The litigation is complex, but behind her work for plaintiffs is a simple quote that heads her website bio: "Justice is a bone-deep urge towards fairness in things large and small. It's the human journey toward a better world."

The firm's recent targets: an automaker accused of emissions fraud, an AI company accused of copyright violations, a giant rocket launch company accused of retaliatory firings, a data broker accused of consumer privacy violations, a railway accused of toxic chemical releases. And there are ongoing cases over opioids and climate change.

"There's frustrating, aggravating conduct we go up against," said Cabraser, who joined the firm in 1981. "It's still outrageous, and it still bothers me."

Cabraser and colleagues won a 2024 Daily Journal CLAY Award for obtaining \$2 billion in settlements from vaping companies over claims they addicted youth to nicotine. *In re: Juul Labs Inc. Marketing, Sales Practices and Products Liability Litigation*, 3:19-md-02913 (N.D. Cal., filed Oct. 2, 2019).

She said much of her time recently has been spent on the ongoing opioid litigation. Representing third-party payors such as labor union health and welfare funds, she negotiated a \$300 million class settlement with three distributors. In re National Prescription Opiate Litigation, 1:17-MD-2804 (N.D. Ohio, filed Nov. 4, 2022).

"We believe that has catalyzed the interest of some other defendants in reaching settlements," Cabraser said.

Lieff Cabraser's new emissions fraud case alleges that a major manufacturer has been misrepresenting the true emissions levels in the engines of its forklifts and construction machinery. *Broadmoor Lumber & Plywood Co. et al. v. Toyota Industries Corp. et al.*, 3:24-cv-06640 (N.D. Cal., filed Sept. 22, 2024).

Earlier in 2024, the firm settled for \$237.5 million in cash for class members a case over claims of emissions and fuel economy manipulation of the defendant's trucks. The deal included an extended warranty component valued at an additional \$208 million. *Express Freight International v. Hino Motors Ltd.*, 1:22-cv-22483 (S.D. Fla., filed Aug. 5, 2020).

Those cases are the latest in a long line of auto defects litigation that Cabraser and her firm have conducted. "Our auto claims group has developed expertise in researching these automakers," she said. "Cars have to be safely and durably designed."

Lieff Cabraser and co-counsel represent writers and the Authors Guild in a class action against AI companies for the alleged theft of copyright-protected materials. "This is a growth area of litigation," Cabraser said. In March, the federal courts' multidistrict litigation panel will consider whether to centralize them. "There is a whole constellation of cases over IP theft and privacy here," Cabraser added. "These are very important questions."

#383295

Daily Journal

DJ [dailyjournal.com/articles/383334](https://www.dailyjournal.com/articles/383334)



San Francisco • Securities, Fraud & Consumer Litigation

In the decades since he got his bar card in 1975, Richard M. Heimann has helped lead the firm he co-founded, Lieff Cabraser Heimann & Bernstein, as a prominent trial attorney and a skilled negotiator with deep experience in cases involving complex securities and investor fraud, antitrust and intellectual property, consumer protection, personal injury and mass torts.

He joined Robert L. Lieff and Elizabeth J. Cabraser in the mid-1980s to launch their plaintiff-side litigation firm; William Bernstein came on a few years later.

"It's been both fun and rewarding, economically and otherwise, and it's gotten even better as the years go by," Heimann said. "

He led Lieff Cabraser's work in the massive Wells Fargo shareholder derivative litigation and was appointed co-lead plaintiffs' counsel in the case. In April 2020, the court granted final approval to a settlement including a \$240 million cash payment -- the largest insurer-funded derivative settlement in history -- plus corporate governance reforms. In re: Wells Fargo & Company Shareholder Derivative Litigation, 16-cv-05541 (N.D. Cal., filed Sept. 29, 2016).

Currently, he's representing a workers' retirement system in a shareholder derivative action against Elon Musk and several directors of Tesla, Inc. The plaintiffs allege breaches of fiduciary duty, including Musk's stock sales in connection with his 2022 purchase of Twitter

Inc. Employees' Retirement System of Rhode Island v. Elon Musk et al., 2024-0631 (Del. Chancery Ct., filed June 10, 2024).

"This is a very large case," Heimann said. "We allege that Musk manipulated the price of Tesla to sell at a very high price while pushing Twitter's price downward. The transaction came at the expense of Tesla to the tune of hundreds of millions of dollars."

In an ongoing securities class action alleging fraud by officers and directors of Akron, Ohio-based electric utility FirstEnergy Corp., the claims emerged from a \$60 million bribery scheme by company officers to pay public officials in exchange for \$1.3 billion worth of benefits to the corporation. Its stock plunged within hours of arrests being made. Owens v. FirstEnergy Corp. et al., 2:20-cv-03785 (S.D. Ohio, filed Dec. 17, 2021).

Before filing Lieff Cabraser's civil action, Heimann followed the criminal case against former Ohio House Speaker Larry Householder, who was convicted of racketeering conspiracy to receive the bribes.

"I was in court when the judge directed the bailiffs to cuff him and take him off to jail immediately after the verdict," Heimann said. "That was very unusual. When we get this case to trial, we'll have two key witnesses testifying for us."

#383334

Litigation

Feb. 5, 2025, 3:00AM PST

Plaintiffs Firm DiCello Levitt Opens in Las Vegas With AllianceBy [Justin Henry](#)

DiCello Levitt, a New York plaintiffs firm, is making a play in Las Vegas through an alliance with O'Reilly Law Group.

"If you were going to make a list of the most dynamic markets in the US, Las Vegas would be at the top of any list right now," DiCello Levitt founder Adam Levitt said in an interview.

The move is the latest example of firms aligning without merging. It comes on the heels of Vaughan McLean's alliance with Cohen Cunningham DeRose Higgins Lyon and Greenspoon Marder's referral partnership with Davidoff Hutcher.

DiCello Levitt is known for working in multi-district litigation involving antitrust and consumer issues. O'Reilly Law is a four-attorney firm focusing on trust and estates and business formation.

O'Reilly Law Group has provided legal services in the city for half a century. John O'Reilly, its chairman and CEO, is a former chairman of the Nevada Gaming Commission.

"The O'Reilly name is such a strong name in Las Vegas, and we didn't want a situation where we would subsume that name," Levitt said.

Tim O'Reilly, president of O'Reilly Law, is serving as of counsel and managing the new office, firm leaders said. DiCello Levitt has one lawyer licensed to practice in Nevada and will encourage more of its lawyers to apply for admission.

To contact the reporter on this story: Justin Henry in Washington DC at jhenry@bloombergindustry.com

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'Diminishing Returns': Is the Superstar Supreme Court Lawyer Overvalued?

 [law.com/nationallawjournal/2025/02/04/diminishing-returns-is-the-superstar-supreme-court-lawyer-overvalued](https://www.law.com/nationallawjournal/2025/02/04/diminishing-returns-is-the-superstar-supreme-court-lawyer-overvalued)

Jimmy Hoover

U.S. Supreme Court courtroom. Credit: Carol M. Highsmith/Library of Congress

News

From "rookies" to "superstars," a new draft study looking at the win rates of Supreme Court advocates based on their experience uncovers some surprising results.

February 04, 2025 at 05:22 PM

By Jimmy Hoover



At the U.S. Supreme Court, like anywhere else, experience matters. But only up to a point.

A new draft study into more than 50 years of Supreme Court advocacy—the most comprehensive research on the subject to date—has largely confirmed the advantage that repeat high court players have over their less experienced peers. At the same time, the study also establishes a point of “diminishing returns” of Supreme Court experience.

“One of the big takeaways is that there’s a positive return on investment to hiring a very experienced Supreme Court advocate,” Tracey George of Vanderbilt University told the National Law Journal this week. “They will do better.”

Still, the value of experience “starts to level off after a certain amount of time,” said Albert Yoon of the University of Toronto Faculty of Law.

George, Yoon and Mitu Gulati of the University of Virginia School of Law are co-authors of a new draft research paper titled “The SCOTUS Tournament: Winning Isn’t Everything.”

The study is a deep data dive on the 4,599 private lawyers who appeared before the court from the 1970 Supreme Court term to the 2023 term, covering more than 7,000 cases.

Drawing heavily on sports metaphors, the authors analogize the soft red carpet of the nation’s most powerful courtroom to the grass courts of Wimbledon, where lawyers trade volleys before a bench of nine umpires.

“The United States Supreme Court ... is the ultimate competition for litigators,” the researchers write in their draft. “SCOTUS is their Wimbledon, if you will. Any lawyer who makes it to the Supreme Court podium has already won multiple qualifying matches.”

“Over time, rookies can become veterans, who can become stars and, for a select few, superstars,” they write.

Befitting their tennis analogy, the researchers measure the head-to-head win rates of those different classes of lawyers.

Table 3 Head-to-Head Performance All Subjects Lawyers in Private Capacity All Terms (1970-2023)									
Lawyer's Sequenced Appearance - Representing Petitioner	Lawyer's Sequenced Appearance - Representing Respondent								
		Pet 1	1st Resp 2	Pet 3	2nd-4th Resp 4	Pet 5	5th-9th Resp 6	Pet 7	
	1st	55.2%	29.8%	59.6%	40.4%	34.4%	65.6%	51.8%	
	N	1,434	1,623	99	99	32	32	83	
	2nd - 4th	69.2%	31.8%	57.3%	31.6%	58.3%	41.7%	40.9%	
	N	104	129	358	358	12	12	44	
	5th-9th	76.6%	30.0%	68.4%	31.6%	61.6%	26.0%	56.3%	
	N	47	70	19	19	112	50	32	
	10th+	79.7%	21.0%	62.3%	37.7%	76.2%	23.8%	67.0%	
	N	158	157	53	53	21	21	388	

Chart shows the relative success of different experience levels of Supreme Court attorneys. Credit: Virginia Public Law and Legal Theory Research Paper

The top-line figure confirms the conventional wisdom that clients would be well served by paying for experienced attorneys, who consistently outperformed their greener counterparts. When going up against a “rookie” attorney representing a respondent, for instance, a lawyer with more than 10 arguments has a nearly 80% chance of winning—at least based on the past 50 years of data.

“If you lose having hired even one of these top litigators on our list, no one can say that you didn’t really invest in doing your best,” George said.

Yet the researchers also uncovered data that present a more complicated picture. For one, lawyers appearing at the nation's most powerful lectern for the first time still win most of their cases, with one crucial caveat—that they argue on behalf of the petitioner.

Unlike most other courts, the Supreme Court is allowed to pick and choose its own cases. The justices tend to exercise this discretion to correct errors by lower courts, a dynamic that favors petitioners bringing the appeals.

The advantage is such that even a first-time advocate enjoys a 55% chance of winning when he or she is representing the petitioner and facing a lawyer with a similar experience level, according to the study.

One of the authors' most intriguing findings concerns the "diminishing returns" of Supreme Court experience, with very little statistical difference in the win-rates of those with around 10 arguments, and those "superstars" with more than 20. The researchers' data show "a significant impact of experience on win rates at low levels of experience, but diminishing effects subsequently, particularly after 10 appearances," they write.

With hourly rates now reportedly around \$2,000 for the most seasoned First Street veterans, clients may be overlooking something of a value option by going exclusively after brand-name superstar lawyers.

"Our data does not support paying that delta [in hourly rates] for someone with 50 appearances ... as opposed to 10," said George. "Basically, the return on investment is measured by the probability of winning against the baseline of winning. You're not getting a substantial gain."

That said, there are exceptions to every rule, and two of them go by the names Lisa Blatt and Paul Clement.

Blatt, a Williams & Connolly partner, and Clement, now at his boutique firm Clement & Murphy, have a petitioner-side win rate of 95% and almost 90%, respectively, according to the study. At 70%, their respondent-side win rates are similarly well above the average of 30%.

"I think going in, we were thinking, 'Oh, this is a world full of Lisa Blatts,'" said Yoon. "There are those people like that, but not everyone."

That said, win rates tell only part of the story—as George and Yoon are quick to point out. Several factors can influence an attorney's record at the high court, such as their risk tolerance for taking certain clients. Some attorneys may prioritize taking "winners" with little risk of sullyng their win rate.

"How can you measure attorney quality? It turns out it's really hard," said Yoon. "The lawyers and the clients choose each other and they're choosing in ways that we don't observe."

‘Elitification’ of Bar ‘More True Than Anyone Ever Said’

The emergence of an elite Supreme Court bar over the past five decades has drawn plenty of academic and media attention.

Yet at the outset of their research, George thought that perhaps the narrative of a shrinking SCOTUS bar dominated by a handful of players was an "exaggeration."

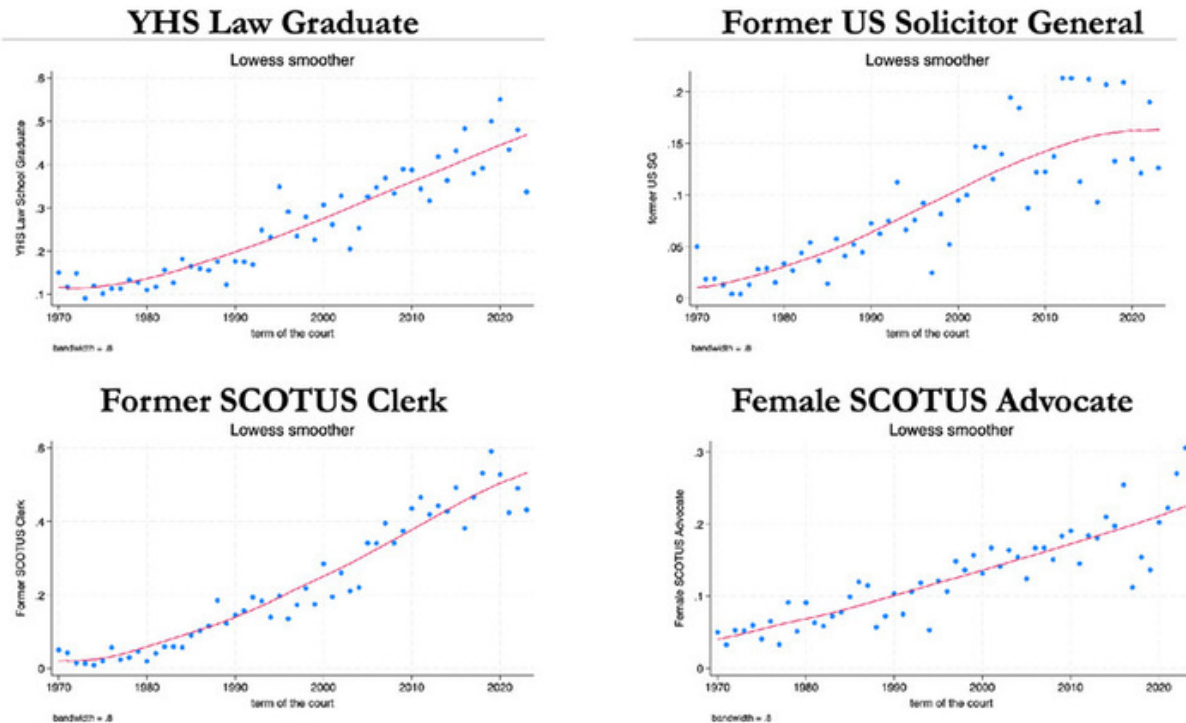
Instead, she was “really astonished” to find that the story is “more true than anyone ever said.”

“Not only is the Supreme Court bar becoming narrower and much more elite in terms of the incoming credentials over time—it’s doing that to the extreme,” she said.

“There are fewer Supreme Court cases and fewer people are arguing, and they all are coming from the same background as the Supreme Court justices do,” George added. “They’re going to the same law schools—Amy Coney Barrett [a Notre Dame graduate] is an exception—they’re all clerking at the Supreme Court. They probably worked in the solicitor general’s office. They’re probably white. They’re mostly male.”

The researchers capture this phenomenon in a set of striking charts that shows the experience level of the average Supreme Court lawyer climbing steadily over the past five decades. Other figures depict a similar phenomenon with the elite credentials of these lawyers.

Figure 6
Elite Credentials and Gender
Private Attorneys (but counting govt experience)
All Terms (1970-2023)



Since 1970, elite credentials have become increasingly common for lawyers arguing at the court. Credit: Virginia Public Law and Legal Theory Research Paper

In 1970, for instance, Harvard, Yale and Stanford grads accounted for roughly 10% of Supreme Court lawyers. That share reached 50% in the 2020s.

These days, Supreme Court lawyers are hired “without regard to subject matter,” George said.

“They’re hired solely for their expertise in the Supreme Court,” she explained. “They’re essentially giving to those people incredible power with respect to shaping the docket and decisions of the court and the country.”

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Board Directors Are Taking the Lead on Cybersecurity Oversight

- *BDO's Amy Rojik says timely testing plans can help directors*
- *Can boost boards' tech expertise, advise management teams*

Corporate board directors are taking financial and cultural action to protect their organizations against cybersecurity risks—and build resilience for future challenges—by fostering a culture of shared responsibility, creating access to good data, and using proactive incident response strategies.

Alongside increased investments, 37% of directors report expanding accountability by shifting the treatment of cyber risk from an IT responsibility to a company-wide responsibility, according to BDO's 2024 board survey.

Directors are benefiting from timely updating and testing incident response plans. During a recent broad-reaching software update issue involving a third party, one organization credited its recent cloud migration and its use of a real-time business model for a quick recovery. Another organization cited effective tracking and clear communication with staff as the key to implementing a quick, coordinated response.

Regulatory compliance adds a layer of complexity. The Securities and Exchange Commission's cybersecurity disclosure rules have heightened the need for timely, transparent, and accurate reporting of material cyber incidents. The rules also have expanded information about a company's cybersecurity strategy, risk management, and governance.

Boards need to determine whether operational leaders such as chief information security officers and chief information officers, financial reporting leaders such as chief financial officers, and others are clearly defining parameters when identifying a material cyber incident for their specific organization. This can be challenging because information about an incident may evolve over time.

Here are some other cybersecurity actions that boards and their directors should consider.

Enhance oversight beyond what's required. Arrange external assessments to validate cybersecurity strength, establish clear internal processes for reporting incidents, and integrate cyber response plans within a broader crisis management framework. This can create a more cohesive approach to managing incidents.

Monitoring competitor disclosures and benchmarking against the organization's own practices can offer additional insights into risks and industry standards.

Regularly evolving tabletop exercises can further harness lessons learned from reported cyber incidents. These types of activities allow boards and management to test and refine responses for future cyber incidents.

Bolster board expertise in technology and cybersecurity. While the SEC's rules stopped short of requiring board to disclose whether they have cyber experts, specialized skills are in demand within the boardroom.

The top experiences sought in 2025 include technology implementation (31%) and cybersecurity (27%), according to BDO's 2024 board survey. To keep up with these evolving needs, many directors are dedicating an average of 42 hours a year—roughly 15% of their reported board service hours—to independent education and research to learn about rising risk areas and enhance their ability to bring value to their boards.

Other ways boards are accessing expertise is by ensuring managerial competence, planning for director refreshment, and partnering with external advisers and subject matter experts to support oversight and management actions.

Advise and guide management teams. Directors and management should work together to foster a culture of technology risk awareness across the organization. This includes asking how enterprise risk management systems integrate technology risks and requesting data-driven insights to understand competitors' technology use and broader industry trends.

Directors should ensure a multidisciplinary group of stakeholders is meeting to establish ethical guidelines on acceptable (and unacceptable) uses for emerging technology and to practice good data hygiene. This group should advance privacy protocols and procedures that govern technology use, particularly for generative AI, to mitigate risks and promote responsible innovation.

Balancing risk and innovation is a complex but critical endeavor. Boards and management teams must meet customer demands swiftly, remain competitive, and fulfill stakeholder expectations, all while upholding rigorous risk management and demonstrating sound oversight.

Forward-thinking directors understand that the relationship between opportunity and risk is symbiotic. Effective oversight not only mitigates threats but also enables the organization to seize opportunities with confidence.

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

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Write for Us: Author Guidelines

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Former Ohio House Speaker Larry Householder appeals bribery conviction

🌐 [cincinnati.com/story/news/politics/2025/02/05/former-ohio-house-speaker-larry-householder-appeals-bribery-conviction/78178372007](https://www.cincinnati.com/story/news/politics/2025/02/05/former-ohio-house-speaker-larry-householder-appeals-bribery-conviction/78178372007)

POLITICS

What's the line between politics and bribery? Householder, Borges appeal their convictions



Jessie Balmert

Cincinnati Enquirer



The fate of former Ohio House Speaker Larry Householder's bribery conviction could hinge on a disjointed set of legal decisions about the fine legal line between an explicit pay-to-play scheme and politics as usual.

Householder, 65, was sentenced to 20 years in prison for his role in a racketeering conspiracy. He was convicted of participating in a nearly \$61 million pay-to-play scheme trading political power for a \$1 billion nuclear plant bailout benefitting an Akron-based FirstEnergy subsidiary.

On Wednesday, Householder's attorney Steven Bradley told a three-judge appeals court panel that jurors were given faulty instructions that led them to believe that legal political contributions for an energy bill Householder already supported were instead a nefarious federal crime.

"There must be an agreement," said Bradley, adding that the agreement must be clear and unambiguous.

Assistant U.S. Attorney Alexis Zouhary contended that Householder crossed the legal line by championing the nuclear bailout legislation while receiving millions from FirstEnergy through dark money groups intended to obscure where the money came from.

"It may be a fine line, but that's the line that has been drawn," Zouhary said.

Sixth Circuit Court of Appeals Judge Amul Thapar, who was appointed by President Donald Trump, said that if there isn't a quid pro quo then all state campaign contributions could be labeled a bribe. He asked whether a candidate who wants to build a dam could hold a fundraiser collecting \$10,000 a plate from dam supporters. Zouhary said that would be legal.

The legal line between which political contributions are protected by the First Amendment and which are criminal is complicated by several legal decisions with different standards. "The Supreme Court case law is all over the map on this," Thapar said.

Thapar and fellow appeals judges John Nalbandian, a Trump appointee, and Stephanie D. Davis, who was appointed by former President Joe Biden, listened to arguments from attorneys for Householder and former Ohio Republican Party Chairman Matt Borges. Their decision on whether to overturn convictions or order a new trial will be released later.

Householder's attorneys have argued that prosecutors never proved that Householder engaged in a bribery scheme, that jurors were given faulty instructions and that the federal judge overseeing the case was biased.

Two others charged in the pay-to-play scheme, Householder political adviser Jeff Longstreth and FirstEnergy Solutions lobbyist Juan Cespedes, testified against their co-conspirators at trial. They have pleaded guilty but have not yet been sentenced.

The final person charged in the conspiracy, lobbyist Neil Clark, died by suicide in March 2021.

FirstEnergy paid a \$230 million penalty for bankrolling the pay-to-play operation. Recently, federal prosecutors charged two former FirstEnergy executives, accusing them of bribing Householder and former top utility regulator Sam Randazzo. Former CEO Chuck Jones and former Senior Vice President of External Affairs Michael Dowling have pleaded not guilty.

In court, Bradley argued that the bribery case should be thrown out because the federal judge overseeing the case had an unauthorized conversation with a juror who had not yet received a negative COVID-19 test and refused to wear a mask. That juror was dismissed from the case.

Bradley said U.S. District Judge Timothy Black should have allowed Householder's attorneys to participate in the call. Zouhary said Householder's attorneys had an opportunity to weigh in on the juror's dismissal and didn't initially object.

Householder not seeking clemency from Trump

After the hearing, Householder attorney Scott Pullins said the former House speaker is not seeking clemency from Trump – an option he considered after the Republican president was reelected.

"He feels this court will get it right," Pullins said.

Borges' attorney argues his client was shoehorned into this scheme

Former Ohio GOP chairman Borges, 52, was sentenced to five years in prison after bribing a political operative for information about the campaign to block House Bill 6. Borges contends that federal prosecutors abused their authority in his case.

Borges' attorney Dennis Belli argued that Borges gave political consultant Tyler Fehrman \$15,000 for the signature collection count that would have become public eventually. "We're talking about criminal liability and it's not there," Belli said.

Zouhary countered that Fehrman had an obligation to his employer not to share valuable, secret information. By asking for it, Borges was committing a crime.

The judges also discussed how Borges was convicted because he participated in the illegal pay-to-play scheme and didn't need to commit the crimes himself. Zouhary pointed to the Fehrman bribe and money laundering offenses as evidence that Borges also committed offenses.

More:Householder attorneys: Biased judge, overzealous prosecutors led to corruption conviction

Jessie Balmert covers state government and politics for the USA TODAY Network Ohio Bureau, which serves the Columbus Dispatch, Cincinnati Enquirer, Akron Beacon Journal and 18 other affiliated news organizations across Ohio.

Householder, convicted of racketeering, tells judges he's only guilty of 'ordinary politics'

[cleveland.com/open/2025/02/householder-convicted-of-racketeering-tells-judges-hes-only-guilty-of-ordinary-politics.html](https://www.cleveland.com/open/2025/02/householder-convicted-of-racketeering-tells-judges-hes-only-guilty-of-ordinary-politics.html)

February 5, 2025

Subscriber

- Updated: Feb. 05, 2025, 11:30 a.m.
- |Published: Feb. 05, 2025, 11:27 a.m.



Former Ohio House Speaker Larry Householder speaks to reporters outside the federal courthouse in Cincinnati on Thursday March 9, 2023, after he was found guilty of racketeering. (Jake Zuckerman/Cleveland.com)

By

Jake Zuckerman, jzuckerman@cleveland.com

CINCINNATI, Ohio – While prosecutors said ex-Ohio House Speaker Larry Householder perpetuated the biggest bribery scheme in state history, his lawyers told an appellate court Wednesday that he's only guilty of "regular politics."

Arguments came nearly two years after a jury convicted him of racketeering, predicated on a bribery scheme to pass a bailout of nuclear plants owned by a subsidiary of FirstEnergy Corp., in exchange for millions in campaign contributions from both subsidiary and its corporate parent.

And two judges on the three-judge panel signaled some amount of warmth to Householder's arguments, made by his attorney Steven Bradley. Namely, that the jury instructions given by U.S. District Judge Timothy Black were so broad that they might capture ordinary political contributions written by any number of parties with interest in state law.

"It just seems like the way 'bribe' has been interpreted here is all campaign contributions," Judge Amul Thapar, an appointee of President Donald Trump, said to a government attorney.

Black sentenced Householder to 20 years in prison in July 2023. He is currently being held in FCI Elkton, in Lisbon, Ohio.

Householder was not in attendance for the hearing at the Potter Stewart U.S. Courthouse in Cincinnati.

This post will be updated through the day with more information.



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

Class Action

Feb. 5, 2025, 4:44AM PST

Silicon Valley Judges Ask Lawyers to Cut Out the Gamesmanship

By Isaiah Poritz

- **Pointless motions put a strain on limited judicial resources**
- **Bar Association event focused on how judges think about cases**

Judges serving on the California federal court covering Silicon Valley said litigators have become increasingly combative and hyperbolic in their motion practice, which bogs down court resources and does little to improve outcomes for clients.

"Routine motions, just because you can file them, is a waste of our time, it's a waste of your time, and it increases our workload so we can't get to the real important things," Judge Yvonne Gonzalez Rogers told attorneys and law students at a Federal Bar Association event in the Oakland, Calif., federal courthouse Tuesday evening.

There was a time when lawyers rarely filed motions to dismiss but "it's almost as if everybody feels compelled to file them," Rogers said. "Push back on your clients: What are you going to get out of this?"

Rogers, who sits in the US District Court for the Northern District of California, spoke alongside fellow Oakland division Judge Haywood S. Gilliam Jr. and Magistrate Judges Donna M. Ryu and Kandis A. Westmore. The event focused on how federal trial court judges think about their cases as they proceed through each phase of litigation.

The Northern District of California, which has divisions in San Francisco and San Jose, covers the center of the US tech industry and is a hotbed for high tech legal disputes and intellectual property litigation.

Rogers has racked up an especially high-profile tech docket. On Tuesday morning, she oversaw a fiery three-hour preliminary injunction hearing in Elon Musk's lawsuit accusing OpenAI of betraying its charitable goals where she indicated Musk's request to block the startup's conversion to a for-profit entity likely falls short.

She's also overseeing a sweeping multidistrict litigation case involving hundreds of lawsuits accusing Meta Platforms, TikTok, Snap, and YouTube of causing a youth mental health crisis. She ran Epic Games' antitrust trial against Apple.

Targeted Motion Practice

Rogers, who was appointed to the federal bench in 2011, said judges are far more interested in hearing targeted motions, ones that "say to the judge, 'Look, they brought 10 causes of action, three of them really should be dismissed' so we can make more efficient use of our time."

"Focus on the three, get a win on the three," Rogers said.

All the judges emphasized that they have very limited resources in the face of hundreds of active cases on their dockets. Each district judge has only three law clerks, and magistrate judges have only two.

"It's a never ending amount of work," said Westmore, who took her post in 2012. "We work all the time, whether we're physically here or we're at home or on vacation where we're not supposed to be working, but it's an endless amount of work, so have mercy on us."

Rogers and Ryu said that they frequently see motion briefs that "are just all over the place" and don't clearly identify what the law is and what the facts are. "Sometimes I think maybe it's on purpose," said Ryu, the court's chief magistrate judge who joined the court in 2010. "Sometimes it may be a litigator's goal to obfuscate."

A good brief, the judges all agreed, should make them feel like the conclusion is self evident without having to make dramatic characterizations about the law and facts.

The judges said that jokes and metaphors are rarely useful in motion briefs. "It might land, it might not," said Gilliam, who was appointed in 2014. Ryu said the one area where analogies have been useful is in complicated patent and trade secrets cases, where a skilled IP attorney can help the judge or jury understand a scientific concept.

The judges said they rarely hold oral arguments in cases when they don't have any questions for the parties. Westmore said she often has her opinion partially drafted by the time of the hearing.

Rogers emphasized that litigators should take the time to know their judge while preparing for oral arguments. They should look at their judge's calendar and see what other cases are being heard the same day, she said.

"Some judges are really well prepared, other judges may not be as well prepared," she said. "Maybe for those judges you do have to repeat your argument, or maybe they've been in trial all day so you want to give them a refresher."

She said the best litigators she has seen focus most of their attention during oral arguments on the weakest part of their case. They give a judge a reason to rule in their favor by grounding their argument in the law, "not in hyperbole, not in ad hominem attacks, not in snarky comments," Rogers said.

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"I guess it's not a GOOD thing that the Chief Justice of the Delaware Supreme Court has to put out messages like these after MAGA targets chancery and the DE judiciary enters judgments that Elon's minions don't like so much. www.linkedin.com/pulse/chief-..." — Bluesky

 bsky.app/profile/katejackson.bsky.social/post/3lhgun3fwgk2w



Kate Jackson

@katejackson.bsky.social

I guess it's not a GOOD thing that the Chief Justice of the Delaware Supreme Court has to put out messages like these after MAGA targets chancery and the DE judiciary enters judgments that Elon's minions don't like so much. www.linkedin.com/pulse/chief-...

The threats and attempts at intimidation of judges have been on the rise exponentially. As leaders in business and the lawyers who advise businesses, I am sounding the alarm and calling for leaders in the business, in the legal world, to call out and stand up to threats to the independence of the third branch of government.

February 5, 2025 at 7:19 AM

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Feb. 5, 2025, 9:13AM PST

Musk 'Fealty' Drives Delaware Exits as His Grip on Power GrowsBy [Mike Leonard](#)

Deep Dive

-
- Musk spent a year attacking state over \$56 billion court loss
 - Corporate exodus spreads, supplicants seen as currying favor

All Elon Musk had to do to finally get some revenge against Delaware was become arguably the world's most powerful person.

As soon as the world's richest man stepped into his new role as Donald Trump's efficiency czar and began throwing his weight around in unprecedented ways, the "DExit" seemed to be underway. Meta Platforms Inc., Dropbox Inc., and Bill Ackman's Pershing Square have since revealed potential plans to relocate.

It's a reversal from 2024, when Musk called for a corporate exodus after the chief judge of Delaware's elite business court voided his \$56 billion pay package, but his plea went unheeded by the nearly 70% of Fortune 500 companies that call the state home.

"What's different this time is Musk's unique power," said Lawrence Cunningham, director of the University of Delaware's Weinberg Center for Corporate Governance. "Go back 10 years, and he was pretty powerful; five years, he was more powerful; then he gets Twitter, and now he's best friends with Trump. I have to look through my history books to identify a captain of industry with that kind of influence."

The tech titan is part of a new administration that's purging perceived enemies and elevating friends. It's impossible to disentangle that dynamic—including public ring-kissing by Mark Zuckerberg and Jeff Bezos—from the push to get on Musk's good side by "teaching Delaware a lesson," according to Tulane University law professor Ann Lipton.

"With Facebook, and probably Dropbox, and definitely Bill Ackman, these are expressive moves," Lipton said. "It's happening as he gets more powerful in general. His allies, his friends, and people who want his favor are demonstrating their fealty."

Delaware's new governor, Matt Meyer (D), responded to the reincorporations by suggesting reforms. But he avoided directly addressing Musk's role in inciting discontent. "I'm not really on social media trying to figure out what's going on and who's causing it," Meyer said in a Feb. 3 interview.

Musk called Meyer's proposals "encouraging" in a post on X.

The state's top court added a wrinkle Tuesday, overturning a decision involving TripAdvisor Inc. that had threatened damages when companies leave for states seen as friendlier to insiders. It wasn't immediately clear how much Tuesday's ruling—focused on the "speculative" nature of any shareholder claims—would help businesses like Meta that already face a slew of cases.

'Rogue Judge' Debate

The state's influential corporate defense bar has compounded the criticism, voicing outrage over several novel rulings by Chancellor Kathaleen St. J. McCormick, who leads Delaware's Chancery Court, and Vice Chancellor J. Travis Laster.

Those decisions cracked down on self-dealing, scrutinized agreements handing governance rights to insiders, and clarified the standards for controlling stockholders, who face special scrutiny. The critics say they blindsided businesses, undermining the stability that draws them to Delaware.

But there's nothing necessarily disruptive about novel rulings, which happen whenever a court confronts a new factual context, according to Friedlander & Gorris PA founding partner Joel Friedlander.

"These decisions didn't come out of thin air," he said. "They're based on precedent. We don't have a rogue judge problem."

McCormick's "textbook" rulings to kill a pay package Tesla shareholders approved twice marshaled reams of evidence suggesting the votes weren't conducted properly, according to Lipton. She called the "uncertainty" narrative unfair to McCormick and Laster.

"What used to be very malleable common law standards have actually, over time, morphed into much more definite rules," Lipton said. "The complaint about uncertainty masks something else, which is that they don't want to be held liable."

Bench Depth

After the January 2024 pay decision, Musk moved Tesla Inc. to Texas, which recently established its own business court. The traditional incorporation alternative is Nevada—a sort of anti-Delaware where corporate managers bear little liability risk.

Judges in those states aren't nearly as "fluent in corporate practice," according to Cunningham, who said building a "deep bench" could take generations.

"You can copy Delaware's statute, its court system, all the precedents," Cunningham said. "You still need judges with that background."

The sophistication is a two-way street, said Keith Bishop, a partner at Allen Matkins Leck Gamble Mallory & Natsis LLP. Delaware's unnecessarily convoluted opinions have produced an "immense body of judge-made law" that only corporate attorneys can navigate, while Nevada takes the opposite approach to balancing flexibility with certainty, according to Bishop.

"You can pretty much read the statute and know the rules," he said. "In Delaware, the rules are all coming from the heads of judges. They're relatively inaccessible to somebody in a boardroom operating in real time."

Partisan Corporate Governance

The parallel momentum toward nearby Texas reflects our “age of partisan corporate governance,” according to Lipton. Though its business court looks superficially like Delaware’s, it has features—such as short judicial terms—that facilitate tighter partisan oversight, she said.

“Elon Musk has allied himself closely with the Republican Party, and I think these companies are making a very rational gamble that if they’re on that side, they’re safe,” Lipton said. “A company that isn’t trying to identify itself with the Republican Party may not be so safe, because they don’t know when Ken Paxton is going to dissolve their charter over gender ideology.”

Musk has both shaped and been shaped by Delaware law, according to Lipton.

“There’s something very unsettling about a corporate governance system that allows people to amass that kind of power,” she said. “Other aspects of law are supposed to deal with that. But what do you do when his wealth overwhelms all of them?”

– With assistance from Jennifer Kay and Jef Feeley.

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Delaware Supreme Court eases path for some companies to leave state

 [reuters.com/legal/delaware-supreme-court-eases-path-some-companies-leave-state-2025-02-04](https://www.reuters.com/legal/delaware-supreme-court-eases-path-some-companies-leave-state-2025-02-04)

Jonathan Stempel

Item 1 of 2 Figurines are seen in front of the Tripadvisor logo in this illustration taken, February 27, 2022. REUTERS/Dado Ruvic/Illustration/File Photo

[1/2]Figurines are seen in front of the Tripadvisor logo in this illustration taken, February 27, 2022. REUTERS/Dado Ruvic/Illustration/File Photo [Purchase Licensing Rights](#) , opens new tab

- Wrong standard used to review TripAdvisor move to Nevada
- Shareholders claimed move would be at their expense
- Elon Musk left Delaware, William Ackman plans departure

Feb 4 (Reuters) - The Delaware Supreme Court on Tuesday issued a decision involving TripAdvisor (TRIP.O) , opens new tab that could make it easier for some companies to move out of the state, which is the corporate home for about two-thirds of the Fortune 500. In a 5-0 decision, the court said a trial judge erred by making it too easy for TripAdvisor shareholders to hold controlling shareholder Greg Maffei liable for damages, should the online travel advice company's proposed move to Nevada benefit him at their expense.

Delaware's business-friendly laws have long made the state a favored home for companies, but some prominent business people have been packing up.

Elon Musk reincorporated Tesla (TSLA.O) , opens new tab in Texas after a Delaware judge struck down as "unfathomable" his \$56 billion pay package, while billionaire William Ackman plans to move his management company's corporate base to Nevada.

Mark Zuckerberg meanwhile is mulling whether to move his company, Facebook parent Meta Platforms (META.O) , opens new tab, to Texas from Delaware, the Wall Street Journal reported last week.

In the TripAdvisor case, shareholders Dennis Palkon and Herbert Williamson complained that a move to Nevada would reduce the company's value because the market values Nevada companies lower than Delaware companies.

They also said a move would reduce the litigation exposure of Maffei, who chairs TripAdvisor's parent Liberty TripAdvisor, and other directors - providing them a so-called non-ratable benefit - because Nevada offers greater protections to corporate officers and boards than Delaware offers.

Last February, Vice Chancellor Travis Laster of the Delaware Chancery Court said TripAdvisor could reincorporate in Nevada but the move would be reviewed under Delaware's onerous "entire fairness" standard, potentially leading to a damages award. But in Tuesday's decision, Supreme Court Justice Karen Valihura said the more lenient "business judgment" standard of review should apply because the objecting shareholders offered mere speculation about future liabilities.

"Delaware policy has long recognized the values of flexibility and private ordering," she wrote. "Declining to second-guess directors' decisions to redomesticate where there are no well-pled allegations of a material, non-ratable benefit flowing to the directors or controllers furthers this important policy."

Lawyers for Palkon and Williamson did not immediately respond to requests for comment. Matthew Close, a lawyer for Maffei, said he was pleased with the decision.

Musk, the world's richest person, is asking the Delaware Supreme Court to restore his Tesla pay package.

The case is Maffei et al v Palkon et al, Delaware Supreme Court, No. 125, 2024.

Reporting by Jonathan Stempel in New York; Editing by Matthew Lewis

TripAdvisor Decision Out

[businesslawprofessors.com/2025/02/tripadvisor-decision-out](https://www.businesslawprofessors.com/2025/02/tripadvisor-decision-out)

February 4, 2025

By Benjamin P. Edwards on February 4, 2025

The Delaware Supreme Court has just released its decision in the TripAdvisor case. It's available [here](#).

Although I'm going to need more time to sit with and read the opinion carefully, it's definitely a significant win for corporations considering exiting Delaware in favor of some other jurisdiction. The decision reverses the Chancery court and finds that redomesticating to operate under different state's law with different standards for liability does not confer a material, non-ratable benefit on defendants. In essence, the mere possibility that the defendants might get away with something in the future that they could not get away with under Delaware law is too remote and speculative a reason to award damages for leaving Delaware or to apply anything other than business judgment rule deference. The Delaware Supreme Court found:

Taken together, these cases suggest that the hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative to constitute a material, non-ratable benefit triggering entire fairness review. Given that Plaintiffs have not alleged any past conduct that would lead to litigation, this case aligns with our case law that applies the business judgment rule.

...

Here, Plaintiffs' allegations have not satisfied the requirement of pleading a material benefit because they have not alleged anything more than speculation about what potential liabilities Defendants may face in the future. On this record, we cannot conclude that the Conversions would provide Defendants with a material, non-ratable benefit triggering entire fairness review. Accordingly, we hold that the business judgment rule is the applicable standard of review in this case.

Delaware's Supreme Court also weighted in on the basis of comity, finding that it provided another reason to stay out of trying to value differences between the two states. The decision finds:

We note finally that, although comity concerns are not an independent ground for reversal in this case, our holding furthers the goals of comity by our declining to engage in a cost-benefit analysis of the Delaware and Nevada corporate governance regimes. . . . States have taken different approaches on matters such as the scope of director and officer exculpation, standards of review, and the scope of stockholder inspection rights. And litigation rights, as the Vice Chancellor recognized, are only one stick in the corporate governance bundle. Delaware courts are well-aware that “it is more than the statutory words on paper that give life to a system of entity law. Much often depends on the extent to which specific disputes are consistently handled by courts, thus giving business[persons] predictable guidance by which to order their relations.”

I wrote about the case shortly after the oral argument and noted that it would be very difficult to figure out damages for moving between states because states offer such different overall packages. Then, I wrote:

Either for the loss of the constituency statutes or for other changes in rights between states, figuring out damages appears to be a really nasty thicket. I don’t know any great way to do it. I don’t think anyone does. How do you value a different set of statutes, different cases, and a different court system? I don’t know. I don’t think the Delaware Supreme Court has a great answer either. It might be better to just treat damages here as too speculative.

The Delaware Supreme Court concluded with a similar view, stating:

We submit that attempting to value competing corporate governance structures, particularly in the absence of any concrete allegations of Defendants receiving a material, non-ratable benefit, and based upon hypothetical future transactions, as here, would be an unacceptably speculative cost-benefit exercise. Such an exercise, under these circumstances, also risk intruding on the value judgments of state legislators and directors of corporations.

Although this decision closes the chapter on how Delaware will treat redomesticating firms, it does also highlight key factors for boards and other states to consider in evaluating jurisdictions and possible reforms. It sets out a broad range of factors that weigh on a decision including: (1) “the court system;” (2) “the predictability of the courts with respect to business matters;” (3) “the judges’ expertise in handling such disputes;” (4) “the development and body of judicial decisions;” (4) “the familiarity of market participants with the corporate governance regime; (5) the process by which corporate statutory amendments are proposed and adopted; (6) “the effectiveness of the Secretary of State office in facilitating corporate filings; and (7) “the existence of a Corporate Bar available, willing, and able to handle such disputes.”

When many firms look at these factors, they may continue to decide that Delaware offers them the best overall package. For states like Nevada, the list highlights areas the state should evaluate and devote additional resources to if it wants to more meaningfully compete.

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TripAdvisor's Move to Nevada Validated by Delaware Top Court (2)

By Mike Leonard and Jennifer Kay

- Delaware increasingly faces competition from Nevada, Texas
- Court reverses ruling that had threatened potential damages

TripAdvisor Inc.'s senior leaders succeeded Tuesday in overturning a landmark court decision that had raised the specter of money damages against companies moving away from Delaware.

The state's top court reversed a ruling that said TripAdvisor's controlling stockholder, chairman Greg Maffei, might be on the hook to pay shareholders if the relocation reduced its corporate value. Although the decision allowed the reincorporation, it was one of several rulings and statutory changes that raised eyebrows last year over how Delaware's courts scrutinize corporate control.

Delaware is home to nearly 70% of Fortune 500 companies thanks to its traditionally robust and predictable corporate laws. But the state has faced increased competition in recent years from Nevada—leveraging a “no liability” reputation to attract corporate bigwigs—and Texas, which recently set up its own competing business court. Elon Musk, who has urged companies to leave Delaware after a judge there voided his \$56 billion pay package, moved Tesla Inc. to Texas in June.

Justice Karen L. Valihura said Tuesday that Vice Chancellor J. Travis Laster was wrong to conclude that TripAdvisor's reincorporation created the type of conflict of interest that calls for heightened court scrutiny. Despite the move to a jurisdiction with fewer protections for shareholders, the allegations fell short of showing that Maffei extracted a “material” benefit from the transaction at the expense of public investors, Valihura said.

“The hypothetical and contingent impact of Nevada law on unspecified corporate actions that may or may not occur in the future is too speculative,” she wrote in a 64-page ruling.

The decision offers welcome legal clarity around reincorporations amid Musk's push for a Delaware exodus, said Freshfields US LLP partner Boris Feldman. Major companies including Meta Platforms Inc., Dropbox Inc., and Bill Ackman's Pershing Square have recently announced they're either leaving Delaware or seriously considering it.

The “well-reasoned opinion” calls to mind the US Supreme Court’s pivot during the New Deal in the face of court-packing threats from President Franklin D. Roosevelt, according to Feldman.

“Incorporation is very important to the business model in the state,” he said. “Neither the lawyers nor the judges in Delaware want to lose that business.”

‘Ill-Equipped’

Maffei has been a repeat player in Delaware’s Chancery Court, the leading US forum for merger fights and corporate cases. He and his affiliates have faced a stream of shareholder suits in Delaware over the years raising claims that they exploited byzantine reorganizations to steer value to their own pockets.

The investors leading the litigation had argued that TripAdvisor’s move was aimed at escaping legal accountability. But the Delaware Supreme Court rejected that idea, saying the prospect of less liability at some potential future point didn’t count as a conflict of interest triggering rigorous legal scrutiny. Valihura drew a “temporal distinction” between a general reduction in liability risk and a corporate move that extinguished pending or concrete legal claims.

Absent a significant conflict of interest, Delaware’s courts generally defer to the decisions of corporate boards instead of actively second-guessing them. That was the appropriate legal standard for the TripAdvisor reincorporation, Valihura said.

She also pointed to practical problems with determining the damages attributable to the reduced rights investors enjoy in Nevada, an issue she raised repeatedly at an October hearing.

“Courts are ill-equipped to quantify the costs and benefits of one state’s corporate governance regime over another’s,” Valihura said. “This is particularly true given that none of these features is static, including the statutory schemes at issue and their related case law developments.”

The shareholders, Dennis Palkon and Herbert Williamson, are represented by Bernstein Litowitz Berger & Grossmann LLP, Block & Leviton LLP, Friedman Oster & Tejtell PLLC, and Kaskela Law LLC. Maffei is represented by Potter Anderson & Corroon LLP and O’Melveny & Myers LLP. TripAdvisor is represented by Ross Aronstam & Moritz LLP and Weil Gotshal & Manges LLP.

The case is Maffei v. Palkon , Del., No. 125, 2024, 2/4/25 .

(Updates with reaction in paragraphs six through eight.)

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Matt Levine's Money Stuff: Robinhood Wanted B*ts on the B*g G*me

By Matt Levine

Opinion

Happy birthday to me

Programming note! I am not completely sure, but my best evidence is that the first edition of Money Stuff, in the form of an email newsletter with that title, was published 10 years ago today. If you had asked me then if I would still be writing this email newsletter a decade later, I would have said “huh, that would be cool.” It has been! It has been an absurd privilege to get to write Money Stuff, I look forward to doing it for many more years, and I am intensely grateful to you, my readers, for making it possible.

Sports betting in your brokerage app

I guess this was inevitable:

Robinhood Markets Inc. is getting in on the sports event contracts craze, offering retail investors the opportunity to place trades on the outcome of Sunday's Super Bowl.

The contracts will be available starting Monday to eligible customers in all 50 states through the derivatives exchange Kalshi Inc., according to a Robinhood statement.

“With an emerging asset class like event contracts, we recognize an opportunity to better serve our customers as their interests converge across the markets, news, sports and entertainment,” the company said in the statement.

Though perhaps this was also inevitable:

Robinhood Markets said Tuesday that it was withdrawing its plans to offer betting contracts on the Super Bowl, following pushback from the Commodity Futures Trading Commission, which raised concerns that the contracts might be illegal.

“We were in regular contact with the CFTC prior to launching this product, and we believe we are in full compliance with all applicable regulations,” said Robinhood General Counsel Lucas Moskowitz.

Robinhood said it had been asked by the CFTC to stop offering its customers access to the sports contracts on Monday afternoon, just hours after it unveiled its sports-betting plans, a move that blurred the lines between regulated financial markets and gambling.

Robinhood has a history here — it once launched a checking account that also lasted roughly one day before regulators shut it down — but it was a nice try. Here is Robinhood's original statement. With things like this it is important to use the right euphemisms. There are two sets of euphemism here. One is the standard hilarious American problem that you are not allowed to call the S*per B*wl by its name for commercial purposes unless you pay the National Football League giant gobs of money, so Robinhood did not :

Today, Robinhood Derivatives, LLC (RHD) is launching event contracts for the Pro Football Championship, allowing eligible customers to place trades on the outcome of the upcoming showdown between Kansas City and Philadelphia. Event contracts for the Pro Football Championship are rolling out to all eligible customers starting today.

Yes the highlight of the US sports calendar, the Pro Football Championship. ("The big game," Robinhood also calls it on the contract page, in lower case, presumably because the NFL once tried to trademark "The Big Game.")

The other set of euphemisms is of course the use of words like "event contracts," "derivatives" and, my favorite, "emerging asset class." Robinhood will let you put in some money to predict that either the Philadelphia Unnamed Team or the Kansas City Unnamed Team will win the Large Football Contest. If your team loses the football contest, you lose the money you put in. If your team wins the football contest, you get back more than you put in. It's a derivative contract, see? Are you *betting on football*? No no no no no no no no no no no, this is an *emerging asset class*.

This set of euphemisms is designed to appease, not the NFL, but the CFTC, which regulates futures contracts. The law says that registered futures exchanges (like Kalshi) can list new events contracts unless the CFTC decides they are "contrary to the public interest" because they "involve ... terrorism; assassination ; war; gaming; or other similar activity." Last year the CFTC proposed rules explicitly saying that sports betting is gaming, which ... seemed sort of obvious anyway? The idea was that sports betting, in the US, is mostly legal, but it is done through (state-regulated) *sports books*, not through CFTC-regulated *futures exchanges*. Futures exchanges are for financial contracts used to hedge economic risk, not for betting on sports.

But those rules haven't gone into effect, we are in a much looser regulatory environment, and several registered derivatives exchanges have announced sports contracts. "The Commodity Futures Trading Commission is asking Crypto.com and Kalshi Inc. to explain how their recently launched Super Bowl event contracts comply with derivatives regulations," Bloomberg's Lydia Beyoud reported earlier today, and presumably the answer was "pfffft what derivatives regulations?" But for form's sake Robinhood did say "event contract" rather than "football bet."

But I am not required to use those euphemisms — though I'm still going to asterisk "S*per B*wl" — so I can just go ahead and say that Robinhood tried to offer football betting in its stock brokerage app. The standard story of Robinhood is that it became big by "gamifying" investing, making it more fun to trade stocks than it was at traditional brokerages, and this is the logical outcome. It is more fun to buy a stock on an app that shows you an animation of confetti when you hit "buy" than it is to buy stock on a stodgy brokerage's website, and it is more fun to buy a meme stock than a regular stock, and it is more fun to buy zero-day options on a meme stock than just the meme stock, and it is more fun to bet on football than it is to bet on stocks.

The announcement went on:

Robinhood's mission is to democratize finance for all. With an emerging asset class like event contracts, we recognize an opportunity to better serve our customers as their interests converge across the markets, news, sports, and entertainment. ...

Event contracts for the Pro Football Championship leverage the power and rigor of financial market structure to facilitate greater liquidity, transparency, and price discovery.

"Our mission is to democratize finance for all" would be an *absolutely incredible* slogan for an online sportsbook, or a casino, or for that matter an old-time Mafia bookie. Robinhood surely *does* help a lot of people save for retirement with lower costs than they paid at pre-Robinhood brokerages, but in *this* case, "democratize finance for all" means "get people to bet on sports." "Leverage the power and rigor of financial market structure to facilitate greater liquidity, transparency, and price discovery" also means "get people to bet on sports." Rigor!

Is this *finance*? What is finance, really? I wrote yesterday about my theory of college savings:

My theory of college savings is that there is an economy, and the economy grows over time because of technological progress and demographic growth, and you invest your money now in a broad range of businesses, and those businesses use your money to make stuff and help the economy grow, as the economy grows those businesses mostly grow, and your investment gets more valuable. And if you put aside, uh, frankly kind of a lot of money every month, and if the economy (or, rather, the equity value of publicly traded companies) grows at a faster rate than college tuition does, then you will have enough money to pay for your kids' college educations. ...

Obviously there are alternative theories of college savings, like "lottery tickets" or "maybe a YouTuber will randomly give me a million dollars" or something.

That first theory — there is an economy, and you can invest in its growth — suggests reasons to "democratize finance for all." The second theory — random chance — suggests reasons for stock brokerages to offer sports betting.

In the broad sense, though, Robinhood is right, isn't it? "We recognize an opportunity to better serve our customers as their interests converge across the markets, news, sports, and entertainment." *My theory* — that financial markets represent investments in real economic activity, while betting on sports represents zero-sum bets on sports — is outdated. The link between finance and real economic activity was always indirect and imperfect — lots of financial markets activity has always been speculative and irrational — and it is increasingly inessential.

All of it is betting on sports. Sports are sports, and entertainment is sports, and politics is sports, and crypto is sports, and stocks are sports. Democratizing finance doesn't mean giving people easier ways to invest in broad economic growth, or to finance new business ideas. It means letting them make the bets that they want to make.

Stocks are dumb

In that vein. In 2015, I wrote about bond traders who lied to their customers:

It might seem like lying to your customers would always be a crime, but that is not true at all. Lying to your customers is only a crime if it is fraud, and it is only fraud if the lies that you tell them are "material," and the lies are only material if there is a "substantial likelihood that a reasonable investor would find" them "important in making an investment decision." Lying to your customers about whether an investment is a Ponzi scheme is fraud. Lying to your customers about what color socks you are wearing probably isn't.

That was a long time ago. Here is a hypothetical case that I had not considered. Let's say that I really like orange socks. Orange socks are important to my identity. I wear them all the time, and I tend to like and trust like-minded people who also wear orange socks. If you came up to me, wearing orange socks, and said "psst, vote for my preferred candidate," or "psst, take these vitamin supplements," or "psst, buy this stock," I would probably follow your suggestions, because your orange socks signal to me that you are part of my social tribe and can be trusted.

But what if you *emailed* me and said "hi, I am wearing orange socks right now, buy this stock"? What if I bought the stock? What if it turned out that you were not wearing orange socks? Is that securities fraud? You lied about what color socks you were wearing. Your lie probably was not material to a *reasonable investor*, because this is stupid. But it was material to *me*. I care a lot about sock color, and I bought the stock because of your false representations. I am not reasonable, but I was deceived.

What if you knowingly exploit this? What if you know that there are a lot of people out there who blindly trust orange-sock-wearers, and so you run a pump-and-dump scheme whose mechanism is (1) you buy a penny stock, (2) you post on social media under the handle OrangeSockWearer420 saying “buy this penny stock, I did,” (3) the orange-sock community buys the stock and (4) you sell at a profit. Is that securities fraud? You are doing something ... dishonest? exploitative? annoying? — but you are not *lying about the stock*. You’re barely mentioning the stock; you’re certainly not misrepresenting its business or financial results. The business and financial results are not, for your audience, the point. You are deceiving your audience about something that is not material to a reasonable investor, but that is foreseeably material to *them*.

Securities law does not traditionally focus on this, because this is stupid. Securities law traditionally focuses on the reasonable investor, because we want to protect reasonable investors, and because in some sense we *can’t* protect unreasonable investors. But reasonable investors seem to be getting harder to find.

Here is a fun paper on “Securities Fraud and the Market for Individual Stocks,” by Sue Guan:

As long as stock markets have existed, so too have those who invest for idiosyncratic reasons unrelated to achieving financial returns. Some investors may be motivated by personal utility, others seek to signal loyalty to corporations, some might see their investments as an expression of their faith, others chase the latest fads, and still others simply make uninformed investment choices. Yet until relatively recently, these forms of demand-driven investing have received little attention: most commentary has either dismissed the phenomenon as noise or attempted to absorb it into existing models of fundamental value-based investing.

This Paper counters that understanding. It argues that demand-driven investing can create a market for individual stocks that is distinct from noisy trading as well as from fundamental-value-driven trading. This is especially so as the voices of retail investors, social media influencers (“influencers”), and other non-traditional, values-driven investors in today’s capital markets have grown in volume and strength. It is increasingly difficult to ignore the investors who systematically choose companies to invest in based on demand-driven factors such as alignment on environmental, social and governance (ESG) issues, an influential investor’s commentary on a security, and preferences between cultural and political values—in addition to seeking financial returns.

The point is that if you are buying stocks for reasons of fun or values or social affinity, (1) lying to you about a company’s financial results won’t have much effect but (2) lying to you about something *else* might. Guan writes:

Imagine a finfluencer who tells a lie, stating that a company's CEO is dating Taylor Swift. For various reasons, the lie appears plausible. Taylor Swift's many fans rush to buy the stock, inflating its price. Evidence emerges that Swift is in fact not dating the CEO, and the stock price plummets. Yet despite the statement being objectively false, the question of materiality remains: is the CEO's (fabricated) relationship with Swift material? If not, there would presumably be no recourse for Swift's fans who bought the stock, even though they suffered financial harm. As one commentator has stated, "is the test for materiality satisfied in cases where market participants seemingly respond in a heuristic fashion to a falsehood by defendants? This is a powerful possibility. If something is immaterial, people are free to lie about it without any liability at all."

Finally, recall the example of Ryan Cohen and his smiley face moon emoji. In other work, I have analyzed Cohen's tweet vis-à-vis the materiality doctrine more fully. There, I argued that the materiality of Cohen's tweet from the perspective of a reasonable rational investor might yield a very different result from the perspective of a reasonable investor who invests based on personal utility as well as Cohen's identity—what I have called a "reasonable retail investor." The reasonable rational investor might easily dismiss the significance of Cohen's tweet; the reasonable retail investor is far less likely to do so.

Yes, the moon emoji. We talked about that case here too. Cohen is an important meme-stock influencer (and current CEO of GameStop Corp.) who (1) owned a bunch of stock in Bed Bath & Beyond Inc., (2) tweeted a moon emoji about Bed Bath & Beyond and (3) dumped all his stock when the price soared because of, I guess, the moon emoji? Investors sued, arguing that the moon emoji might be securities fraud, and a judge found that the moon emoji could be read as "an expert insider's direction to buy or hold." I was skeptical, but that's only because I'm old-fashioned. I wrote:

Back in the olden days, I learned that securities fraud meant lying about things that would be material to a "reasonable investor." Everyone understands that if you go around saying "Bed Bath has doubled sales this quarter" or "Bed Bath has signed an agreement to be bought by Amazon at \$40 per share," and you are lying, then that is fraud: You are saying things that aren't true and that would be material to a reasonable investor thinking about the stock and the company and its cash flows.

But in the world of meme stocks, *there are no reasonable investors*. What matters is not cash flows or business plans but memes and influencers, and so the standards for fraud are ... perhaps different? In the world of meme stocks, if you are a meme-stock influencer, and you tweet a moon emoji when you are in fact feeling pensive-face-emoji, then arguably you are lying, and arguably your misleading emoji is material to your meme-stock fans. They are not reasonable, necessarily, but they are the investors you've got, and if the stock doubles due to your emoji then I guess it was material.

That, I think, is roughly Guan's view: Securities regulation has to meet investors where they are, and if they're all into vibes then lying about the vibes is fraud. I'm not sure it's right, though, either in theory or as a practical prediction of what courts and regulators will do. I have speculated that there will not be a ton of securities fraud enforcement over the next four years, mostly for the obvious reasons, but also for this one. If financial markets are increasingly a game, if what matters are not business fundamentals but memes and influence, then maybe nothing is securities fraud.

SWF?

I guess the main points are:

1. Donald Trump and Elon Musk are both very good at creating chaos in financial markets.
- 2. Broadly speaking, their chaotic interventions have predictable impacts. When Musk or Trump endorses a memecoin, that coin goes up; when Trump announces a surprise trade war, the dollar goes up and the stock market goes down. If Trump or Musk called you with advance warning of their plans, you could probably make profitable trades on those plans.
- 3. Trump, at least, does not seem all that averse to profiting a little bit from this. (When he endorsed a memecoin, it added billions of dollars to his net worth, just as a for instance.)
- 4. Nor does the Trump administration seem all that concerned about traditional ethical restrictions on profiting off government service.
- 5. Bloomberg News reports:

President Donald Trump signed an executive action he said would direct officials to create a sovereign wealth fund for the US, following through on an idea he floated during the presidential campaign.

"We have tremendous potential," Trump told reporters in the Oval Office on Monday as he announced the move. The president said the action would charge Treasury Secretary Scott Bessent and Howard Lutnick, the nominee for Commerce secretary, with spearheading the effort.

Bessent, who joined Trump at the Oval Office, said the fund would be created in the next 12 months, calling it an issue "of great strategic importance." ...

Lutnick said the US government could leverage its size and scale given the business it does with companies, citing drug makers as an example.

"If we are going to buy two billion Covid vaccines, maybe we should have some warrants and some equity in these companies," he said. ...

Trump floated the idea of a sovereign wealth fund during an address at the Economic Club of New York during the campaign in September, where he proposed funneling money from tariffs into a wealth fund that could invest in manufacturing hubs, defense and medical research.

"We will create America's own sovereign wealth fund to invest in great national endeavors for the benefit of all the American people," Trump said at the time and suggested that the Wall Street and corporate leaders at that event could have a role to play, helping to "advise and recommend investments."

I have no idea what this will be, and Trump's plans apparently include "TikTok, we're going to be doing something perhaps ... and we might put that in the sovereign wealth fund, whatever we make, or if we do a partnership with very wealthy people — a lot of options, but we could put that as an example in the fund," so you could imagine various sorts of straightforward corruption.

But there are more interesting possibilities! Trump announced drastic tariffs over the weekend, the stock market fell sharply yesterday morning, and then he announced that he was kidding over the course of the day and the market recovered. If you were an aide to Donald Trump, and you sat with him when he approved tariffs and then listened in on his phone calls yesterday when he walked them back, you could have made money trading on the news in your personal account. But that would be bad; it would be insider trading; don't do that.

But if you were an aide to Donald Trump *in charge of the sovereign wealth fund*, could you trade for the fund using inside information about what Trump was up to? Every time he wants to do something financially chaotic, he tells you 10 minutes in advance, and you put on some trades? Not a traditional sovereign wealth fund — not long-term investments in strategically important businesses, not diversified investments in stocks and bonds — but more of a day-trading, insider-trading, market-timing, volatility-harvesting operation. Also so much crypto.

It just seems like a bad enough idea that it might happen. Here are two important objections:

1. The people on the other side of these trades would be, you know, regular US investors, who might feel aggrieved about losing out to government insider trading. On the Money Stuff podcast earlier this year, we discussed a reader question about why the government doesn't regularly insider trade on, e.g., economic data, and my main answer was this one: The government is not primarily in the business of *making money*, but of *serving its citizens*, and insider trading against the citizens seems like bad service. But I am not sure the administration would care that much. Arguably this is mostly a transfer of wealth from BlackRock to the Treasury, and BlackRock is politically disfavored.

- 2. The more you do this, the less effective it is. I said above that "the stock market fell sharply yesterday morning" when Trump announced huge tariffs, but it didn't fall *that* sharply. "It's Almost Like They Knew Trump Was Bluffing" was my Bloomberg Opinion colleague John Authers' headline; "Markets Bet Trump's Tariffs Are Art of the (Temporary) Deal" was James Mackintosh's headline at the Wall Street Journal. The more frequently you try to inject chaos into markets, the more markets will tune you out; the more you try to harvest volatility, the more you will dampen volatility.

1869

Disclosure, I am an alumnus of Goldman Sachs Group Inc. But I never got anywhere near the *partnership* at Goldman, so I am apparently not eligible for this:

Goldman Sachs has slashed the investment minimum by 90 per cent for a new alumni vehicle that will put money into the Wall Street bank's private market funds.

The bank is fundraising for its 1869 programme, which takes its name from the year Goldman was founded, and follows a similar fund raised in 2022, according to people briefed on the matter. ...

However, this time Goldman has reduced the investment minimum from \$250,000 to \$25,000. A little over half of former Goldman partners invested in the original 1869 fund, the people said, raising about \$1bn.

I have to say this strikes me as bad advertising? One of Goldman's main selling points to potential employees is its aspirational partnership, "the most exclusive club on Wall Street" etc., with its promise of power and prestige and riches. That promise is a bit tarnished in recent years, as Goldman becomes more of a normal public company with power centralized in the hands of its chief executive officer, but the money is still a lure. If I ran Goldman, I would want to create the impression that \$250,000 is pocket change to its retired partners. They don't need a discount, they're Goldman partners!

Citi

I suspect that there are some creative industries where letting employees work from home a lot is an important competitive advantage. Creative people often like flexibility and don't like rigid rules, and if your advertising agency or software startup requires only three days a week in the office while your competitors require five, you might be able to recruit the best advertising visionaries or software developers and produce the best work.

And then clearly there are industries where in-person collaboration is really important, and if you let your employees work from home a lot, your work will be *less* creative, and worse, than the work done by your competitors who are back in the office full time.

And then the question is, which one is investment banking? There is an ongoing experiment:

Citigroup chief executive Jane Fraser has told top executives that the bank will continue to allow most employees to work remotely two days a week, in a move that puts it out of step with some rivals and the Trump administration.

Fraser pledged to maintain the hybrid work schedule on the executive's quarterly call with the US bank's managing directors in mid-January, according to people familiar with the matter.

Citi is sticking with flexible work even as other bankers are upping their in-office mandates. ...

On the recent management call, Fraser called Citi's more flexible in-office work requirements a competitive advantage. It can be a recruitment tool for Citi to attract employees who dislike the more rigid approach at some rivals. However, competitors have argued that bringing staff back to the office full time is vital to foster better collaboration and mentorship for younger bankers.

Flexible in-office requirements surely are "a recruitment tool for Citi to attract employees who dislike the more rigid approach at some rivals," but the question is: Are those the employees you want? That's a genuine question. Probably in recruiting junior bankers you mostly want people who want to work long hours, be mentored and do whatever it takes to get a deal done, but in recruiting senior bankers you might favor the less rigid thinkers who do their best merger structuring in their pajamas.

Things happen

UBS Absorbs Tougher Swiss Trading Rules While Global Peers Delay. UBS warns \$3bn buyback plan is hostage to Swiss capital overhaul. OpenAI's Sam Altman and SoftBank's Masayoshi Son Are AI's New Power Couple. Palantir predicts windfall from Elon Musk's government cost-cutting. Everyone in crypto is 'begging' for a spot on Trump's new advisory council. Apollo Raises Record From Private Wealth as Credit Grows. Apollo Builds \$5 Billion Multi-Strategy Fund With 30-Year Life. Waffle House adds egg surcharge amid rising egg prices. "Olive Garden is under fire once more after a customer alleged the use of hot dog buns instead of its standard breadsticks."

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- 1. The contract specification page links to a Kalshi document suggesting that "Super Bowl" *could* be in the event description, but it isn't. (Also the team names are trademarked, so the contract names only the cities, not the Chiefs and Eagles.) If you live in Philadelphia and have friends in Kansas City, you should consider betting on this contract, setting up a flag football game between your Philadelphia friends and your Kansas City friends, playing it on Feb. 9, printing posters calling it "the Pro Football Championship," rigging the game, and then demanding a payout. This is not gambling advice and probably wouldn't work, but it would be funny.
- 2. Hilariously Kalshi *did* list an assassination-related contract for a while, oops.
- 3. The rule proposal cites the legislative history of the statute, which specifically mentions the S*per B*wl: "During the 2010 Colloquy, Senator Lincoln stated that, among other things, CEA section 5c(c)(5)(C) was intended to 'prevent gambling through futures markets' and to restrict derivatives exchanges from 'construct[ing] an "event contract" around sporting events such as the Super Bowl, the Kentucky Derby, and Masters Golf Tournament.'" I guess if you're a senator you can use the name.
- 4. That said, we have talked a few times about the civil and criminal case against Andrew Left. Broadly speaking, Left is not charged with lying *about the companies* he was long or short; rather, he is charged with lying about his own trading and intentions. If he shorted a stock, *accurately* said that the company was a fraud, covered his short as the stock went down, and then went on television to say that he had not covered, the SEC argues that that would be material fraud, because his audience cared about his position, not just his analysis. Left was thus arguably misusing his position as a financial influencer, even if his actual statements about companies were sincere and accurate.
- 5. Musk seems genuinely weirder in this regard, and he never seems to trade all that tactically around his chaos, though I can't be sure.
- 6. Not legal advice and, you know, who's going to prosecute you?
- 7. No it isn't, since BlackRock index funds don't trade that much. It's a transfer from, like, Citadel to the Treasury, which also has some political appeal. Gotta punish the people shorting Trump Media stock!

Securities Law

Feb. 5, 2025, 9:17 AM PST

UnitedHealth Raises Concerns With SEC Over Ackman Post on X (1)

By John Tozzi

UnitedHealth Group Inc. said it contacted the US Securities and Exchange Commission with concerns about investor **Bill Ackman**'s since-deleted post on X suggesting that the company overstated profits.

UnitedHealth shares slipped as much as 4.3% Wednesday after Ackman's post suggested shorting the health insurer's stock while questioning its profitability.

"I would not be surprised to find that the company's profitability is massively overstated due to its denial of medically necessary procedures and patient care," Ackman wrote Tuesday.

A UnitedHealth spokesperson said the company reached out to regulators about the billionaire's post.

"Health insurance has long been subject to significant regulatory oversight and earnings caps," the company said in a statement, adding that claims that insurers "can somehow over-earn are grossly uninformed."

A representative for Ackman had no immediate comment.

Ackman, 58, gave up short selling after a disastrous bet against the weight-loss shakes and vitamins company Herbalife Ltd. He made a \$1 billion bet against the company in 2012 and spent more than five years trying to prove it was a pyramid scheme. Instead, the shares more than doubled, with billionaire **Carl Icahn** and other investors taking the other side of the trade.

(Updates with Ackman's exit from short selling in last paragraph.)

--With assistance from **Angel Adegbesan** and **Katherine Burton**.

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John Lauerma, Peter Eichenbaum

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B. Riley, Former Investment Banker Settle Trade Secrets Dispute

By Maia Spoto

- Parties filed notices in L.A., Dallas state courts
- B. Riley Financial Inc. may spin off securities business

B. Riley Securities Inc. has reached an agreement to end litigation that spanned two states with one its former top investment bankers over allegations that the banker stole trade secrets as he left the firm.

Attorneys for B. Riley filed a notice of nonsuit with prejudice Monday in Dallas state court. The same day in Los Angeles, attorneys for banker David Merriman filed an unconditional settlement notice that gives Jan. 23 as the date of settlement between the parties. Neither party's lawyers could immediately be reached for comment.

B. Riley in December accused Merriman in Texas District Court, Dallas County of stealing trade secrets, saying he plotted to take clients and staff to Texas Capital Bank before he unexpectedly resigned from his senior managing director position. The firm said Merriman forwarded confidential data to his and his wife's email addresses more than a month before he left.

Merriman then filed a lawsuit in California Superior Court, Los Angeles County, denying the allegations and saying he was part of a group of people leaving "a sinking ship" where business development had become nearly impossible.

B. Riley Financial Inc. has briefed staff on a potential plan to spin off its securities business into a separate company, Bloomberg reported Jan. 31. The firm's value has tumbled since the collapse last year of Franchise Group Inc., which was one of B. Riley's main holdings.

Bressler, Amery & Ross PC represents B. Riley. Quinn Emanuel Urquhart & Sullivan LLP represents Merriman.

The cases are B. Riley Securities Inc. v. Merriman , Tex. Dist. Ct., No. DC-24-21565, notice of nonsuit 2/3/25 and Merriman v. B. Riley Securities, Inc. , Cal. Super. Ct., No. 24STCV33550, settlement notice 2/3/25 .

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Trump's Crypto Project Appears to Buy Ether After Price Sank

By Muyao Shen

- Ether tumbled by more than 25% at one point during the weekend
- 'Great time to add \$ETH,' Eric Trump wrote on X on Monday

World Liberty Financial, the decentralized-finance project linked to Donald Trump's family, appears to have added tens of million of dollars worth of the Ether cryptocurrency after crypto markets crashed during the weekend as the US president briefly imposed tariffs on Mexico and Canada.

And Eric Trump, the president's third child, posted on social media platform X on Monday that "In my opinion, it's a great time to add \$ETH. You can thank me later." He has since edited the post and deleted the second sentence. Representatives for World Liberty and the Trump Organization did not immediately respond to requests for comment.

Since the launch of World Liberty in October, market observers have raised questions about potential conflicts of interest for the Trumps given the administration's sway over regulations. Typically, a promise of a return on an investment such as what Eric Trump first alluded to could cause scrutiny from regulators such as the US Securities and Exchange Commission, which has often seen that as indicating an asset is a security that the agency should regulate.

"We're all still navigating what the new paradigm is going to be with respect to the intersection of crypto and the securities laws going forward," said **Ryne Miller**, partner at Lowenstein Sandler LLP and former general counsel for failed crypto exchange FTX's US unit. "What will not change is that regulators are going to expect transparency and disclosure, and regulators will continue to be very aggressive where they suspect fraud or other similar misconduct. What we do expect to change is that good faith statements and actions about crypto projects will not risk immediate escalation to a SEC enforcement investigation, a welcome change."

Digital wallets belonging to World Liberty on Monday added about 21,177 Ether tokens in net inflows worth about \$55 million, according to blockchain data analytics firm Nansen, a figure which includes both purchases as well as the conversion of an Ether derivative to the cryptocurrency. Between Jan. 18 and Feb. 1, Nansen also estimated that World Liberty's digital wallets in total received net inflow of Ether worth about \$340 million before the funds were sent to wallets belonging to Coinbase Prime.

World Liberty's X account also posted on Monday that the project was not selling tokens, when many in the crypto community questioned whether moving its assets to Coinbase Prime meant it was selling them.

Crypto-related endorsements are not uncommon, and many crypto firms have frequently enlisted celebrities like Kim Kardashian to promote projects. Those partnerships were under legal scrutiny when Gary Gensler was SEC chair. Founders of crypto companies promoting tokens via social media have also faced scrutiny in the past.

World Liberty has been promoted as a DeFi lending platform, though it hasn't become operational yet. Its purchases of a number of niche tokens in the past have put the firm at the center of the crypto market's discussion.

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Dave Liedtka, Michael P. Regan

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Tesla Sales Plunge 59% in Germany to Lowest Level in Years

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Feb. 5, 2025, 9:18 AM PST

Marilen Martin

Bloomberg Editorial

William Wilkes

Bloomberg Editorial

- Registrations of 1,277 cars is worst showing since July 2021
- Carmaker lost ground in EV market that was up 54% last month

By Marilen Martin and William Wilkes

(Bloomberg) --

Tesla Inc.'s sales plummeted 59% last month in Germany, adding to indications that Chief Executive Officer's Elon Musk political activities are hurting the carmaker's business in major electric vehicle markets.

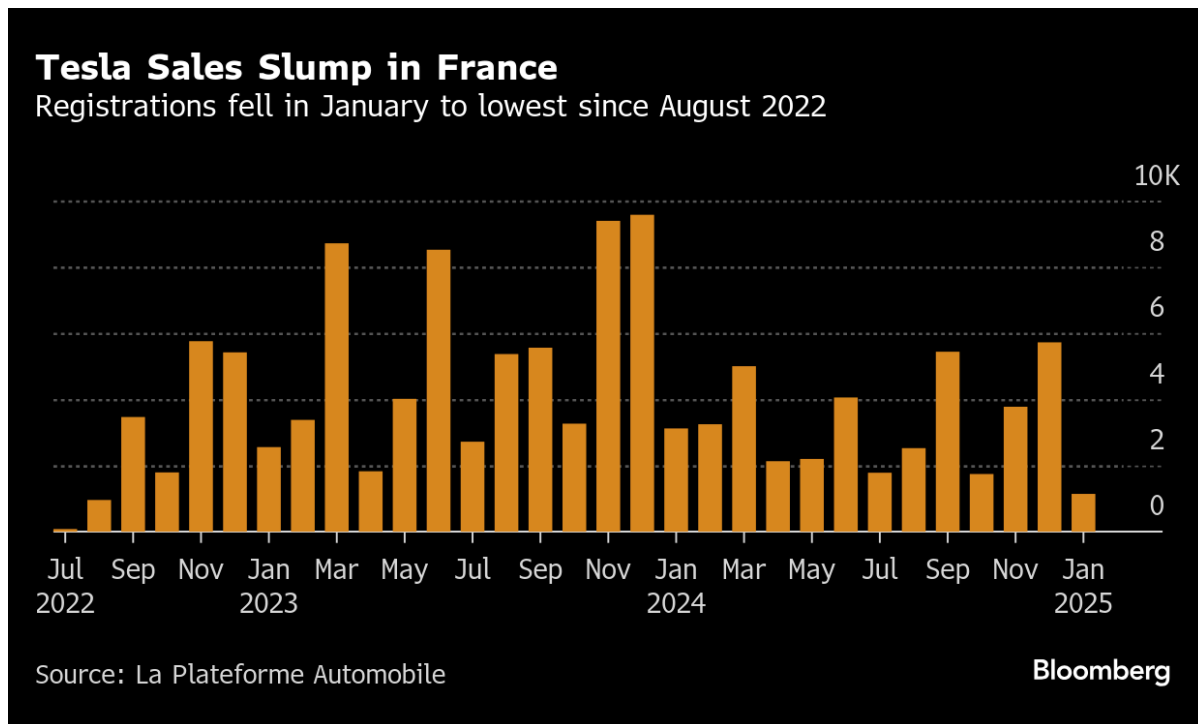
The US manufacturer registered only 1,277 new cars in January, its lowest monthly total since July 2021, according to the German Federal Motor Transport Authority.

Tesla lost substantial ground in an EV market that was up 54% for the month. Musk's intervention in Germany's upcoming federal election likely factored in the result — a poll taken in mid-January found the CEO was viewed unfavorably, and that his political interventions were unwelcome.



Tesla also posted declines in France and the UK last month, meaning its sales fell in Europe's three largest EV markets. In addition to vouching for Germany's far-right Alternative for Germany party and taking on UK Prime Minister Keir Starmer, Musk spent the month cementing his position in the administration of US President Donald Trump, who's threatened to hit the European Union with tariffs.

The company's sales plunged 63% last month in France — the EU's second-biggest EV market, after Germany — and dropped 12% in the UK. Tesla shares traded down as much as 3.1% as of 12:15 p.m. Wednesday in New York.



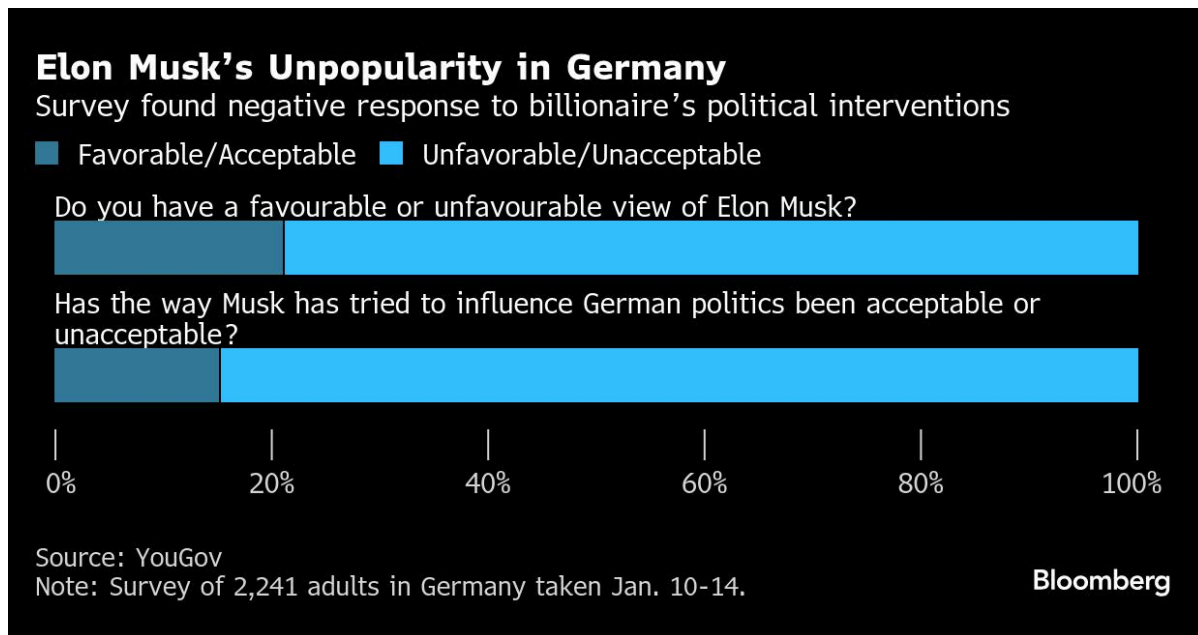
AfD Support

Musk, 53, hosted a live discussion with AfD leader Alice Weidel on his social media site X on Jan. 9, giving a platform to the co-chair of a party that's opposed Tesla's construction of a plant outside Berlin and taken a dim view on renewable energy.

During a virtual appearance at an AfD rally later in January, the Tesla CEO urged Germans to be proud of their culture and, in an apparent reference to wartime atrocities under the Nazis, discouraged "too much focus on past guilt."

The remarks — made just before the 80th anniversary of the liberation of the Auschwitz death camp — sparked outrage in a country where reckoning with the past is central to its postwar identity.

Read More: Musk's Election Interference Rattles German Political Class



Other factors outside of politics are likely at play in Tesla's slow start to the year. The company is changing over assembly plants to produce a redesigned Model Y, its best-selling vehicle, which will cost the manufacturer several weeks of lost production.

Tesla also may be contending with shortages of inventory in some markets due to the all-out push the company made to boost sales late last year.

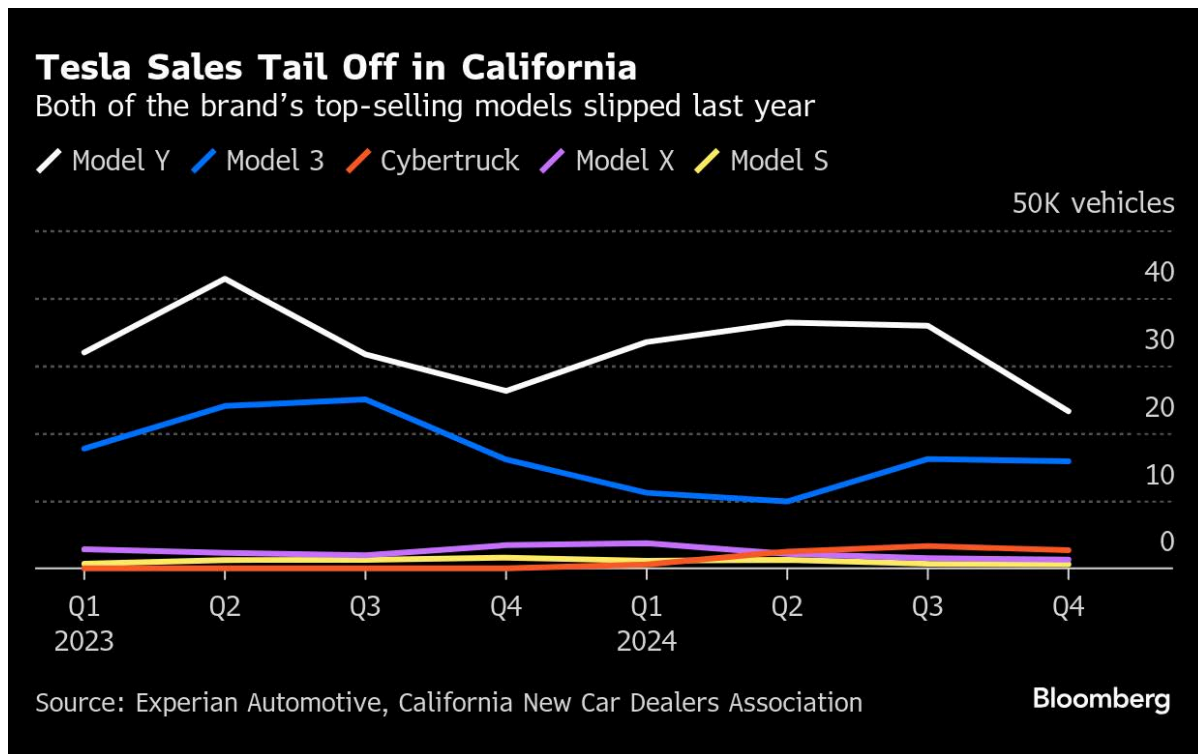
While the automaker delivered more vehicles than ever in the fourth quarter, it fell short of a forecast for slight growth for the full year. Instead, the company posted its first annual decline in more than a decade.

California Weakness

But there have been more signs outside of Europe that Musk's politics are having an effect on the carmaker he runs. Tesla registered fewer cars in California in all four quarters of 2024, as sales of its second-most important vehicle — the Model 3 — plunged 36% for the year.

California went for Trump's opponent Kamala Harris by a wide margin in November, and Musk feuded with Governor Gavin Newsom throughout last year.

Read More: Musk and Trump Are Getting a Foil in California Governor Newsom



In Germany and across the EU, Tesla's competitors including Volkswagen AG, Stellantis NV and Renault SA are under pressure to sell more EVs in order to meet tougher pollution standards taking effect this year. VW and BMW AG were among manufacturers that gained share in Germany's EV market last year, while Tesla lost ground.

In addition to having to contend with those more concerted efforts from makers of combustion cars, Musk will face off with rival EV brands looking to seize on his divisive politicking.

"We get a lot of people writing that they don't like all this," Polestar CEO Michael Lohscheller told Bloomberg News in an interview last month. The German national called Musk's endorsement of the AfD "totally unacceptable" and said he's told salespeople to target disgruntled Tesla owners for potential business.

(Updates with polling starting in the third paragraph, more background after last chart.)

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Jamie Nimmo

Tesla sees German car sales plunge in January

 [reuters.com/business/autos-transportation/tesla-sees-german-car-sales-plunge-january-2025-02-05](https://www.reuters.com/business/autos-transportation/tesla-sees-german-car-sales-plunge-january-2025-02-05)

Reuters

By Reuters

February 5, 2025 6:42 AM PST Updated 3 hours ago

People gather around the Cybertruck vehicle by Tesla at the Mall of Berlin in Berlin, Germany, May 2, 2024. REUTERS/Lisi Niesner/File Photo Purchase Licensing Rights , opens new tab

FRANKFURT, Feb 5 (Reuters) - Tesla (TSLA.O) , opens new tab sold almost 60% fewer cars in Germany in January than in the year-earlier period, as the U.S. electric vehicle maker faces a test of popularity amid headline-grabbing political involvement by its billionaire CEO Elon Musk.

German road traffic agency KBA's website on Wednesday showed the number of newly registered Tesla cars fell 59.5% to 1,277 in January, while the overall German market was down just 2.8% at slightly more than 207,000 vehicles during the month.

The overall segment of battery-electric vehicles, where Tesla is competing, however, gained popularity in January, with sales up 53.5% at almost 34,500 vehicles across all brands.

KBA did not give reasons for the developments in car sales.

Car registration data in Sweden and Norway earlier this week also showed that Tesla lost market share there in January.

A total of 405 new Teslas were registered in Sweden last month, down 44% from January 2024, while registrations in Norway fell to 689, a decline of 38% over the same period, despite soaring overall demand for cars in the two countries.

In addition to his strong backing for U.S. President Donald Trump, Musk has also voiced polarising opinions on politics in Europe and beyond, drawing criticism from European capitals, including Norway's prime minister and Germany's chancellor.

Musk, who also runs the X social media platform, has dismissed criticism against him as an affront to democracy and free speech.

Reporting by Ludwig Burger, Editing by Miranda Murray

Ex-Celsius VP Cops to \$1.6 Million Securities Fraud Scheme

By John Woolley

A former Celsius Holdings Inc. vice president pleaded guilty on Tuesday to one count of securities fraud after profiting more than \$1.6 million from an insider trading scheme, the US Justice Department said.

Stephen George leveraged material non-public information about Celsius's better-than-expected financial performance days after he left the company in April 2023 in order to buy 20,000 shares of the company's common stock and 300 call options, then sell that stock and options the next trading day after Celsius's announcement, the US said. George faces a maximum penalty of 20 years in prison and a \$5 million fine, the plea agreement said.

- George entered the plea agreement less than two weeks after the government accused him of insider trading
- George is scheduled to be sentenced by Judge William P. Dimitrouleas of the US District Court for the Southern District of Florida on April 28, the Justice Department's announcement said
- The plea agreement also required George to forfeit to the US any property traceable to his admitted securities fraud, including accounts at Bank of America, JPMorgan Chase, and Merrill Lynch

Kobre & Kim LLP and King & Ruiz represent George.

The case is US v. George , S.D. Fla., No. 0:25-cr-60011, plea agreement 2/4/25 .

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Securities Law

Feb. 5, 2025, 5:29 AM PST

Green Investment Defies Gravity of Anti-ESG Era: Mark Gongloff (Correct)

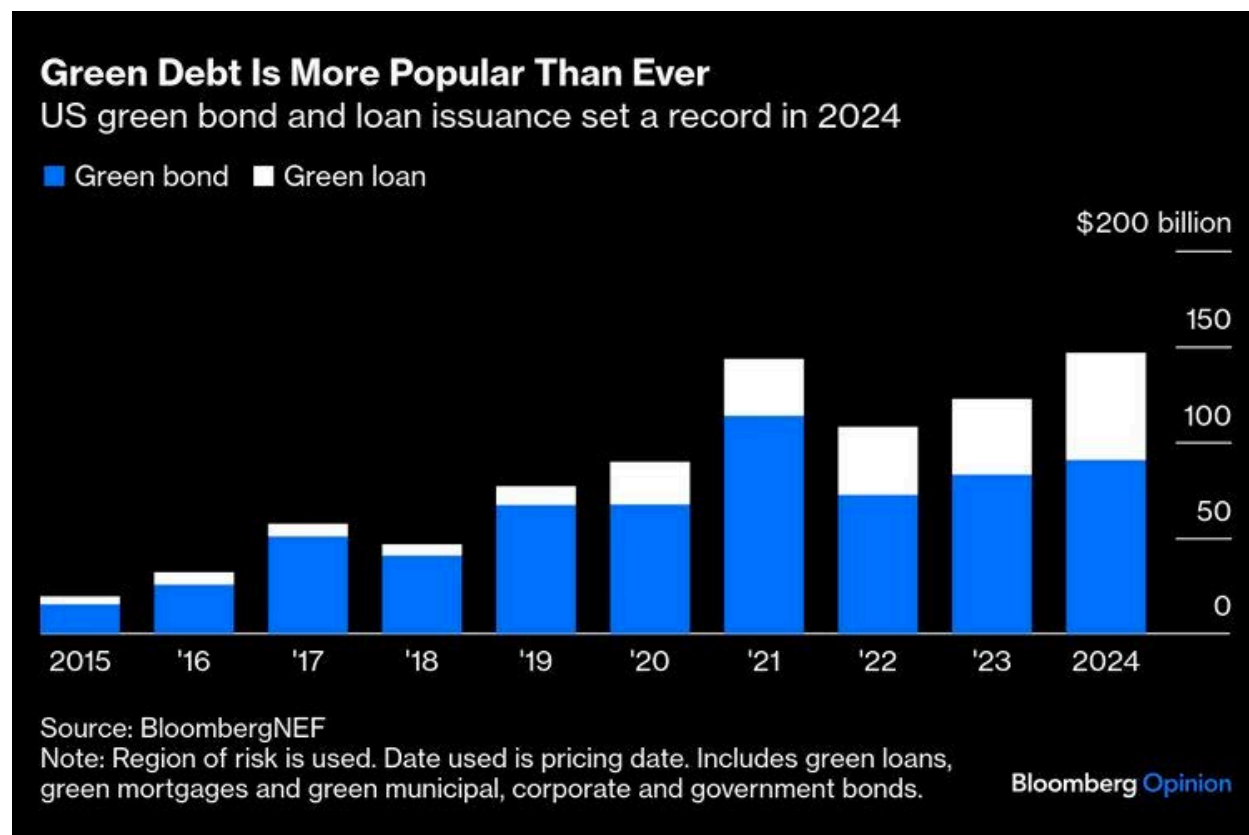
By Mark Gongloff

Opinion

In these days of President Donald Trump's return to power, when entire government websites are being pulled down and scrubbed of so-called woke references, investing by environmental, social and governance factors is so roundly despised that green finance is ... smashing records everywhere? Even in its [flop era](#), ESG is apparently still capable of producing big hits.

US issuance of bonds and loans for clean-energy projects [set a record](#) of nearly \$147 billion last year, according to Bloomberg NEF. Green municipal bonds jumped 22% from a year earlier despite red-state efforts (not always successful) to pass anti-ESG laws and [sue green-minded investors](#).

All this climate finance also happened despite every large US bank recently [fleeing the Net Zero Banking Alliance](#), a coalition pledging to cut carbon emissions, amid growing political hostility at home and abroad. (The NZBA was originally part of the Glasgow Financial Alliance for Net Zero, which is co-chaired by Bloomberg LP founder Mike Bloomberg and Mary Schapiro, the former head of the Securities and Exchange Commission.)



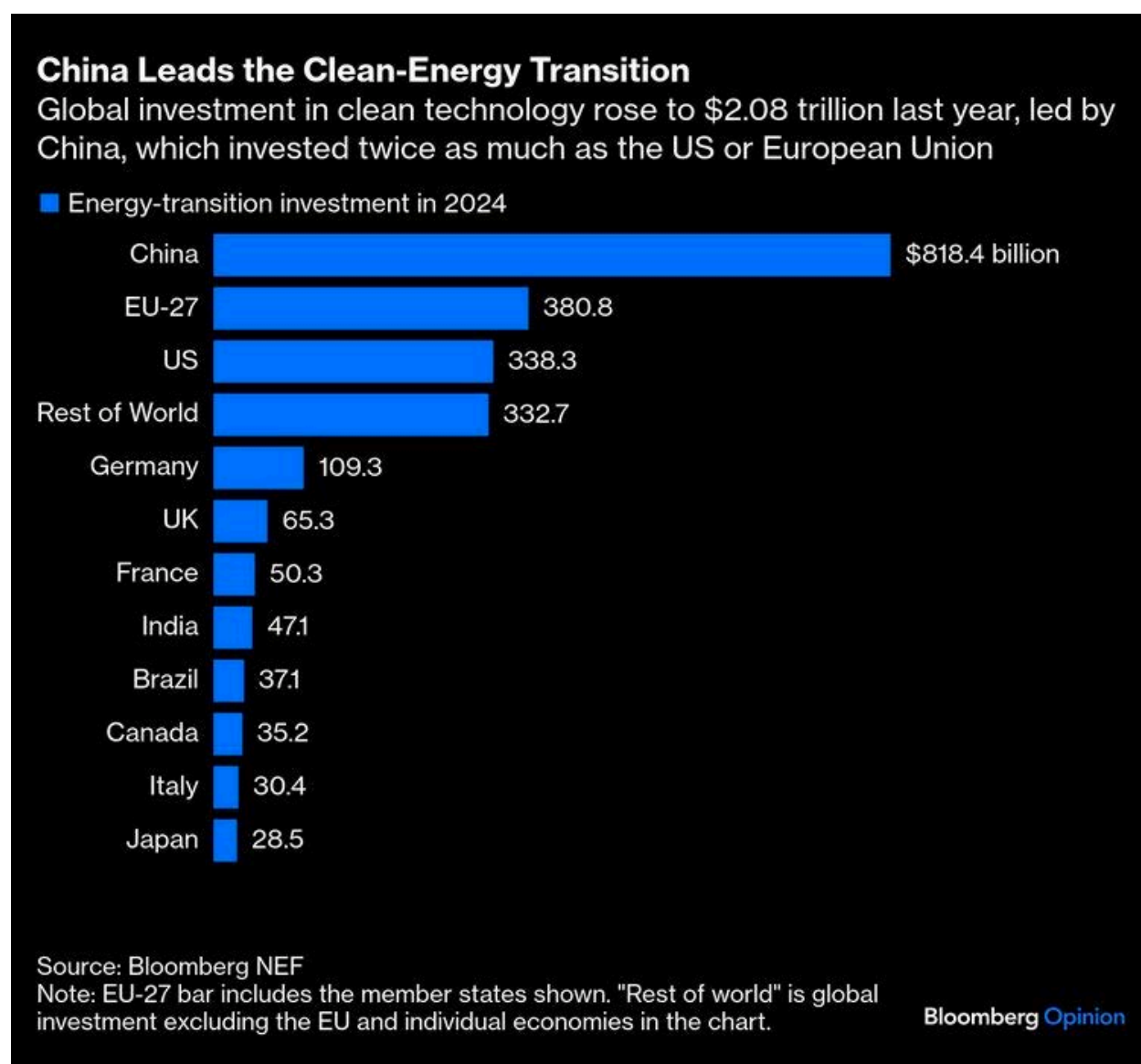
There are no green payday-lending or loan-shark industries as of this writing, so it's safe to say these bonds and loans were mainly issued by banks. While scurrying to avoid any public association with ESG, they're also scurrying to make money on it.

"Ultimately, despite vocal pushback at the state and federal level against sustainability, core sustainable debt markets will likely continue to grow as the energy transition provides further opportunities," BNEF analyst Jameson McLennan wrote in a report.

The key word here is “opportunities.” The transition away from fossil fuels to clean energy may be under assault by Trump and other far-right politicians around the world, who deny either that human-caused climate change is real or that it is a problem in need of solving. But the [transition is inevitable](#), oblivious to such opinions, and it stands to make its financiers a lot of money. Just last week, less than two months after Goldman Sachs Group Inc. [joined the exodus](#) from the NZBA, Bloomberg News reported that Goldman Sachs Asset Management plans to raise [\\$3 billion for climate credit](#) strategies.

Globally, green investment grew 11% to a record \$2.1 trillion last year, according to a separate BNEF report last week, with \$1.1 trillion raised in debt and equity (those darn banks again). Growth was slower than the 24% to 29% pace between 2021 and 2023, but annual clean-tech investment has more than doubled from \$929 billion in 2020. And it didn’t fall off the table as one might expect in a year when Trump was reelected, European green parties suffered [deep parliamentary losses](#) and fossil-fuel producers [derailed global climate meetings](#).

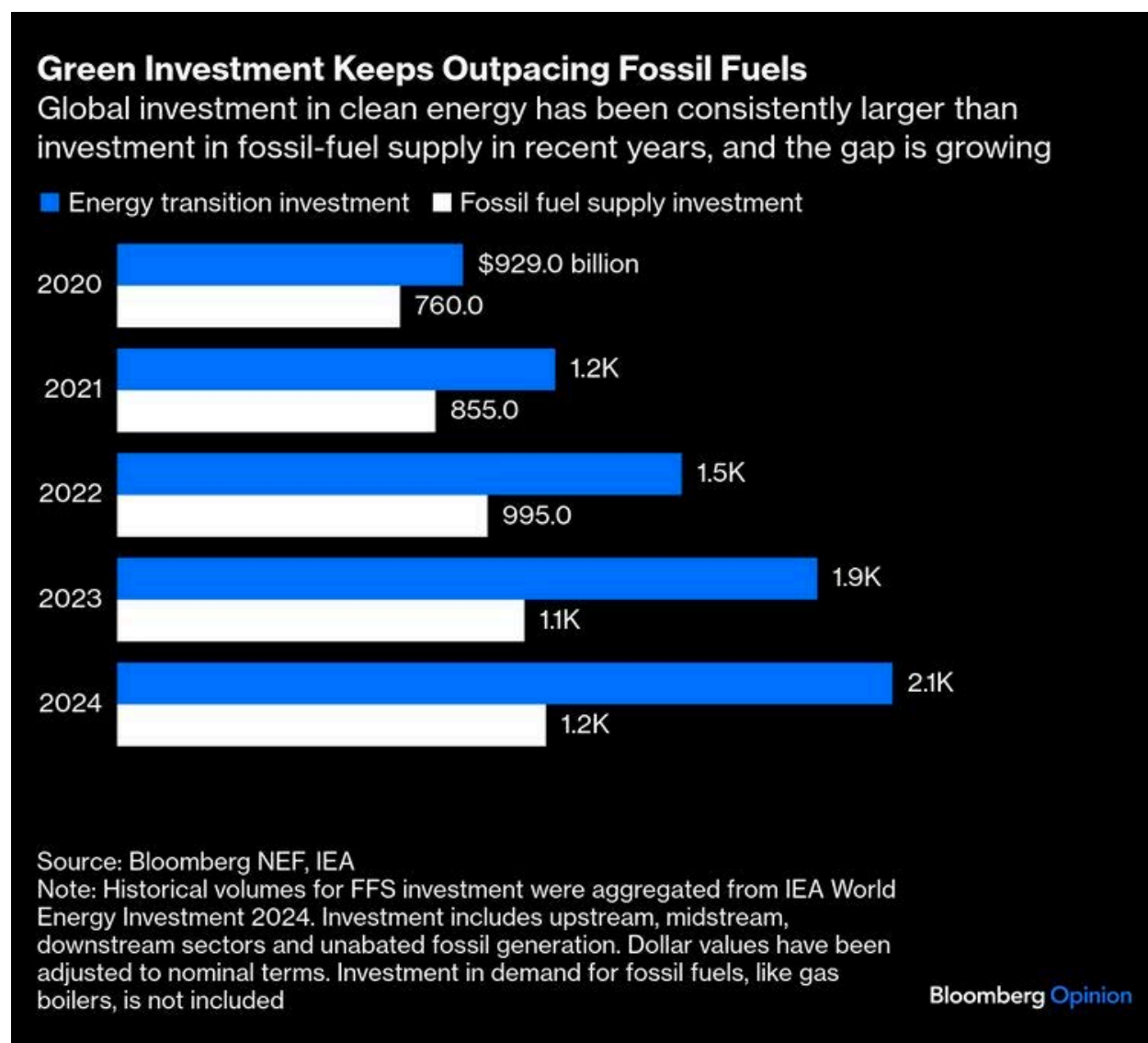
Battery storage capacity increased 76% over the year, solar installations rose 35% and electric-vehicle sales grew 26%. Even deeply hated wind power, which Trump incorrectly claims causes cancer and kills whales, gained 5%.



To be sure, this growth was driven mainly by China, which invested \$818 billion in 2024, up 20% from a year earlier and more than double the \$338 billion spent by the US. But the US and its banks are still far and away the world leaders in green debt and equity issuance. And for all of Trump's efforts to not only ignore global heating but stoke more of it by drilling, baby, drilling, the US can't afford to cede more of this ground to China without losing global influence and technological skill.

Of course, those same banks are still making money on fossil fuels. The global financial industry has funneled roughly \$7 trillion to oil, gas and coal since the Paris climate agreement in 2016, according to a study last year by the Rainforest Action Network, Sierra Club and others.

The good news is that green finance is far outpacing the dirty stuff, BNEF points out. The \$2.1 trillion invested in clean tech last year was nearly double the \$1.15 trillion going to fossil-fuel supply. The gap between the two has yawned from just \$169 billion in 2020 to \$931 billion last year. Not even Trump's zeal for oil, gas and "clean coal" can stop that trend. As my Bloomberg Opinion colleague Liam Denning has written, the [markets decide](#) how much oil and gas gets pumped, not presidents.



And the markets keep favoring clean energy, though they may be at a moment of [peak confusion](#) about its fate. The easiest part of the energy transition may have already happened, which helps explain slowing growth rates, BNEF analysts pointed out. Political pressures certainly aren't helping. And we're running out of time to limit global heating to 2 degrees Celsius above preindustrial averages.

But as long as policymakers and investors recognize both the many risks of letting heating become more catastrophic and the potential payoffs from stopping it, there's still hope.

More From Bloomberg Opinion:

How Labour [Could Save](#) Its Green Reputation: Lara Williams

- Will These 32 Republicans [Save the IRA](#) From Trump?: Liam Denning
- Real [ESG Sin](#) Isn't Ideology, But That It's Useless: John Authers

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(Corrects the leadership of the Glasgow Financial Alliance for Net Zero in the third paragraph. Mark Carney is no longer chairman of Bloomberg Inc.)

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Pepsi Points to Risk of Sustainability Scrutiny, Looming Tariffs

By Clara Hudson

- Pepsi has faced lawsuits over recyclability of plastic bottles
- 'No assurance' of meeting sustainability goals, 10-K warns

PepsiCo Inc. on Tuesday flagged a handful of possible risks to shareholders, including making progress on its sustainability goals and the threat of tariffs in North America.

The company said in its 10-K annual report this year that “there can be no assurance” that it will achieve its sustainability goals. That comment was in a section of the report focused on possible damages to the business or its reputation.

“We have made, and plan to continue making, necessary expenditures for compliance with applicable environmental laws and regulations and that aim to make progress toward achieving our sustainability goals,” the company said. The same sentence from last year was more forceful, asserting that its efforts were to “achieve” its sustainability goals.

Many businesses have launched sustainability goals in recent years in an effort to avoid depleting natural resources and minimize environmental harm. Pepsi's website lists targets including reducing newly manufactured plastic from non-renewable sources by 20% by 2030. It also has a goal to achieve net-zero greenhouse gas emissions by 2040.

Pepsi says on its website that it's achieved some goals ahead of schedule, including its 2025 operational water-use efficiency target, and “made meaningful progress on others.”

The soft drinks maker also noted in its annual report that it will need extensive resources to gather information to report under the Corporate Sustainability Reporting Directive in Europe, “especially to the extent these standards are not harmonized or consistent.” The directive, which will also apply to big non-EU businesses operating in Europe by 2029, will mandate much more thorough disclosure on corporate sustainability.

Pepsi did not immediately respond to a request for comment.

The risk warnings come as the soft drinks maker fends off attacks over its environmental impact: Pepsi was sued alongside Coca-Cola Co. by Los Angeles County in late October for allegedly misleading consumers about the recyclability of their plastic bottles. Pepsi secured a win late last year in a lawsuit brought by the New York attorney general that sought to hold it accountable for pollution in the Buffalo River.

The report also responded to policies under President Donald Trump that have the potential to disrupt supply chains, pointing to the administration's move to impose tariffs on China, Canada, and Mexico—as well as any retaliatory steps—as a possible risk for its business.

The company also omitted the term “diversity” or “diversity, equity and inclusion” in several places throughout the 10-K where it had appeared in last year's annual report. Companies have been reeling in references to DEI for more than a year, but the trend is expected to ramp up following Trump's directive for the federal government to scrutinize illegal corporate diversity programs and encourage private sector companies to avoid them.

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Choice-of-Law Issues as the UCC 2022 Amendments Come into Effect

 [law.com/newyorklawjournal/2025/02/05/choice-of-law-issues-as-the-ucc-2022-amendments-come-into-effect](https://www.law.com/newyorklawjournal/2025/02/05/choice-of-law-issues-as-the-ucc-2022-amendments-come-into-effect)

Adam C. Wolk and Barbara M. Goodstein

Introduction

In August 2021 and April 2022, this column discussed the, at the time, proposed substantial revisions to the Uniform Commercial Code (UCC) under consideration by the Uniform Law Commission (ULC) and American Law Institute (ALI) intended primarily to address the growing presence of an entirely new class of assets often referred to as “digital assets.” See *Virtual Currencies (and Other Digital Assets) Under the UCC*, 266 N.Y.L.J. No. 25 (Aug. 4, 2021) and

The UCC Emerging Technologies Committee: Part II (Chattel Paper) 267 N.Y.L.J. No. 66 (Apr. 7, 2022). In July 2022, the ULC and the ALI adopted the so-called UCC 2022 Amendments as a model law, which included a new Article 12 that provides a framework for transactions in negotiable digital records (called Controllable Electronic Records (CERs)) and controllable accounts and controllable payment intangibles, and then rolled that out for adoption by state legislatures in the United States.

Fast forward to today, and approximately 25 states have now adopted these amendments. Not surprisingly, this has given rise to some interesting choice-of-law issues when transactions involve, as they often do, multiple jurisdictions, some of which have and some of which have not adopted these amendments.

In July 2022, the ULC and the ALI adopted the so-called UCC 2022 Amendments as a model law, which included a new Article 12 that provides a framework for transactions in negotiable digital records (called Controllable Electronic Records (CERs)) and controllable accounts and controllable payment intangibles, and then rolled that out for adoption by state legislatures in the United States.

Fast forward to today, and approximately 25 states have now adopted these amendments. Not surprisingly, this has given rise to some interesting choice-of-law issues when transactions involve, as they often do, multiple jurisdictions, some of which have and some of which have not adopted these amendments.

New Article 12 governs the transfer of property rights in a CER, that being a “record stored in an electronic medium that can be subjected to control.” (UCC §12-102(a)(1)). CERs would include such intangible digital assets as nonfungible tokens. Article 12 provides a framework

for control of CERs, which is most analogous to “possession,” and for the negotiability of CERs in a way that cuts off competing property claims, such as security interests.

It also provides that perfection of a CER by control will have non-temporal priority over a security interest in the same CER perfected through the filing of a financing statement. This is a significant departure from the current UCC under which digital assets are usually considered general intangibles, security interests in which can be perfected only by the filing of a financing statement.

As of Feb. 4, 2025, according to the ULC website the UCC Amendments have been enacted in 25 jurisdictions, consisting of Alabama, California, Colorado, Delaware, the District of Columbia, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Minnesota, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Virginia and Washington.

Also according to the ULC website, as of Feb. 4, 2025 the UCC Amendments have been introduced but not yet adopted in Massachusetts, New York, Oregon and South Carolina. Thus, the amendments are effective in approximately half of the U.S. states.

CERs and Potential Choice-of-Law Issues

Under Sections 9-306B and 12-107 of the UCC Amendments, the “local law of a controllable electronic record’s jurisdiction” will generally govern matters relating to Article 12, including perfection, the effect of perfection or non-perfection, and priority of a security interest.

Section 12-107(c) of the UCC Amendments provides a waterfall to determine a CER’s jurisdiction under that Article. If a CER “or a record attached to or logically associated with” the CER specifies a jurisdiction for purposes of Article 12, that is the CER’s jurisdiction. If the CER doesn’t so provide, but its system does so for the CER for purposes of Article 12, that is the CER’s jurisdiction.

If neither the CER nor its system provides a specific jurisdiction for purposes of Article 12, but the CER “expressly provide[s] that the controllable electronic record is governed by the law of a particular jurisdiction” then that is the CER’s jurisdiction. Failing that, if a CER’s system “expressly provide[s] that the controllable electronic record or the system is governed by the law of a particular jurisdiction,” that is the CER’s jurisdiction.

Finally, if none of the above apply, then the CER’s jurisdiction is the District of Columbia. This “waterfall” applies to perfection by control and the priority of a security interest in a CER. However, the perfection (but not priority) of a security interest in a CER by the filing of a financing statement is still governed by the debtor’s location (in the below examples, Delaware).

Despite Article 12's proposed jurisdictional structure for CERs, choice-of-law issues pertaining to assets that could be characterized as CERs and that are pledged as collateral could still occur.

This is especially the case because approximately half of U.S. jurisdictions, including New York, have not yet enacted the UCC Amendments and, under the current UCC in those states, a CER would likely be classified as a general intangible, and perfection by control (which would give non-temporal priority) as contemplated by Article 12 would not be available. The following examples illustrate several potential scenarios involving such conflicts.

Example 1: Consider a litigation surrounding whether a security interest has been perfected in a valuable nonfungible token, an asset that would likely be classified as a general intangible under the pre-amendments UCC, and as a CER under the UCC Amendments. In this example, the security interest is granted by a Delaware corporation debtor (D) to a secured party (SP) under a New York law-governed security agreement.

The security agreement grants a security interest in the described nonfungible token and SP perfects its security interest through the filing against D with the Office of the Delaware Secretary of State of a financing statement describing the token. Next, D tries to finance the nonfungible token with a third party lender (3P). 3P obtains control of the nonfungible token in accordance with Article 12, but 3P does not file a financing statement.

Imagine next that D encounters financial difficulties, and SP brings suit against D in California, the jurisdiction of D's principal place of business, in order to foreclose on its perfected security interest in the nonfungible token. What ensues is a battle between the creditors, SP and 3P, with 3P claiming priority over SP's filing because of its control, per Article 12, of the nonfungible token. California and Delaware have adopted the UCC Amendments; New York has not.

The California court, being the forum court, would first have to determine what underlying law applied to this litigation (i.e., whether this was a transaction governed by the UCC or some other legal system). Assuming it determined this was a UCC transaction, the court would then apply the choice-of-law rules applicable under the California UCC. Under UCC Section 1-301(a), parties may choose the governing law for their transaction as long as that jurisdiction bears a "reasonable" relation to the chosen jurisdiction or, if not, an "appropriate" relationship.

Given virtually all courts in the U.S. will give effect to New York as the governing law for a UCC security agreement, it is safe to assume the California court in this example would do the same, in which case the California court will apply New York law in determining whether a security interest has been effectively *created* in respect of the nonfungible token.

However, UCC Section 1-301 does not apply to questions of perfection and priority. See UCC Section 1-301(c)(8). So the California court would then also apply California UCC choice-of-law rules for determining the jurisdiction governing perfection on the nonfungible token and the priority of that security interest. California UCC Sections 9-301-9-307.

Since California has adopted the UCC Amendments, the California court would apply California's characterization of the nonfungible token as a "CER". Then, assuming that the CER's jurisdiction is the District of Columbia (see the waterfall above) the court in California would look to the law of the District of Columbia to determine how to perfect a security interest in a CER by control.

The California court would likely determine under District of Columbia law that the nonfungible token constitutes a "CER". Accordingly, perfection by control with non-temporal priority (such as for a CER in a jurisdiction that adopted the UCC Amendments) would be available under District of Columbia law. 3P would, therefore, have non-temporal priority in its perfection of its security interest in the nonfungible token on the basis of its having taken control of it per Article 12.

Example 2: If, in the above circumstance, all facts were the same, except that the CER provides that the CER's jurisdiction is New York, which has not adopted the UCC Amendments, the outcome would be different.

In that case, the California court would proceed through the same steps, but as the UCC Amendments are not effective in the CER's jurisdiction of the nonfungible token (New York), the California court, applying NY law, would determine that New York would not recognize the asset to be a CER and, in turn, would not permit perfection by control. SP would, therefore, have priority in its perfection of its security interest in the nonfungible token on the basis of its having filed a financing statement.

Example 3: Consider another example with identical base facts to Example 1 (a litigation surrounding perfection of a security interest in a nonfungible token pledged by a Delaware corporation debtor (D) to a secured party (SP) under a New York law-governed security agreement with the same ensuing battle of the creditors). As above, SP perfected its security interest through the filing of a financing statement in Delaware. This time, however, SP sues D in a jurisdiction that has not adopted the UCC Amendments.

If SP brings suit against D in, for example, Texas, which has not adopted the UCC Amendments, the Texas court would proceed through the same steps of determining what underlying law applied, and assuming the court determined the transaction was a UCC transaction, apply the applicable Texas UCC choice-of-law rules, which would send the court back to the New York-law governed security agreement for creation purposes.

But, for perfection and priority purposes, the Texas court would apply Texas UCC sections 9-301 – 9-307 and hold that Delaware law governs perfection. Per the above, that would likely result in the nonfungible token being characterized as a CER under the law of Delaware, which has adopted the Amendments, so 3P's perfection by control would take priority over SP's perfection by filing a financing statement.

Conclusion

The introduction of CERs and Article 12 in the UCC Amendments attempts to address the increasing prevalence of digital technologies and provide a framework by which parties to a financing arrangement could perfect liens on this new class of assets. As approximately half of U.S. states—including New York—have not adopted the UCC Amendments, however, choice-of-law issues, such as those discussed above, could emerge in this transitory period. The state of affairs will continue to evolve as more states enact the UCC Amendments.

Barbara M. Goodstein and **Adam C. Wolk** are partners at Mayer Brown. **Adam Kulewicz**, an associate at Mayer Brown, assisted in the preparation of this article



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Del. Judge Tells Fuel Cell Co. Investors To Filter Imprecise Suit

By **Sydney Price**

Law360 (February 4, 2025, 10:52 PM EST) -- A Delaware federal judge on Tuesday ruled that investors of hydrogen fuel cell company Plug Power Inc. must submit more particular details to support their allegation that shareholders were damaged by the company's failure to disclose production challenges, saying it is not the court's responsibility to filter out evidence.

In her order, U.S. District Judge Jennifer L. Hall gave the investors three weeks to refile a new complaint with more discrete allegations. Judge Hall said that the complaint currently fails to meet the specificity requirements of the Private Securities Litigation Reform Act.

"It is not the court's job to parse through 33 pages of alleged false statements and then hunt through the remainder of the 111-page complaint to try to figure out what evidence might plausibly support falsity and scienter for each one of those hundreds of statements," the order states. "The PSLRA puts that burden on plaintiffs, not the court."

Judge Hall said that the complaint is largely undated and leaves the court unable to determine whether it is plausible that defendants' statements were false or misleading when they were made or whether there is a strong inference of scienter.

"What's more, it appears that many (if not most) of the challenged statements are forward-looking statements — and thus protected by the PSLRA Safe Harbor — but the court has no practical ability to make those assessments until plaintiffs precisely identify which statements are at issue," the order states.

In their suit, which was most recently amended in September 2023 after consolidation, the investors allege Plug Power and its executives did not represent that the company could not effectively manage its supply chain and product manufacturing, affecting the company's margins, revenue and inventory levels, as well as several large deals.

The suit's class period begins Jan. 19, 2022, the day Plug Power announced its full-year 2021 earnings. Plug Power failed to reveal that day, and for the rest of the class period, that it suffered from a host of undisclosed issues affecting its manufacturing operations, which negatively affected revenues, the suit alleges.

The truth was gradually revealed in several announcements in which Plug Power declared that it failed to achieve its reduced 2022 revenue and liquid hydrogen production goals, and belatedly revealed that it was facing substantial challenges in ramping up its manufacturing operations, the suit claims.

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

The investors are represented by Jeffrey M. Gorris and David Hahn of Friedlander & Gorris PA, Chad Johnson, Noam Mandel, Desiree Cummings and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP and Johnston de F. Whitman Jr., Nathan A. Hasiuk, Evan R. Hoey and Andrew Rocco of Kessler Topaz Meltzer & Check LLP.

Plug Power is represented by Ronald N. Brown III of DLA Piper LLP and Rudolf Koch and Jason J. Rawnsley of Richards Layton & Finger PA.

The case is In re: Plug Power Inc. Securities Litigation, case number 1:23-cv-00409, in the U.S. District Court for the District of Delaware.

--Editing by Jay Jackson Jr.

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Judge Explains Biogen Class Cert. Ruling After 1st Circ. Order

By **Katryna Perera**

Law360 (February 4, 2025, 10:00 PM EST) -- A Massachusetts federal judge on Tuesday said he was reminded of a grade school lesson in long division as he explained his reasoning behind granting class certification and cutting short the class period in a suit against drugmaker Biogen Inc. on the orders of the First Circuit.

U.S. District Judge William G. Young granted certification in September to a class of Biogen investors over alleged misleading statements the company made in connection with the rollout of its Alzheimer's drug, Aduhelm. However, the judge didn't issue a memorandum at the time outlining his reasoning.

Both the company and its suing investors, led by the Oklahoma Firefighters Pension and Retirement System, subsequently appealed Judge Young's decision to the First Circuit last year. The investors for their part sought a longer class period than what Judge Young granted.

Taking up the matter, the First Circuit directed Judge Young in December to enter a memorandum reflecting his "rigorous analysis," so that the appeals court could determine whether a review of the cross-petitions is warranted. On Tuesday, Judge Young issued a **report and order** complying with the appeals court directive.

"Remember learning long division in grade school? Quite properly the teacher would say, 'Show your work!' to ensure that the student understood the steps in long division, notwithstanding any addition or subtraction errors. So here," Judge Young said in a footnote.

The suit alleges that Biogen made misleading statements in connection with the rollout of Aduhelm.

Judge Young said in his order that the investors satisfied the class certification requirements of numerosity, commonality, typicality and adequacy. Regarding the factor of predominance, Biogen had argued that the investors failed to show stock price impact as a result of the alleged misconduct, according to the order.

"Biogen argues that the Firefighters have in effect hoisted themselves on their own petard, presenting this court with an expert event study that itself shows that the alleged misrepresentations had no impact on price," the order said.

However, Judge Young said Tuesday that the investors have carried their burden in this area but that he is not compelled to extend the class period any further than July 12, 2021, the date of a corrective disclosure identified in the complaint, because "that is the date on which the alleged misrepresentations were unambiguously cured."

"This court allowed the motion to certify the class with a class period ending July 12, 2021, because, although Biogen did not meet its burden of showing no price impact in the whole class period, Biogen persuasively argued that the alleged misrepresentations were corrected by the disclosure on that date," the order further stated.

Biogen also argued that the investors did not offer a plausible way to calculate classwide damages. According to the order, the investors said their expert has identified the "common 'out-of-pocket' methodology for securities fraud, and proposed to determine the difference between stock price

inflation when purchased and stock price inflation when sold or when held at the end of the class period."

But Biogen argued that such a calculation would be too difficult because of the "multiple possible disclosures and confounding variables, such as the market's assessment of the importance and implications of the [national coverage determination] process and other developments affecting Aduhelm's commercial viability."

However, Judge Young said the investors' proposed methodology is sufficient and that if Biogen's theory were accepted, it would be difficult for any securities fraud case to proceed past certification.

Judge Young also declined the investors' request to file a third amended complaint and to extend the class period, saying the motions can be refiled after a pending appeal in the action is resolved.

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

The investors are represented by Jeffrey C. Block, Jacob A. Walker, Michael D. Gaines, Brendan Jarboe and Nathan J. Abelman of Block & Leviton LLP.

Biogen and the other defendants are represented by James R. Carroll, Michael S. Hines, Maya P. Florence and Yaw A. Anim of Skadden Arps Slate Meagher & Flom LLP.

The case is Oklahoma Firefighters Pension and Retirement System v. Biogen Inc. et al., case number 1:22-cv-10200, in the U.S. District Court for the District of Massachusetts.

--Editing by Rich Mills.

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AI Clean Energy Co. SPAC Suit Should Be Zapped, Judge Says

By **Katryna Perera**

Law360 (February 4, 2025, 8:09 PM EST) -- A federal magistrate judge has recommended the dismissal of a derivative shareholder suit accusing the top brass of Stem Inc., an artificial intelligence-driven clean energy company, of making misleading statements leading up to a conflicted merger with a special purpose acquisition company, saying no one should have to "connect the dots" to figure out what is specifically being alleged against them.

U.S. Magistrate Judge Christopher J. Burke issued a **report** on Friday recommending that the suit against Stem be dismissed, noting, among other things, that the complaint leaves "the reader well confused" about what statements at issue were misleading or false.

In recommending dismissal, Judge Burke first noted that the shareholders have not addressed the defense's argument that their so-called contribution claims, or request for damages from multiple parties, are "unripe." As a result, Judge Burke said the investors have waived any challenge that the contribution claims should be kept alive. Therefore, the judge recommended the claims be tossed.

The defendants also argued that the court should toss the suit's claim that misleading information was included in Stem's proxy statement ahead of the SPAC merger because the shareholders have engaged in "puzzle pleading."

"[The defendants] say this is so because: plaintiffs do not always identify which portions of the alleged misstatements at issue are supposedly false or misleading, [and] the complaint tends to set out various paragraphs including certain statements, and then follow that up with a single paragraph asserting that these alleged statements were in some way false or misleading for any one of several reasons," the report states.

Judge Burke agreed on Friday and said the complaint "surely is a puzzle," since the paragraphs pointing to claims of misleading statements do not provide details or describe why the challenged statements were, in fact, misleading or false.

"Instead, they (and the complaint more broadly) leave the reader well confused on these fronts," the report states.

The judge specifically noted the paragraphs in the complaint related to the merger proxy. According to the report, these paragraphs list several allegedly misleading statements made in the proxy, and they are formatted in block quotes.

But the complaint fails to explain why certain statements are bolded or italicized or how they are related to the alleged misstatements or omissions at issue, the report states.

"This formatting leaves the court and defendants to guess whether plaintiff is claiming that only the highlighted portions are actionable misstatements or the highlighting is merely for emphasis and the entire paragraph is false or misleading," the report states. "Additionally, the complaint makes no effort to place any of the alleged false or misleading statements into understandable categories that might otherwise assist the reader."

The judge said that until the court can understand with specificity and clarity what portions of the proxy statement are alleged to be false and misleading, the court cannot determine whether or not a

viable claim is present.

Judge Burke also recommended dismissing all of the suit's state law claims, saying the shareholders "have not articulated an understandable basis as to why this court should retain jurisdiction over the state law claims if the federal claims are dismissed."

Finally, the judge denied as moot a motion to intervene filed by shareholder Edward Manetta, who told the court he was investigating whether or not to bring derivative claims on behalf of Stem. According to the report, Manetta sought to stay the current action while he pursues his investigation and demand on Stem's board, and to prevent any potential adverse ruling on the defendants' dismissal motions.

"The court notes that the impetus for the motion to intervene is Manetta's concern that if the court issues an 'adverse ruling on [the issue of] demand futility[,]' he will 'likely [be] precluded from relitigating an adverse ruling on' that issue," the report states. "However, herein, the court has not ruled on demand futility; therefore, no decision herein could be given preclusive effect on those grounds."

The operative complaint alleges that the defendants misrepresented the proposed merger and Stem's prospects leading up to the deal and afterward.

"The offering documents contained false and misleading statements and omissions about Legacy Stem's internal controls over financial reporting, its and the post-merger company's business prospects and competitive standing, legacy Stem's software revenue, and the expected benefits that would result from legacy Stem's partnerships," the complaint states.

Counsel for the shareholders and defendants declined to comment, and counsel for Manetta did not immediately respond to requests for comment.

The shareholders are represented by Timothy Brown and Saadia Hashmi of The Brown Law Firm PC, Peretz Bronstein and Eitan Kimelman of Bronstein Gewirtz & Grossman LLC and Brian E. Farnan and Michael J. Farnan of Farnan LLP.

The defendants are represented by Boris Feldman, Doru Gavril, Jon B. Fougner and Courtney Y. Sohn of Freshfields Bruckhaus Deringer US LLP, Elena C. Norman, Anne Shea Gaza and Daniel G. Mackrides of Young Conaway Stargatt & Taylor LLP and Stefan Atkinson and Ahson Azmat of Kirkland & Ellis LLP.

Manetta is represented by Ryan M. Ernst of Bielli & Klauder LLC.

The case is In Re: Stem Inc. Derivative Litigation, case number 1:23-cv-01011, in the U.S. District Court for the District of Delaware.

--Editing by Jay Jackson Jr.



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Del. Justices Nix Fairness Ruling In TripAdvisor Nevada Move

By **Jeff Montgomery**

Law360 (February 4, 2025, 8:58 PM EST) -- Citing in part aversion to "speculative litigation," Delaware's Supreme Court on Tuesday reversed a ruling that kept in play potential stockholder damage claims in connection with the proposed reincorporation in Nevada of TripAdvisor and its parent, finding that business judgment deference should govern the court challenge.

The 64-page decision reversed Vice Chancellor J. Travis Laster's refusal in February 2024 to dismiss a suit contesting the company's move.

Also kept alive by the lower court decision were minority stockholder damage claims alleging that a vote to approve the relocation provided unfair benefits to directors and officers of TripAdvisor and parent Liberty TripAdvisor Holdings Inc. — in particular controlling stockholder Gregory Maffei — in the form of diminished stockholder litigation rights in Nevada.

Writing for the full five-member court, Justice Karen L. Valihura found that those who sued "have not alleged anything more than speculation about what potential liabilities" the travel ventures might face. In addition, the opinion said, the decision Tuesday "furtheres the goals of comity by our declining to engage in a cost-benefit analysis" of the Delaware and Nevada corporate governance regimes.

"Under the facts presented here, we should be cautious about second-guessing the judgments of the directors as to how best [to] evaluate and weigh the various competing considerations, as such factors might apply to a specific corporation" and corporate charter location, the decision said, particularly in light of changing legal landscapes.

"We submit that attempting to value competing corporate governance structures, particularly in the absence of any concrete allegations of defendants receiving a material, non-ratable benefit, and based upon hypothetical future transactions as here would be an unacceptably speculative cost-benefit exercise," the decision said.

According to the record, the justices said, the two companies "considered a number of factors in their weighing the costs and benefits of the conversions," including court systems, predictability with regard to corporate matters, judicial expertise and body of law.

Complicating the issues faced by the justices was an announcement in December, two months after arguments before the full Supreme Court, that TripAdvisor had agreed to merge with Liberty TripAdvisor, creating a single class of stock and eliminating Maffei's controller status.

On Tuesday, the justices nevertheless rejected arguments that the appeal was moot.

"As to the merits, we hold that the Court of Chancery erred in determining that plaintiffs had alleged facts supporting a reasonable inference that the conversions were subject to entire fairness review. Instead, we hold that the business judgment rule applies," the decision said.

The decision also found that speculation and the possibility of stockholder redress were insufficient to move ahead with the earlier claims, because "the plaintiff must show that it is likely, not just speculative, that the requested relief will redress the injury."

Stockholders who sued in Chancery Court argued that re-domestication in a jurisdiction that permits

shielding of duty of loyalty breaches increases the value of control and potentially allows immediate monetization after a relocation, such as selling control stake or engaging in a self-interested transaction.

Nevada also does not follow the Delaware courts' so-called Revlon duties, Vice Chancellor Laster observed in his decision last year. Revlon duties require companies to get the best reasonably available price in a sale. Instead, Nevada permits other considerations.

In addition, the justices said, the decision Tuesday has special significance in Delaware, where corporate and alternative entity franchise payments were estimated to account for about 29% of state general fund revenues.

It also arrived as Delaware policymakers and the courts are still coming to terms with a rare state General Assembly vote last year to amend Delaware's General Corporation Law to explicitly allow company approvals of agreements that cede some control rights to stockholders that are otherwise reserved for directors.

Debate over the legislation and a court decision that triggered it focused attention on the potential fragility of Delaware's corporate haven status and its connection to a predictable and corporation law regime.

More than 1 million companies currently hold Delaware charters and rely on the Court of Chancery and state Supreme Court's rapid attention and deeply grounded decisions and precedents.

The state's high court's decision had a tighter focus, however.

"Despite the vigorous debate about whether the variation of state corporate laws is vibrant competition among laboratories of democracy or a race to the bottom of stockholder protections, the issue before us is a narrow one — which standard of review governs the decisions to approve the conversions?" the court said.

Justice Valihura wrote that the court recognized that "providing protection to directors against future liability exposure does not automatically convey a non-ratable benefit" not shared with other stockholders.

"We hold that the absence of any allegations that any particular litigation claims will be impaired or that any particular transaction will be consummated post-conversion weighs heavily against finding that the alleged reduction in liability exposure under Nevada's corporate law regime is material," the decision said.

Liberty TripAdvisor 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 Tejtcl, Christopher Windover and Lindsay LaMarca of Friedman Oster & Tejtcl 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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Fidelity National Urges Del. Toss Of Weak F&G Deal 'Gripe'

By **Jeff Montgomery**

Law360 (February 4, 2025, 6:10 PM EST) -- An attorney for Fidelity National Financial Inc. told a Delaware vice chancellor Tuesday that stockholders failed to do more than "fundamentally gripe" about terms of a \$250 million investment in spun-off F&G Annuities & Life Inc. when the shareholders sued for breaches of fiduciary duty last year.

Michael A. Barlow of Quinn Emanuel Urquhart & Sullivan LLP, counsel to F&G controller Fidelity National, said during dismissal arguments that the F&G investors failed to show harm in the deal, which provided F&G with cash without diluting shareholders.

"It was a beneficial transaction for F&G, including on terms they could not receive in the public market," Barlow told Vice Chancellor Lori W. Will. "Nevertheless, we're here today on an entire fairness case."

Fidelity National, or FNF, spun off F&G while retaining an 85% interest in December 2022 and then, in January 2024, bought \$250 million of F&G's convertible preferred stock, paying a 6.875% rate. The Chancery Court complaint described the deal as "lucrative" to Fidelity National and unfair to F&G, and pointed to the absence of a minority stockholder approval vote.

F&G minority stockholders, led by Roofers Local 149 Pension Fund, **sued both** FNF and its controlling investor, billionaire William P. Foley, derivatively in May 2024 but dismissed Foley from the case in September, subject to continued discovery and possible renewal of the claim against him.

Barlow said a two-member, independent special committee that approved the preferred share deal wanted to receive terms "at least as favorable as those that could be obtained in a public market deal."

FNF made "numerous" offers in negotiations that produced a "slightly higher" dividend rate and higher conversion premiums than initially presented, according to the company, which characterized the minority's allegations in a **brief** as "white noise" that distracts the court from a focus on price.

"I think the factual background shows the robust analysis that the special committee went into and the procedural protections employed," Barlow told the vice chancellor. "The result is a complaint before you that I think is problematic from the perspective of Delaware law."

Joshua M. Glasser of Labaton Keller Sucharow LLP, counsel to the stockholders, argued that the deal left minority FNF facing years of allegedly excessive dividend payments and potential dilution of their interests, followed by conversion into common shares.

Vice Chancellor Will asked if the deal was detrimental based on dilution of share value in the future, if it occurs, and a potential increase in controller interest "overhang."

"It's dilution every time they issue a dividend. It could be cash or common shares, every time," Glasser said, adding separately: "We allege the controller caused F&G to pursue a patently unfair transaction and an unfair process."

Vice Chancellor Will asked how the stockholders' allegations square with the fact that the special committee that negotiated the deal was "broadly empowered" to consider alternatives.

"On paper it was technically empowered," Glasser said, but Fidelity National's announcements "boxed them in," Glasser said. He added: "It's hard to imagine the committee doing another [different] transaction when the market was told this is the only one the committee is going to look at."

Barlow told the vice chancellor that the deal was "handled the right way, taught by countless opinions of the court" calling for appointment of an independent special committee. The deal, Barlow said, gave the committee "full authority" over the transaction, including authority not to go forward, and not limiting it to Fidelity National.

"There's really a pleading problem here, where they failed to establish what the "get" is – why any of the benefits to Fidelity National aren't outweighed by the \$250 million received by F&G," Barlow said. "What is plaintiff's theory about why \$250 million wasn't enough to outweigh those benefits?"

Attorneys for FNF argued in a brief that the company "does not have a duty to ensure that the transaction is the best alternative available for [F&G] and its stockholders. That is a duty owed by F&G's directors, none of whom are before this court facing fiduciary duty claims."

Vice Chancellor Will said she would take the arguments under advisement.

Fidelity National Financial Inc. is represented by Michael A. Barlow, Hayden J. Driscoll and Michael B. Carlinsky of Quinn Emanuel Urquhart & Sullivan LLP.

Roofers Local 149 Pension Fund and the proposed derivative class are represented by Ned Weinberger, Mark Richardson, Guillaume Buell, John Vielandi, Nina Varindani and Joshua M. Glasser of Labaton Keller Sucharow LLP, Jeremy S. Friedman, David Tejtelt and David Rosenfeld of Friedman Oster & Tejtelt PLLC and Lyndsey Bates of AsherKelly Attorneys at Law.

The case is Roofers Local 149 Pension Fund, derivatively on behalf of nominal defendant F&G Annuities & Life Inc. v. Fidelity National Financial Inc. and F&G Annuities & Life Inc, case number 2024-0562, in the Court of Chancery of the state of Delaware.

--Editing by Linda Voorhis.



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McKesson, Others Beat Indirect Drug Reseller Price-Fix Suit

By **Gina Kim**

Law360 (February 4, 2025, 10:37 PM EST) -- A Pennsylvania federal judge permanently tossed antitrust claims from indirect generic-drug resellers who alleged distributors like McKesson Corp. and AmerisourceBergen colluded with manufacturers to fix prices of many medications, writing Monday the plaintiffs fail to show the existence of such an agreement between drugmakers and distributors.

In a 13-page order, US District Judge Cynthia M. Rufe permanently dismissed Sherman Act and state law claims filed by indirect reseller plaintiffs, or IRPs, against generic drug distributors, accusing them of scheming to fix prices of generic drugs, which allegedly caused prices to spike tenfold.

The IRPs claim the distributors violated antitrust laws by orchestrating coordinated price increases, passing anticompetitive messages at the behest of their co-conspirator drugmakers, and brokering the allocation of customers to establish "fair share."

The indirect reseller plaintiffs — which are entities that did not buy directly from the manufacturers — are independent pharmacies and a hospital: Reliable Pharmacy, Halliday's & Koivisto's Pharmacy, Russell's Mr. Discount Drugs, Falconer Pharmacy, Chet Johnson Drug and North Sunflower Medical Center.

The distributor defendants are McKesson Corp., AmerisourceBergen Drug Corp. and HD Smith LLC, Cardinal Health, The Harvard Drug Group, and Red Oak Sourcing LLC.

Judge Rufe **had already dismissed the IRPs' initial complaint in May 2022**, finding they failed to sufficiently allege a conspiracy. The judge also found at the time that the plaintiffs failed to allege the distributors — as intermediaries — cannot pass price increases onto their customers. The May 2022 order further noted that the fact the manufacturers and its distributors discuss pricing and marketing strategies does not, on its own, show the distributors are not making their own pricing decisions.

A third amended complaint was filed, which the distributors moved to dismiss again.

On Monday, Judge Rufe agreed to toss the amended pleading with prejudice, reiterating earlier points she made in the dismissal order from 2022. The judge concluded that the plaintiffs had multiple opportunities to state a Sherman Act claim against the distributors but failed to do so again.

Once again, the exchange of information between generic drugmakers and distributors does not give rise to the inference that a conspiracy or an agreement existed and the act of trading information without an agreement itself is not an antitrust violation, Judge Rufe's Feb. 3 order said.

Judge Rufe also rejected the IRPs' contention that the latest allegations go beyond mere information sharing, due to the volume and nature of their communications.

"The frequency of those conversations is not direct evidence of an agreement," Monday's ruling said. "The third amended complaint fails to allege specific facts that would show distributors entered into an agreement with manufacturers, or even that the distributors were necessarily aware that manufacturers had entered into an agreement with one another."

Monday's ruling also repeated a notion from the 2022 decision, where the judge concluded that "a

desire for profit does not itself constitute a conspiratorial motive" and that something more must be alleged. Again, the judge wrote that the latest pleading had the same issue.

"In the third amended complaint, the IRPs again allege that distributor defendants were motivated to decrease competition to increase their own profits, and that this motivation is sufficient as a plus factor," the judge wrote. "As stated previously, however, something more than profit must be alleged to imply a conspiratorial motive. Further, as addressed in this court's previous opinion, the IRPs do not allege that distributor defendants, as middlemen, cannot pass on increased prices to customers."

Finally, the plaintiffs lack standing to pursue damages under the Supreme Court's decision in **Illinois Brick Co. v. Illinois** , as the resellers are indirect purchasers of the product. Judge Rufe disagreed with the plaintiffs' argument that the Illinois Brick Co. doctrine did not apply to them, since the plaintiffs directly bought drugs from the distributor defendants.

A party is an indirect buyer if what they bought has passed through two different levels in the distribution chain before they ultimately receive it, the order explained.

"The IRPs cannot erase the first sale from the manufacturers to the distributors," Judge Rufe said. "The IRPs remain the second purchaser in the chain of distribution and are thus prevented from recovering damages from distributor defendants under Illinois Brick."

The MDL, launched nearly a decade ago, accuses companies like Sandoz, Teva, Actavis and others of participating in schemes to fix prices for generic drugs, along the same lines **as a criminal probe** into the industry by the US Department of Justice. Throughout the litigation, Apotex, Breckenridge Pharmaceutical Inc. and Heritage Pharmaceuticals Inc. have reached settlements with direct purchasers in the case, totaling around **\$45 million**.

In December, Sandoz **struck a \$275 million settlement** to end claims from consumers, insurers and others in the MDL, also known as end payors. The agreement included no admission of wrongdoing, but resolves claims from consumers, insurers and benefit funds that allegedly overpaid for generic prescription drugs between 2009 and 2019.

Sandoz entered into a **deferred prosecution agreement** with the DOJ in 2020 over price-fixing allegations that included a \$195 million criminal penalty. The DOJ also reached a \$185 million civil settlement with Sandoz in 2021 to resolve **additional claims**.

In 2023, Teva and Glenmark agreed to pay around \$305 million as part of deferred prosecution agreements with the DOJ to end the investigation of their roles in the alleged schemes.

On May 15, 2024, Judge Rufe granted the IRPs' motion for preliminary approval of a class action settlement reached with Apotex, which contributed \$5,537,000 to a settlement fund. A fairness hearing on the IRPs' deal with Apotex is set for March 17.

"While we are disappointed in the court's ruling dismissing our claims against the distributor defendants, we are carefully reviewing the decision and considering all available legal options, including an appeal," Christian Hudson of Cuneo Gilbert & LaDuca, who serves as lead counsel for the IRPs, said in a statement to Law360 on Tuesday. "This ruling does not absolve the manufacturers of their misconduct, nor does it affect our claims against them, which remain active. We look forward to proceeding with our upcoming bellwether trial in the MDL to expose the manufacturers' role in this widespread price-fixing conspiracy and hold them fully accountable for the harm they have caused."

Representatives for the distributor defendants did not immediately respond to inquiries seeking comment Tuesday.

The indirect reseller plaintiffs are represented by Cuneo Gilbert & Laduca LLP.

McKesson Corp. is represented by Simpson Thacher & Bartlett LLP.

AmerisourceBergen Drug Corp. and HD Smith LLC are represented by Reed Smith LLP.

Cardinal Health and The Harvard Drug Group are represented by Crowell & Moring LLP.

Red Oak Sourcing LLC is represented by Foley & Lardner LLP.

The individual case is Reliable Pharmacy et al. v. Actavis Holdco US Inc., case number 2:19-cv-06044, in the US District Court for the Eastern District of Pennsylvania.

The MDL case is In re: Generic Pharmaceuticals Pricing Antitrust Litigation, case number 2:16-md-02724, in the US District Court for the Eastern District of Pennsylvania.

--Additional reporting by Matthew Perlman, Matthew Santoni, Bryan Koenig, and Dan McKay. Editing by Vaqas Asghar.

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Whirlpool Sinks Customer's Suit Over Service Plan Repair

By **Rachel Riley**

Law360 (February 4, 2025, 10:30 PM EST) -- A Washington federal judge has tossed a customer's proposed class action over a dishwasher warranty for good, finding no "reasonable consumer" would have been misled to believe the terms covered the full cost of any repair given the "caveats" on marketing materials.

U.S. District Judge James L. Robart dismissed the latest iteration of Hadassah Shellenberger's lawsuit against Whirlpool and AIG WarrantyGuard Inc. with prejudice in a Monday **order**, finding the Washington resident still couldn't show the companies tried to dupe her about the details of the "extended" service plan — including its "buyout" provision offering up to 75% of the original purchase price for a broken appliance. Judge Robart pointed to an asterisk in the marketing literature indicating that limitations and exclusions applied, a footnote link to the plan's complete terms and conditions online and other limiting language in the four bullet points describing the offer.

"In sum, after reading defendants' offer, a reasonable consumer would realize that it does not contain all applicable terms and conditions, and the consumer would know to follow the link in the disclaimer to view the terms and conditions," the judge said. "As the court has already held, the Service Plan contract fully discloses all relevant terms and would not mislead or deceive a reasonable consumer."

Shellenberger **first launched the lawsuit** in May 2024, saying she'd bought the plan for a KitchenAid dishwasher from Best Buy for \$1,085 in April 2020. While she initially purchased a Geek Squad Protection Plan, she allegedly later canceled it after receiving mailers about a less expensive extended service contract, administered by Michigan-based Whirlpool with AIG WarrantyGuard as its obligor. Specifically, the plaintiff contended she was tricked into buying the extended service plan based on marketing materials touting "100% parts and labor for covered repairs, where applicable," and "No out-of-pocket expenses on covered repairs and replacements."

Judge Robart tossed **an earlier version** of the suit in October, ruling Shellenberger "cannot ignore readily available contract terms and then plausibly claim she was deceived by those terms."

In the Monday order, the court again agreed with Whirlpool and AIG WarrantyGuard that the marketing materials clearly conveyed that a customer would have to visit the website link included to see the full terms and conditions of the plan.

Shellenberger also claimed she had to pay out-of-pocket costs when the dishwasher first malfunctioned in 2022 and no repair technicians in her area would agree to do the repairs under the terms required by the companies. When it failed again in 2023, the companies exercised the buyout option, she alleged.

Judge Robart also rejected the consumer's second shot at stating a claim for breach of warranty, noting Shellenberger never exercised the option for reimbursement following the initial breakdown in 2022.

"Because Ms. Shellenberger admits that she never obtained repair services herself and that she stopped looking before the month was over, she never triggered defendants' obligation under the Service Plan contract to reimburse her for the repair," the judge said.

As for the subsequent 2023 malfunction, the judge concluded, Whirlpool and AIG fulfilled their

obligations with the buyout payment.

A marketing letter attached to the suit shows she would have paid \$383 to purchase the plan, which suggests she would have received a net financial benefit from the \$764 buyout, according to Whirlpool's prior dismissal bid.

Representatives for Shellenberger, Whirlpool and AIG WarrantyGuard did not immediately respond Tuesday to requests for comment.

Shellenberger is represented by Evan E. Sumer of the Law Office of Evan Sumer and Gregory W. Albert and Tallman H. Trask IV of Albert Law PLLC.

Whirlpool is represented by Emily J. Harris and Kristin Bateman of Corr Cronin LLP and Galen Bellamy, Riley Collins and Andrew M. Unthank of Wheeler Trigg O'Donnell LLP.

AIG WarrantyGuard is represented by Donald J. Verfurth of Gordon Rees Scully Mansukhani LLP and Rachel E. K. Lowe, David B. Carpenter and Adam Kaiser of Alston & Bird LLP.

The case is Hadassah Shellenberger et al. v. AIG WarrantyGuard Inc. et al., case number 2:24-cv-00657, in the U.S. District Court for the Western District of Washington.

--Additional reporting by Greg Lamm. Editing by Dave Trumbore.

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Losing A Motion To Dismiss Ruling Isn't Necessarily The End

By **Philip DeVoe and Andrew Stern** (February 4, 2025, 6:46 PM EST)

In 2022, the defendants in *Manti Holdings LLC v. The Carlyle Group Inc.* lost a battle. The Delaware Court of Chancery denied their motion to dismiss claims of breaches of fiduciary duties in connection with the 2017 sale of Authentix Acquisition Co., which had been majority-owned by affiliates of The Carlyle Group, a private equity firm.

But on Jan. 7, following a weeklong trial, Carlyle won the war when the court **ruled for it** on the remaining claims in the case.

The plaintiff-stockholders had alleged that the sale was a conflicted controller transaction.

They alleged that the final sale price was much lower than initial estimates, and that the controller was motivated to sell quickly to provide liquidity to its investors, avoid clawback and realize on its preferred shares, rather than to maximize value for all Authentix stockholders.

More than seven years after the September 2017 transaction, the court found after trial that the plaintiffs had not demonstrated any conflicts of interest.

The court also found that although the private equity fund and its affiliates controlled the company — and, therefore, the sales process — they were motivated by the same considerations as other stockholders: maximizing share price and limiting a further decline in company revenue. The business judgment rule thus applied, and no breaches could be proven.

Manti Holdings serves as an important reminder that a decision on a pleading motion is not the end of the story. Fiduciary defendants with the means and ability to litigate the merits of a case retain the opportunity to avail themselves of Delaware's deferential business judgment rule in the absence of facts — and not just allegations — demonstrating disabling conflicts.

By the same token, defendants should continue to press trial courts to probe beneath conclusory allegations before forcing parties down a yearslong litigation path to resolve such cases.

Background

In 2008, the Carlyle U.S. Growth Fund III LP purchased a \$40 million stake in Authentix. Although the fund's stated term ran until Sept. 30, 2017, the term could be extended and, in any event, the fund was not required to sell portfolio companies by that date.

By 2013, the fund had accumulated a \$60.3 million stake in Authentix, representing 70% of Authentix's preferred stock and 52% of its common stock.

Authentix's board began preparing for the sale process as early as autumn 2015. The company had recently escaped a period of financial hardship, and it was hoping for even better news in May 2016, when Saudi Aramco was expected to renew a two-year contract.



Philip DeVoe



Andrew Stern

But rather than renewing, Aramco surprised Authentix with new, unfavorable terms and required it to compete with other companies to win new bids.

Before the renegotiation, Authentix's valuation was between \$200 and \$275 million. After, it dropped to between \$120 and \$177 million, with one outlier at a maximum of \$248 million.

Authentix's valuation continued to drop throughout the sale process. By April 2017, Authentix was negotiating with two buyers, both of whom indicated a \$115 million valuation.

After due diligence, one buyer required \$30 million of this to be contingent, so Authentix granted exclusivity to the other — Blue Water Energy LLP. BWE's price, too, came down after due diligence — to between \$60 and \$70 million.

But then, during BWE's due diligence, Authentix won a rebidding competition with Aramco, allowing the board to approve an Aramco bid and renegotiate with BWE. Following the renegotiation, the board — voting 4-0 — approved a sale to BWE, for less than \$90 million up front.

One director did not appear for the vote, but communicated his disapproval: He noted Authentix's recent achievements and urged that a 12-month delay would increase value.

The deal closed on Sept. 13, 2017 — 17 days before the end of the 10-year term of the fund that held the majority stake.

The Complaint

On Aug. 7, 2020, a group of Authentix stockholders sued the private equity fund and certain affiliates, along with three of the four directors who approved the sale.

The plaintiffs argued that the Court of Chancery should review the sale under the onerous standard of entire fairness because, they claimed, Carlyle and its affiliates, the controlling stockholder, had extracted a unique benefit from the transaction. Their theory was that the fund's business model compelled it to sell at that time, regardless of price.

The Post-Trial Decision

To demonstrate conflicts, the plaintiffs sought to prove that the controller competed with the other common stockholders for consideration by receiving something uniquely valuable in the sale.

Namely, the plaintiffs argued, the controller faced two potential conflicts: (1) liquidity-based pressures resulting from the controller's private equity fund structure; and (2) the allegedly nonratable benefit that the controller received for its preferred shares.

The plaintiffs' first liquidity-based argument centered around their allegation that Authentix was the last so-called needle-moving deal in the private equity fund at issue, which they contended supported their view that the controller was pressured to sell.

The court rejected this argument. As Authentix's largest shareholder, the court explained, the controller was driven by the same incentive as the other stockholders: to sell Authentix for as much as possible.

Further, the court found that the fund was not required to sell its portfolio assets by 2017, nor was Authentix the last remaining asset in the fund.

The court also noted that, if the controller were facing a liquidity crunch, it would not have drawn out the sale over a full year, entertaining more than 120 potential buyers.

The court also found the plaintiffs' evidence of investor pressure to be insufficient. No emails between investors and the fund or sponsor, for example, demonstrated that investors were pushing for a sale.

And the court held that the testimony of one of the plaintiffs' experts — that the general industry expectation is a timely return on private equity investments — demonstrated simply that a term limit

"indicates an intent to exit investments, profitably, on that general time-frame," but provided no basis to conclude that this fund's investors' expectations "caused the board to run a fire sale."

The court also rejected the plaintiffs' second liquidity-based argument, based on the fund's clawback provision, which kicked in if the fund could not meet a 7% preferred return on the capital outstanding in Authentix prior to a sale.

The court explained that the possibility of a clawback incentivized the controller to "sell portfolio companies that are more likely to decline than grow in proceeds," which aligned with all stockholders' interests.

Last, the court rejected the plaintiffs' argument that the controller was conflicted because it received nonratable consideration for its preferred shares. The first \$70 million of the sale went to preferred stockholders.

Since the fund held 70% of the preferred shares, this meant it received around \$48.6 million for those shares. But the court explained that the controller would always receive the same percentage of the first \$70 million for its preferred shares: Its 52% stake in common stock, on the other hand, incentivized it to seek the highest possible sale price.

Thus, the court found "that Plaintiffs ... failed to rebut the business judgment rule because there [was] no conflicted controller transaction." Applying the rule, the court declined to review the entire fairness of the transaction and found for the defendants on all remaining counts.

Conclusion

Manti Holdings is, first and foremost, a reminder to fiduciaries and their counsel that, even in the face of a lost motion to dismiss, litigating a case to final judgment can be worthwhile in the right cases. It is often the case, as here, that an early decision on the pleadings is not reflective of the merits and the ultimate outcome.

It may be relatively easy to allege disabling conflicts, particularly if courts do not closely scrutinize conclusions disguised as factual allegations.

Of course, the trade-off to litigating to final judgment is the protracted distraction and significant economic cost. Although the development of the law based on a full record, rather than mere allegations, may well be a benefit to society — or at least the community that cares about such things — this development likely provides cold comfort to the parties paying the bill.

As such, defendants understandably would prefer that trial courts take a more exacting look at complaints. In Manti Holdings, for example, on both the motion to dismiss and post-trial actions, the court noted that the controller would have earned the same amount on its preferred shares regardless of Authentix's sale price — so long as it was over \$70 million.

However, only in its ruling on the motion to dismiss did the court characterize the benefit the controller derived from its preferred stock as nonratable.

Trial hindsight and the plaintiff-friendly Rule 12(b)(6) standard make it difficult to compare these rulings, but a closer examination of conclusory allegations would provide more certainty to market participants and practitioners.

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