

Power chip maker hid product flaws that cost Nvidia deal, suit says | Secondary Sources | National

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(February 06, 2025) - Power circuits maker Monolithic Power Systems Inc. made false statements about the performance of its products while ignoring quality control issues, a shareholder says in a Washington federal court lawsuit.

Waterford Township General Employees Retirement System v. Monolithic Power Systems Inc., No. 25-cv-220, *complaint filed* (W.D. Wash. Feb. 4, 2025).

Waterford Township General Employees Retirement System's complaint, filed Feb. 4 in the U.S. District Court for the Western District of Washington, says Monolithic's products had performance and quality control problems that impacted the products of client Nvidia Corp.

In addition to Monolithic, the complaint names as defendants Monolithic founder, CEO and Chairman Michael Hsing and Chief Financial Officer and former corporate controller Bernie Blegen.

Amped-up claims?

According to the complaint, Monolithic depends on technical sales engineers to tailor its products to customer needs. Nvidia is its largest client in the artificial intelligence-driven enterprise data market, the complaint says.

The company is the sole supplier of power modules for Nvidia's Hopper graphic processing unit, launched in 2022 amid a global surge in AI data center investments, the complaint says.

Investors were allegedly unaware that Monolithic's power solutions had quality issues that harmed Nvidia's graphics processing units, damaging their relationship and exposing the company to financial risks.

In 2024, Monolithic together with Hsing and Blegen touted the company's increasing profits, the quality of its products and its strong ties to Nvidia, the suit says.

Nvidia's 'lost confidence'

On Oct. 30, 2024, Monolithic reported enterprise data revenue of \$184 million, missing estimates by 13%, with Blegen citing weak customer orders and forecasting low single-digit growth, the complaint says.

Analysts attributed Monolithic's weak enterprise data sales to Nvidia's delayed Blackwell chip shipments, citing a report from investment firm Rosenblatt that said the segment "took a pause" and an analyst report from Summit Insights Group linking underperformance to the delays, the complaint says.

Monolithic's shares dropped over \$160, or 17%, to \$759.30 on Oct. 31, 2024, but remained artificially inflated due to ongoing misstatements, the complaint says.

In the company's third-quarter earnings call, Hsing claimed Monolithic maintained AI market share with best-in-class power solutions and said the enterprise data business would grow, despite market competition, the suit says.

On Nov. 11, 2024, Edgewater Research revealed that Nvidia had canceled half of Monolithic's orders and planned to drop the company as a supplier for Blackwell chips due to performance issues. The analyst noted that Nvidia engineers had "lost confidence" in Monolithic's products, the suit says.

According to the complaint, Monolithic's share price dropped \$114, or 15%, to \$647.31 the same day. Monolithic's denial failed to reassure investors, as Nvidia shifted its Blackwell business to competitors, driving the share price down to \$560 by Nov. 20, 2024, the complaint says.

The defendants violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, by deceiving investors, the complaint says.

Hsing and Blegen are also liable as control persons under Section 20(a) of the Exchange Act, 15 U.S.C.A. § 78t(a), the suit says.

The plaintiff seeks class-action certification, damages, legal fees and other appropriate or injunctive relief.

Juli E. Farris and Derek W. Loeser of Keller Rohrback LLP, Brian E. Cochran and Francisco J. Mejia of Robbins Geller Rudman & Dowd LLP, and Cynthia J. Billings-Dunn of Asherkelly represent the plaintiff.

By Russel Loreto

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Plug Power Investors Fall Short in Class Suit Over Revenue Goals

By Martina Barash

- Hydrogen fuel company defeated previous investor suit
- Shareholders will be able to re-plead suit over growth

Plug Power Inc. investors failed to provide specificity in their allegations that the hydrogen fuel cell maker misrepresented its anticipated growth, a federal court ruled.

The complaint must be dismissed, Judge Jennifer L. Hall said for the US District Court for the District of Delaware. But Hall gave lead plaintiffs Guy and Wesley Brown another chance to plead their claims on behalf of a proposed class and declined to strike allegations based on a confidential witness account.

Plug Power has been embroiled in other investor litigation and a Securities and Exchange Commission matter in recent years, fending off a proposed class action alleging delivery costs were misclassified as research and development and settling with the SEC for \$1.25 million over its financial reporting. A shareholder derivative suit, which tracks the Browns' allegations of revenue and growth misstatements in 2022 and is also pending before Hall, is on pause for now.

The investors alleged Plug Power presented a rosy picture of its supply chain in August 2022 and promised significant growth, even though several deals had been delayed until at least 2023. When the company signaled problems in January 2023 and reported missed revenue guidance in March of that year, the stock price sank, they said.

The Browns failed to adequately allege false statements and the necessary intent, or scienter, for securities fraud, Hall said.

"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," she said.

Robbins Geller Rudman & Dowd LLP is lead counsel for the investors. DLA Piper LLP (US) represents Plug Power.

The case is In re Plug Power Inc. Sec. Litig. , 2025 BL 35872, D. Del., No. 23-409, 2/4/25 .

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Block Leaders Sued Over Square, Cash App 'Red Flags' on Crime

By Martina Barash

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** [No. 4:25-cv-01262](#) (Bloomberg Law subscription)

Block Inc. directors and officers made deliberately misleading statements about the company's due diligence and financial reporting while it was ignoring red flags about criminals' use of its payment platforms, an investor alleges.

Block "was at heightened risk of regulatory scrutiny and reputational damage," but its leadership issued statements that failed to disclose those risks, Viraj Patel says in a shareholder derivative suit. He filed his complaint Wednesday in the US District Court for the Northern District of California.

Co-founder Jack Dorsey and 14 other current and former Block directors and executives are responsible for the ensuing investigations by regulators and prosecutors, a series of stock drops, potential class action liability, and overpayment for share repurchases, Patel says.

The proposed class action, recently filed in the same court, ties the company's failure to properly oversee the payment platforms to a 77% drop in Block's stock price.

"Company management ignored red flags indicating that Square and Cash App were being widely used for a variety of unlawful and unethical activities," Patel says. Those included "money laundering, child sexual abuse, sex trafficking, drug trafficking, terrorism financing, contract killings, and transactions in violation of economic sanctions," he says.

Patel brings claims for securities fraud, breach of fiduciary duties, unjust enrichment, abuse of control, and waste of corporate assets. He seeks compensatory damages, punitive damages, and a constructive trust.

Block didn't immediately respond to an emailed request for comment on behalf of itself or the individual defendants.

Tostrud Law Group PC, Rigrodsky Law PA, and Grabar Law Office represented Patel.

The case is Patel v. Dorsey , N.D. Cal., No. 4:25-cv-01262, complaint 2/5/25 .

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Marqeta shareholders sue executives, claim mismanagement

[dailyjournal.com/articles/383482-marqeta-shareholders-sue-executives-claim-mismanagement](https://www.dailyjournal.com/articles/383482-marqeta-shareholders-sue-executives-claim-mismanagement)

Securities

Feb. 7, 2025

Marqeta Inc. shareholders filed a lawsuit against CEO Simon Khalaf and other executives, claiming "gross mismanagement" caused a 42.5% stock drop after undisclosed regulatory risks surfaced in Q3 earnings.



Shareholders for Marqeta Inc., a global card issuing platform whose customers include Uber and DoorDash, sued the CEO Simon Khalaf and 10 other executives this week over claims of "gross mismanagement and abuse of control" leading to a 42.5% drop in stock price.

The derivative shareholder complaint, filed Tuesday in federal court in San Francisco, centers on the company's alleged failure to disclose upcoming regulations on the small banking industry prior to its Q3 earnings report.

A disclaimer in the Nov. 4 earnings report stated: "Actual results may differ materially from the expectations contained in these statements due to risks and uncertainties, including, but not limited to, the following: . . . the risk that changes in the regulatory landscape could adversely affect Marqeta's operations and revenues, including heightened scrutiny of the banking environment and specific customer program changes," the earnings report stated.

The precipitous stock price drop occurred on the next day.

The company was valued at \$15.2 billion upon its initial public offering in June 2021 but was only valued at \$1.96 billion as of Jan. 30.

Lead attorney for the shareholders, Robert Charles Moest of The Brown Law Firm PC in Santa Monica, could not be reached for comment Thursday but identified in the complaint the two areas in which the company's executives allegedly failed to disclose relevant information.

"(1) The company had understated the negative impact that enhanced regulatory scrutiny in the smaller banking industry was having on its operations and business outlook; and (2) due to the foregoing, the company would be forced to slash its guidance for the fourth quarter of 2024," Moest wrote. "As a result of the foregoing, the company's statements about its business, operations, and prospects were materially false and misleading and/or lacked a reasonable basis at all relevant times."

Marqeta's investment relations team could not be reached for comment Thursday. *Smith v. Khalaf et al.*, 3:25-cv-01174 (N.D. Cal. filed Feb. 4, 2025).

The parties are due to appear before U.S. District Judge Thomas S. Hixson on May 1 for an initial case management conference.

In the earnings report, the company reported a net loss of \$29 million, saying it was an improvement on the year before. "Net loss of \$29 million in the quarter improved by \$26 million year-over-year due to gross profit growth and lower operating expenses. Net loss margin was 22% in the third quarter of 2024, an improvement of 29 percentage points versus last year."

Marqeta has had to battle derivative shareholder complaints in courts across the country in recent years.

In August 2023, a putative class action, with the same lead plaintiff as the newly filed case, sued the company in Delaware Chancery Court, claiming the executives failed to prevent founder Jason Gardner from allegedly engineering a stock buyback to gain voting control in the company. *Smith v. Gardner et al.*, 2023-0872 (Del. Chanc. Ct. filed Aug. 24, 2023).

The case was closed by the court on March 25, 2024, according to an SEC filing by Marqeta CFO Mike Milotich, a co-defendant in the latest complaint. In that filing, Milotich revealed that the company agreed to pay \$425,000 in attorney fees for plaintiffs' counsel and disclosed the terms of the "standstill and release agreement" that ended the case.

"Mr. Gardner agreed not to take unilateral, affirmative action to increase his voting power above 49.99% of the total voting power of the company's outstanding stock for the period of time between and including February 24, 2024 and September 11, 2024, and the parties agreed to releases and related provisions. The stipulation of dismissal has received court approval," the filing stated.

#383482

Walnut farmer v German investment group in lead plaintiff race

DJ [dailyjournal.com/articles/383478-walnut-farmer-v-german-investment-group-in-lead-plaintiff-race](https://www.dailyjournal.com/articles/383478-walnut-farmer-v-german-investment-group-in-lead-plaintiff-race)

Outside the Supermicro headquarters in San Jose. Photo: Shutterstock

In behind-the-scenes drama before the curtain rises on a stock-drop class action targeting a Silicon Valley tech company, a Central Valley walnut farmer is facing off against a large German investment group over who gets to be lead plaintiff.

As the row intensified, a federal judge in San Jose noted that the walnut farmer is presumptively in the lead, but the German group has raised serious questions about his fitness for that role.

It's all part of what a scholar of securities class actions calls the Kabuki dance of law firms maneuvering behind their chosen plaintiff candidates to win the coveted lead assignment.

"They play tough," said James D. Cox of Duke University School of Law, speaking generally about how lawyers often scramble at the outset of such cases.

"They're all on the same side, but they have to make a living. If you're going to make money, you need to represent the lead plaintiff. The lead plaintiff's lawyers negotiate the fee structure of the case and get the lion's share themselves."

In their complaint, plaintiffs accuse Super Micro Computer Inc. of accounting manipulation and sanctions evasion. The company is accused of misleading investors by posting positive statements while concealing negatives including overreporting of sales and underreporting of expenses.

Plus, the company allegedly continued to export products to Russia and Belarus, areas restricted by the U.S. government due to the Russia-Ukraine war, risking government sanctions.

Several investor groups sued late last year after a critical report appeared in the financial press and Super Micro's stock plunged 20% overnight.

The drop came despite news in July that Super Micro would be providing half the servers for Elon Musk's artificial intelligence start-up, xAI, along with servers for Musk's Gigafactory Texas, Tesla Inc.'s global headquarters.

But canny litigators had their eye on the company. In 2020, the Securities and Exchange Commission charged Super Micro with improperly recognizing revenue and understating expenses from 2015 to 2017. The company paid a \$17.5 million civil penalty.

When the German investment group Universal-Investment-GmbH joined the current litigation it sought the lead plaintiff slot. *Averza et al. v. Super Micro Computer Inc. et al.*, 5:24-cv-06147 (C.D. Cal., filed Aug. 30, 2024).

So did Crain Walnut Shelling LP of Los Molinos, which bills itself online as a producer, processor and packer of fine English walnuts.

In the race to be lead plaintiff in such suits, the winner is usually the biggest loser, thanks to rules in the Class Action Reform Act of 1996 that assign the leading role to the candidate with the most severe damages.

As the Super Micro case launched, 10 plaintiff groups filed motions for appointment as lead. By January, two were left.

Crain Walnuts and its owner, Charles R. Crain Jr., gained the forerunner position by claiming to have lost around \$49 million when Super Micro's stock declined. Universal, the German group, said it incurred losses of more than \$12 million.

But suspicious lawyers for the German group pointed out that Crain Walnuts' asserted losses were more than the company's entire estimated annual revenue and yet comprised only one-third of the \$144 million Crain said it invested in Super Micro.

After the German group took its objections to court, Senior U.S. District Judge Edward J. Davila in San Jose became skeptical and ordered discovery into Crain Walnuts' fitness to be lead plaintiff.

He pointed out that Crain Walnut said it amassed its entire \$144 million position in Super Micro stock over the course of six weeks. "Whether or not pouring this much money this quickly into a single stock is unusual for large institutional investors, it raises eyebrows when a walnut company does so," wrote the judge, a veteran of Silicon Valley legal battles who presided over the criminal trial of Theranos CEO Elizabeth Holmes.

Citing other anomalies in Crain Walnut's filings, Davila added, "What most concerns the Court is that much about Crain Walnut's investment in Super Micro does not add up, including why Mr. Crain would choose an entity actively operating in the walnut market to also serve as his investment vehicle."

Both Universal and Crain Walnut returned to court in late January as Crain sought a protective order to limit Charles Crain's testimony and Universal sought an order to compel Crain to produce more financial information.

Due to the sensitivity of the contest for lead plaintiff, no comment was forthcoming from lawyers for Universal at Bernstein Litowitz Berger & Grossman LLP and those for Crain Walnuts at Hagens Berman Sobol Shapiro LLP.

Elizabeth J. Cabraser of Lieff Cabraser Heimann & Bernstein, a prolific holder of lead counsel slots in scores of class actions, said, "Under the 'biggest loser' system, smaller investors are usually foreclosed from leadership, even though their own losses may be a higher percentage than that of a large institutional investor."

Cabraser, who is not involved in the Super Micro case, added, "The leadership role is crucial, since in practice the lead plaintiff and its counsel prosecute and manage the litigation on behalf of the entire class."

#383478

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CVS Dodges Another Investor Lawsuit, This Time Over Aetna Deal

By Gillian R. Brassil

- Mimicked previously dismissed Omnicare acquisition lawsuit
- First Circuit affirmed that, offered roadmap to toss this case

CVS Health Corp. escaped an investor lawsuit concerning its 2018 acquisition of Aetna Insurance Corp. thanks to its similarities to a case the First Circuit said was properly dismissed in 2022, a judge said.

The complaint filed by lead plaintiff Los Angeles Fire and Police Pensions in this putative class action was “wanting” and provided similarly imprecise correlations of timing as the other suit filed by Omnicare Corp. shareholders. Judge Mary S. McElroy also dismissed that potential class action concerning the 2015 Omnicare acquisition, she said in her order and judgment dropping the L.A. fund’s lawsuit in the US District Court for the District of Rhode Island on Wednesday.

Both suits, filed in 2019, claimed CVS “painted an overly rosy picture” of operations to get shareholder support for the deals and that CVS stock suffered because of the Omnicare acquisition, McElroy said. The Omnicare case said CVS’s business practices “decimated the value” of what was brought by Omnicare, a provider of pharmaceutical services to long-term care facilities, she said.

The Aetna suit said CVS’s valuation, in convincing them to approve the merger, failed to accurately tell them about losses the Omnicare deal caused on CVS’s retail and long-term care unit, she said. “Both lawsuits complained that CVS had concealed the impact of losses of Omnicare’s value by writing down losses in Omnicare goodwill too late and too slowly,” she said.

This case, seeking to impose liability, was stayed while the Omnicare one alleging securities fraud was on appeal. The Aetna plaintiffs filed an amended complaint after the US Court of Appeals for the First Circuit said the other suit failed to allege any actionable false statements or misleading omissions, affirming McElroy’s Omnicare dismissal.

The First Circuit’s opinion “provides an obvious and instructive guide for the review” of this complaint, she said.

The L.A. fund had asserted that the securities statutes each case relied on were different, she said. The statutes the L.A. complaint relied on didn't require allegations of fraudulent intent, but they do "impose liability for statements which are false because they are untrue or are misleading because they omit information or facts necessary to make the statement not misleading."

McElroy said that suits' allegations weren't inadequate due to a stringent pleading standard for fraud cases, rather "because there are insufficient facts pled to show they were false or misleading when made." Just like the Omnicare case's shortcomings, this complaint also lacked sufficiently connecting direct inconsistencies between CVS's performance and highlighted statements.

McElroy said she thus "reaches a similar result—dismissal for failure to state a claim upon which relief can be granted."

"We're pleased the court rightfully dismissed this case," CVS said in an emailed statement.

Williams & Connolly LLP and Whelan Corrente & Flanders LLP represent CVS. Bernstein Litowitz Berger & Grossmann LLP is lead counsel for the lead investor and didn't immediately respond to an email seeking comment.

The case is *In re CVS Health Corp. Sec. Act Litig.*, D.R.I., No. 19-cv-434, dismissed 2/5/25.

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Securities Law

Feb. 7, 2025, 9:31AM PST

Tutoring Company Investors Advance Suit Over Chinese Crackdown

By Gillian R. Brassil

- **Gaotu hid knowledge of issue with new regulations, suit says**
- **Insider sales could indicate executives' motive to defraud**

Gaotu Techedu Inc. must defend against US shareholder claims that it misleadingly glossed over the gravity of the People's Republic of China's impending restrictions on the after-school tutoring industry, a judge ruled.

The plaintiffs plausibly alleged that several risk disclosures and public statements were knowingly misleading about the upcoming 2021 regulations' effect on the Chinese online tutoring company, Judge Pamela K. Chen of the US District Court for the Eastern District of New York said Thursday. However two other challenged statements were optimistic "puffery" and not actionable, Chen said.

The double reduction policy, issued in 2021, prohibits tutoring programs for kindergarten through ninth grade from going public or raising capital. Investors sued Gaotu in 2022, alleging the company's leaders began implementing mitigating measures while publicly denying they knew about the regulation before its official publication.

In March 2021, while parliamentary deliberations on the DRR were still ongoing, a British Virgin Island company that held stock for Gaotu employees filed a form to sell about 890,000 Class A shares with market value of over \$137 million. Investors alleged the company was controlled by Gaotu executives.

Potential insider trading points to intent to defraud, Chen said in her order largely denying Gaotu's motion to dismiss the proposed class action. While similar US investor lawsuits over China's crackdown have been dismissed at this stage, Chen said, "none of those cases alleged stock sales made through a corporate entity that was ostensibly 'controlled' by one of the defendants and worth almost \$140 million, only a few weeks before the relevant risk disclosures were filed."

Other pleadings pointing to scienter involved news reports that Gaotu had been notified about the "spirit" of the regulation and took action before the policy's official publication, plus anonymous statements from ex-employees, Chen said.

The investors say Gaotu's shares fell 63% in July 2021 on leaked news about the upcoming regulations, and another 29% when they were officially announced.

The proposed class period is March 5, 2021 to July 23, 2021.

Levi & Korsinsky LLP represents the lead plaintiff, TCP Diversified Technology Fund. Skadden, Arps, Slate, Meagher & Flom LLP represents Gaotu, chief executive officer Xiangdong Chen, and chief financial officer Nan Shen. Neither firm immediately responded to an email seeking comment.

The case is TCP Diversified Tech. Fund v. Gaotu Techedu Inc. , E.D.N.Y., No. 22-CV-7966, 2/6/25 .

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Genius Brands Must Face Investor Suit on Nickelodeon Airing (1)

By Gillian R. Brassil

- Investors sufficiently pled Rainbow Rangers claim misleading
- Ninth Circuit revived suit last year; plaintiffs can re-file

Genius Brands International Inc. must defend against claims it overstated how often Nickelodeon Jr. aired its Rainbow Rangers show, a federal judge ruled.

The lead plaintiffs sufficiently alleged the level of intent to bring securities fraud claims against CEO Andy Heyward since the discrepancy was so large and the show so important to Genius' business that it seemed unlikely the executive didn't know Rainbow Rangers aired only once or twice a day and "believed it was now expanding to 26 times per week," said Judge Dale S. Fischer in the US District Court for the Central District of California.

When short-seller Hindenburg Research said in 2020 the show was only airing nine times a week, Heyward responded the network had scaled back while Genius produced more episodes, Fischer said. "Considering Nickelodeon Jr. had been airing Rainbow Rangers infrequently and only in the early hours of the morning since at least mid-March, Heyward's attempt to attribute the show's June schedule to a recent scaling back further supports the inference of scienter," Fischer said in his Tuesday order granting in part and denying in part Genius' motion to dismiss.

Other claims—that Genius hid a relationship with PennyStocks.com to get favorable articles in exchange for shares, misled that it would be acquired by The Walt Disney Co. or Netflix Inc., and exaggerated rights to the Stan Lee Universe—didn't meet stringent pleading standards, Fischer said. He dismissed claims against former CFO Robert Denton. He's letting investors re-plead.

Investors in 2020 sued Genius, now called Kartoon Studios, alleging it used various tactics to boost its stock price.

"Since the inception of this litigation, the Company has been consistent in its position that the case is entirely without merit. We will continue to vigorously defend that position," Michael Jaffa, COO and general counsel for Kartoon Studios, said in an email.

Investors weren't able to tie a loss to or adequately allege intent for the PennyStocks claim, Fischer said. They didn't sufficiently plead scienter regarding an acquisition since the report Genius shared on Twitter, now X, that investors said heightened speculation more plausibly was posted for its positive tone toward Heyward, Fischer said. And plaintiffs fell short of alleging intent concerning the Stan Lee intellectual property rights due to knowledge of litigation involving POW! Entertainment, the company Genius purported to be entering a venture on using it; it seemed more cogent "that Heyward was aware of a series of earlier judgments in POW's favor that only bolstered his confidence in the joint venture," Fischer said.

The court previously had dismissed this second amended complaint. The Ninth Circuit revived multiple allegations last year, finding investors adequately pled falsity regarding PennyStocks and loss causation for the other three aforementioned claims. The appellate panel asked the district court to determine whether allegations met all the requirements to bring securities fraud claims.

Glancy Prongay & Murray LLP represent lead plaintiffs Ali Alavi and A Legacy Foundation; the firm didn't respond to an email seeking comment. Vinson & Elkins LLP represent defendants.

The case is In re: Genius Brands Int'l, Inc. Sec. Lit. , C.D. Cal., No. 2:20-CV-07457, 2/4/25 .

(Updates to include Kartoon Studios comment in the sixth paragraph.)

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AIG, Chubb Appeal M&A Settlement Ruling to Delaware High Court

By Olivia Alafriz

- Insurers ask high court to reconsider ruling for Harman
- Appeal was expected as 'bump-up' battles pile up in Delaware

American International Group Inc. and Chubb Ltd. units are appealing a Delaware state court ruling that sided with policyholders on a contentious insurance clause limiting payouts for acquisition-related shareholder settlements.

The insurers filed a notice of their appeal to the state's high court on Wednesday. The move was widely anticipated as a pile-up of disputes in Delaware over the "bump-up" exclusion has pushed carriers to seek definitive answers on whether they'll have to cover costly claims for post-acquisition litigation.

The provision, which is common in D&O policies, has become a sticking point as insurers seek to deny coverage for settlements in acquisition-related cases brought by shareholders seeking damages that could be characterized as an increase in the purchase price for the target company.

In the ruling at issue, Delaware Superior Court Judge Paul R. Wallace last month sided with Samsung Electronics Co. subsidiary Harman International Industries Inc., holding that the carriers couldn't rely on the exclusion to deny coverage.

The settlement amount, \$28 million, was agreed upon to avoid further litigation and was in line with the estimated cost of continuing the case—and far less than the alleged disparity between the transaction price and actual value, Wallace said in the order. The settlement therefore didn't represent an increase in consideration to shareholders, he wrote, and didn't meet the criteria to trigger the exclusion.

Illinois National Insurance Co. and Federal Insurance Co.'s appeal also concerns a 2023 order denying their motion to dismiss the case.

The insurers' opening brief is due March 25.

Counsel for Harman declined to comment.

Heyman Enerio Gattuso & Hirzel LLP and Alston & Bird LLP represent Illinois National. Smith Katzenstein & Jenkins LLP and London Fischer LLP represent Chubb. Potter Anderson & Corroon LLP and Cohen Ziffer Frenchman & McKenna LLP represent Harman.

The case is Illinois Nat'l Ins. Co. v. Harman Int'l Industries Inc. , Del., No. 47,2025, notice of appeal 2/5/25 .

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Recent Controversial Decision and Insurance Law May Mitigate Exposure for Companies Subject to False Claims Act Lawsuits

 [law.com/corpcounsel/2025/02/07/recent-controversial-decision-and-insurance-law-may-mitigate-exposure-for-companies-subject-to-false-claims-act-lawsuits](https://www.law.com/corpcounsel/2025/02/07/recent-controversial-decision-and-insurance-law-may-mitigate-exposure-for-companies-subject-to-false-claims-act-lawsuits)

Fritz E. Berckmueller and Michael G. VanBuren and Tae Andrews

A controversial decision from 2024 and insurance law may help companies facing investigations and *qui tam* lawsuits brought by relators under the False Claims Act. This article analyzes the Act, strategic advice for policyholders seeking insurance coverage, and a shocking decision that may render all currently pending *qui tam* suits unconstitutional.

I. The False Claims Act & Civil Suits Brought by *Qui Tam* Relators

The False Claims Act was originally passed to combat contractor fraud during the Civil War. Under the Act, any person who knowingly submits false claims to the federal government may become liable for treble damages and statutory penalties. Both the attorney general and private persons, termed “relators,” may bring actions to enforce violations. Relators can recover up to 30% of the proceeds of *qui tam* suits brought in the government’s name.

The terms “relator” and “whistleblower” are sometimes used interchangeably, but they are different. Relators prosecute civil actions in the name of the government, take actions to final judgment and handle appeals, bind the government in future cases, and recover punitive damages for the government. In contrast, whistleblowers are merely informers who provide information. Deputized by the government in this fashion, *qui tam* relators file most civil lawsuits brought under the Act.

II. Strategic Insurance-Coverage Advice for False Claims Act Investigations & Actions

Companies subject to False Claims Act investigations and actions may mitigate their exposure using applicable insurance. Here are some best practices:

A. Provide Notice ASAP Under All Potentially Applicable Policies

Several different types of insurance can potentially cover government investigations and civil actions brought under the Act, including Directors & Officers (D&O) and Errors & Omissions (E&O) policies. These policies typically provide coverage on a claims-made-and-reported basis and require notice of a pending investigation, claim, or suit within the policy period or a certain number of days after expiration.

Insurers often use late notice as a potential ground for denying otherwise covered claims, so companies should provide notice under all potentially applicable policies as soon as possible. Insurance brokers can help.

B. Beware of Insurer Attempts to Sidestep, Pigeonhole, or Delay Coverage

In addition to late notice, insurers often assert other coverage defenses to deny coverage for False Claims Act investigations and suits. One common tactic involves an insurer trying to sidestep its coverage obligations by arguing that another type of policy should provide coverage.

1. Does a Policyholder's Submission of Allegedly False Claims to the Government Constitute Professional Services?

D&O policies have broad insuring agreements covering "Claims" alleging "Wrongful Acts," but some may also contain Professional Services exclusions that purport to bar coverage for losses "involving the rendering or failing to render professional services." In 2016's *HotChalk, Inc. v. Scottsdale Insurance Co.* decision, the United States District Court for the Northern District of California held that a False Claims Act lawsuit arose out of the policyholder's professional services and the exclusion applied. A D&O insurer may thus argue that a Professional Services exclusion bars coverage for a suit brought under the Act. However, E&O policies specifically provide coverage for the policyholder's losses due to "Claims" alleging "Wrongful Acts" in the performance of its professional services. Furthermore, other decisions have ruled otherwise. For instance, in 2023's *ACE American Insurance Co. v. Guaranteed Rate, Inc.*, the Supreme Court of Delaware held that a False Claims Act suit and eventual settlement did not fall within a Professional Services exclusion in a D&O policy.

This variance underscores the importance of providing notice under both D&O and E&O policies. Regardless of whether a policyholder's allegedly false submissions to the government constitute professional services, either type of policy may provide coverage, depending on the applicable law and policy wording.

2. Investigative Notices May Constitute "Claims" That Trigger an Insurer's Coverage Obligations.

Many investigations begin when a government agency issues a notice. An investigative notice can take several forms, including a target letter, subpoena, or Civil Investigative Demand, among other documents. These notices often state that the government is investigating potential False Claims Act violations, believes the company may have relevant information, and seeks documents, sworn testimony, or other information. Responding to these investigative notices can cost hundreds of thousands or even millions of dollars in attorneys' fees.

D&O and E&O policies typically require a “Claim” alleging that the policyholder has committed a “Wrongful Act” to trigger the coverage. However, when a policyholder provides notice, its insurer may try to avoid paying by claiming that the investigative notice is not yet a “Claim” or does not allege “Wrongful Acts,” downplaying the investigative notice as a mere request for information or take a narrow view of the policy coverage.

Courts deciding this issue have reached varied results. Many policies define “Claim” to include “a written demand for non-monetary relief”; under this language, several courts have held that investigative notices are covered “Claims” because they demand information and can “compel compliance without judicial intervention,” as a Delaware Superior Court decided in *Conduent State Healthcare, LLC v. AIG Specialty Insurance Co.* in 2019.

While other courts have reached different results, policyholders should not simply take their insurer’s word for it and review their policy’s definition of “Claim.” Some policies also specifically cover pre-“Claim” investigations, either by endorsement or sublimity. At minimum, reporting an investigatory notice should constitute a Notice of Circumstances that could later give rise to a “Claim” and anchor an eventual suit to the policy period.

III. Controversial Decision May Render *Qui Tam* Relators Unconstitutional If the President Does Not Appoint Them Under the Appointment Clause

A controversial decision from 2024 may further aid companies facing False Claims Act suits brought by *qui tam* relators. In *United States v. Florida Medical Associates, LLC*, the United States District Court for the Middle District of Florida ruled that the Act’s *qui tam* provision violates the Appointments Clause of Article II of the U.S. Constitution, as relators are “officers of the United States” and therefore must be appointed by the president to survive constitutional scrutiny. Because the president did not appoint the relator in question, the court held that she was improperly appointed and dismissed the case.

If the decision stands, it could upend False Claims Act jurisprudence. As the president did not appoint the relators in pending *qui tam* cases as officers of the United States, presumably those actions would all be unconstitutional and must be dismissed. However, note that the government has already appealed and later in 2024, the United States District Court for the Eastern District of Tennessee found the *Zafirov* decision to be “unpersuasive” in *United States v. Chattanooga Hamilton County Hospital Authority*.

IV. Conclusion

Even if *Zafirov* stands on appeal, the Attorney General and the Department of Justice will still retain investigatory and enforcement authority, so the False Claims Act will remain a source of potential exposure for companies that submit claims to the government. These businesses can follow the steps outlined above to maximize their chances at recovering for their losses under their insurance policies.

Fritz E. Berckmueller serves as Vice Chair of Calfee's Litigation practice group and Leader of the firm's White-Collar Defense and Investigations practice. He handles complex and high-stakes disputes and litigation for clients across the country. **Michael G. VanBuren** is a Partner and Leader of Calfee's Health Care Regulatory practice. He represents hospitals, health systems, dialysis providers, pharmacies, device manufacturers and suppliers, physician groups and private practice physicians in corporate, business, regulatory and governmental relations matters. **Tae Andrews** is a Senior Counsel and experienced member of Calfee's Insurance Coverage practice team. He advises corporate insurance policyholders in multiple industries and litigates complex insurance disputes in both state and federal courts.

Class Action

Feb. 7, 2025, 1:45 AM PST

Defining a 'Market' Creates Headaches for Antitrust Plaintiffs

By Katie Arcieri

Deep Dive

- Failing to properly define market proves fatal for litigants
- Defense attorneys often attack relevant market definitions

Plaintiffs who sue under federal antitrust laws must define a “relevant market” for their allegations, a threshold issue that has become a stumbling block for high-stakes litigation in recent years.

The latest example came Feb. 3, when a federal jury found for US Soccer and MLS in a case claiming they colluded to exclude an upstart league from the top tiers of men’s professional soccer in the US and Canada.

Plaintiffs have to prove that a specific market exists, how that market is controlled by the defendant, and how they were harmed—which the jury said the North American Soccer League didn’t do, meaning jurors didn’t even reach other questions in the case.

That is a reminder of the pitfalls of defining a market and how defendants can easily knock down that definition, said Christine Bartholomew, a law professor at University at Buffalo School of Law who focuses on antitrust law.

“There’s no magic, fully agreed upon single way to define a market,” she said. “It is a very unpredictable, very outcome-determinative component of any antitrust case.”

Cases involving bedding companies Tempur Sealy and Mattress Firm, pharma giant Bayer AG, and health-care group purchaser Vizient have turned on the same threshold issue.

‘They Are in the Business’

The Federal Trade Commission on Jan. 31 lost a bid to block Tempur Sealy International Inc. from closing its \$5 billion acquisition of Mattress Firm after a judge said the market it targeted—premium mattresses priced at \$2,000 or more—was arbitrary.

“Plaintiffs have an uphill battle to prove a market if the defendants really fight tooth and nail—because they are in the business,” said Eleanor Tyler, a Bloomberg Law antitrust analyst. “It’s hard to make the fact finder believe you over them.”

Vizient was accused of monopolizing markets, including the one for selling disposable medical supplies to its member hospitals. But a federal judge in October said the plaintiff’s market was insufficient because it didn’t encompass all reasonably interchangeable substitutes—essentially what the consumer would buy instead if there were a price increase.

A relevant market doesn't have to include all potential substitutes—just ones that would be close enough to constrain pricing if a monopolist “were to try to push prices above a competitive level,” said David Cross, a partner in Goodwin Procter LLP's antitrust and competition practice.

When antitrust cases go to trial, jurors can bring common sense to bear and conclude that there wasn't a relevant market, he said.

A jury last year also found for Bayer in a case where a competitor claimed the company restrained trade in the flea and tick treatment industry. The jury found that the plaintiff, veterinary drug company Tevra Brands LLC, failed to prove that the relevant antitrust market was topical imidacloprid flea and tick products for cats and dogs in the US.

Soccer Stars

In the soccer case, jurors simply weren't convinced that there were standalone markets for the Division I designation for men's professional soccer leagues in the US and Canada and for team membership in a Division I men's professional soccer league in both countries, said Marc Edelman, an antitrust law professor at Baruch College's Zicklin School of Business.

“There is anecdotal evidence of a meaningful number of professional soccer players that move back and forth between US leagues and foreign leagues and weigh competitive offers between US leagues and foreign leagues,” he said. “That creates an argument that the market is broader than the United States.”

The NASL attempted to define a market small enough to show that US Soccer had sufficient market power, but that didn't “reflect actual market realities,” said Dodi Allocca, antitrust attorney in Clifford Chance's Washington office.

“Real facts have to support your market definition, and it just seems like the plaintiffs were cherry-picking their market a little bit too much to fit their theory,” she said.

Slicing a market too thinly is risky.

“The problem you see in a lot of these cases is you have plaintiffs who gerrymander markets because it's the only way they can establish or at least plead market power, which is really what's at stake,” Cross said.

In the US Soccer case, jurors likely knew about international soccer stars like Lionel Messi, who plays for Inter Miami, indicating the presence of a worldwide professional men's soccer market, Allocca said.

Rule of Reason Test

Plaintiffs that bring sports antitrust suits like the US Soccer case are judged under the rigorous “rule of reason” test as opposed to the “per se” test, in which conduct is considered on its face illegal.

That's because defendant sports leagues, such as Major League Soccer, are considered joint ventures among many businesses—the teams—whose collective conduct should be judged under the rule of reason, Edelman said.

Rule of reason cases present a lot of uncertainty for plaintiffs, who have to hire the right expert to bolster their market definition and create an economic model to support it, University at Buffalo's Bartholomew said.

Defendants can easily chip away at that definition, claiming the plaintiffs failed to include a key input.

Vizient, for example, argued in its summary judgment motion that plaintiff Endure Industries Inc.'s proposed market definitions failed because they didn't capture all areas of competition for the products at issue.

Whether a market is properly defined can become a battle of experts on opposing legal teams, Bartholomew said.

"Two economists can look at the very same thing and conclude different things," she said.

– With assistance from Justin Wise.

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San Diego County sues popular social media platforms

[kpbs.org/news/health/2025/02/06/san-diego-county-sues-popular-social-media-platforms](https://www.kpbs.org/news/health/2025/02/06/san-diego-county-sues-popular-social-media-platforms)

February 7, 2025

Health



Mike Damron

/

KPBS

San Diego County Supervisor Terra Lawson-Remer addressing the media about the County's lawsuit against Meta, Google, SnapChat, YouTube and TikTok at the County Administration Building in San Diego, CA on Feb. 6, 2025.

San Diego County leaders, school officials and students announced a lawsuit Thursday against Meta — the parent company for Facebook and Instagram — Google, SnapChat, YouTube and TikTok.

The suit claims the companies use behavioral and neurobiological techniques to "induce students to compulsively use their social media platforms." It says the companies conduct constitutes a public nuisance.

San Diego County Supervisor Terra Lawson-Remer said the companies know exactly what they're doing.

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"Addiction is profitable. And it's not just Meta — Snapchat, TikTok, YouTube all use the same tricks. Infinite scroll, autoplay, algorithms designed to keep our kids trapped on an endless loop. It's not an accident. It is their business model," Lawson-Remer said.

Mt. Everest Academy 10th Grader Vihann Bhardwaj said social media used to help him connect with his extended family, but things have changed.

"Instead of connecting me, social media kept me disconnected as ever, keeping me lost and chasing the deceptively perfect lives of the seemingly perfect influencers I was targeted to. This is when I realized that social media capitalizes on vulnerability. It capitalizes on insecurities," Bhardwaj said.

Richard Barrera, a San Diego Unified School Board member, said he sees the impact of social media on students.

"It means our young people are sleeping less, are experiencing more depression, more anxiety, in some cases leading to suicidal ideation. And then it affects the relationships that young people have with each other. It increases bullying," Barrera said.

Lawson-Remer said they are seeking financial damages for the money the county is spending to treat the mental health crisis that she said social media addiction fuels.

"Financial penalties to help compensate us are important, but ultimately that's not sufficient. We need these companies to stop designing their platforms in a way that creates addiction. So we're looking for real reforms in how these platforms operate," Lawson-Remer said.

A Google spokesperson responded to the lawsuit with a statement.

"Providing young people with a safer, healthier experience has always been core to our work.," said José Castañeda, a Google spokesperson in the emailed statement. "The allegations in these complaints are simply not true."

The other companies did not respond to requests for comment.



Melissa Mae

As a freelance reporter, I cover a wide variety of stories. One day I may cover the current COVID-19 situation and the next day my story may be about a San Diego landmark. With a background in sports broadcasting, any time I get to cover a sports story is an added bonus! I love covering stories about the place I am lucky enough to call home, San Diego.

See stories by Melissa Mae

What issues need to be exposed in your community?

Judge grants final approval of \$375 million UFC antitrust settlement after decadelong battle

 [courthousenews.com/judge-grants-final-approval-of-375-million-ufc-antitrust-settlement-after-decadelong-battle](https://www.courthousenews.com/judge-grants-final-approval-of-375-million-ufc-antitrust-settlement-after-decadelong-battle)

Erik Uebelacker

Welterweight fighter Nate Diaz poses on the scale during a ceremonial weigh-in for the UFC 279 mixed martial arts event on Sept. 9, 2022, in Las Vegas. (Steve Marcus/Las Vegas Sun via AP, File)

(CN) — A decadelong legal fight for lost wages between the Ultimate Fighting Championship and its former athletes reached the final horn on Thursday after a federal judge gave final approval of a \$375 million antitrust settlement.

More than 10 years after a group of ex-UFC fighters filed their class action, *Le v. Zuffa*, in 2014 to recover lost wages — saying the UFC used anticompetitive business practices to keep its talent locked into low-paying contracts — a class of 1100 fighters will now be eligible to split the \$375 million pot after U.S. District Judge Richard Boulware gave final approval at a federal courthouse in Las Vegas.

“It feels like we’ve been in a long fight camp for 12 years,” Nate Quarry, a named plaintiff who fought in the UFC from 2005 to 2010, told Courthouse News on Thursday. “We got knocked down a few times and yet somehow at the end, our hand is being raised.”

Quarry was one of dozens of fighters in the Las Vegas courtroom when Boulware, a Barack Obama appointee, put to rest the lengthy piece of litigation. He said that the room erupted in applause and “hugs all around” when the judge gave his final approval.

“I’m still on the verge of tears right now thinking about how difficult this has been,” Quarry said. “With all the obstacles we overcame, the friendships and relationships that we’ve built along the way, it’s just overwhelming.”

Class members covered in the settlement include fighters who competed in UFC bouts between 2010 and 2017. According to court filings, the class members will receive \$250,000 each, on average after fees, with the amount to fluctuate based on number of bouts and other factors.

Thirty-five class members are expected to net more than \$1 million, while around 100 fighters should receive more than \$500,000. More than 200 fighters should net more than \$250,000, over 500 would get more than \$100,000 and nearly 800 would recover over \$50,000.

The fighters’ attorney Eric Cramer, an antitrust lawyer for class action firm Berger Montague, told Courthouse News on Thursday that he was “extremely pleased” that the court approved the long-awaited settlement.

“The plaintiffs and lawyers are thankful that Judge Boulware presided over this case with an unusual degree of thoughtfulness and care,” Cramer said. “And we couldn’t be prouder to have represented the brave group of athletes who stepped forward on behalf of the class, namely, Cung Le, Jon Fitch, Brandon Vera, Luis Javier Vasquez, Kyle Kingsbury and Nate Quarry. This precedent setting result brings to a close a ten year legal battle for economic justice for these athletes. We will be working hard over the coming weeks to ensure that every single fighter in the class makes a claim and gets the money that is rightfully theirs.”

The fighters will need to be proactive about collecting their cash. Cramer said that his firm will send out claim forms 60 days after the court issues the written order granting final approval. After that, fighters will have a 45-day deadline to sign and return the forms to claim their earnings.

Attorneys for the UFC are urging the fighters to collect what they are owed.

“Today’s decision is welcome news for both parties. We are pleased the *Le* case is now fully resolved,” a company spokesperson said in a statement.

As Quarry said, the settlement didn’t come without its obstacles. Last year, it appeared as if the case was headed to trial after Boulware denied a \$335 million settlement agreement between the parties. The judge said he feared the dollar amount wasn’t high enough for the fighters, and worried that the agreement — which also would have settled another pending antitrust case against the UFC, in addition to *Le* — left no room for injunctive relief.

A month later, the parties reached the new settlement worth \$375 million, to which Boulware gave preliminary approval.

The new settlement isn’t just a higher dollar amount, it also leaves the other antitrust case — *Johnson v. Zuffa* — intact for further litigation. Currently in the discovery process, that class action covers fighters who competed in the UFC from 2017 on.

While the goal with *Le* was back pay for former fighters, the goal with *Johnson* is to force the UFC to change its business practices for future ones.

“There’s still a lot of work to be done,” former UFC fighter Gray Maynard told Courthouse News on Thursday, in reference to the *Johnson* case.

Maynard, a two-time UFC title contender, told Courthouse News last year that despite his success in the organization, he was locked into a predatory \$42,000-per-fight contract that forced him to take up a second job working construction while training full-time.

Sometimes, he’d go straight from the job site to the cage, like in 2013, when he went from working on a client’s house in the morning to fighting Nate Diaz on pay-per-view later that night.

“We were remodeling a house,” Maynard said. “I was trying to look for other ways to make money. After my first title fight, I knew this wasn’t a sustainable career.”

Now that *Le* is settled, Maynard guesses that his total payout will be in the neighborhood of \$400,000 to \$500,000. The money is nice, he said, but he’s also thrilled that the *Johnson* case is still alive so fighters like him can continue to share their stories with hopes of changing the sport for the better.

“The money is icing on the cake,” Maynard said. “There are a lot of stories out there. Hopefully this gives a lot of people confidence and opens people’s eyes as to what’s going on with the UFC and where it needs to go.”

The *Johnson* case is currently pending before the same judge in the same court. Cramer and his firm are representing the fighters in that action, too.

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BUSINESS

Edison Unit Says Its Equipment May Have Been Involved in SoCal Fires

Southern California Edison said its equipment may be associated with the start of the Hurst fire

By *Dean Seal*

Updated Feb. 6, 2025 1:47 pm ET



The Los Angeles Fire Department is still investigating the Eaton and Hurst wildfires that raged in Southern California last month. PHOTO: MARIO ANZUONI/REUTERS

A subsidiary of Edison International **EIX -2.46%** ▼ said there may be a link between its equipment and two of the wildfires that raged in Southern California last month.

Southern California Edison on Thursday submitted two letters to the California Public Utilities Commission with updates on its analysis of the Eaton and Hurst wildfires, saying it believes its equipment may be associated with the start of the Hurst fire.

Information and data, including videos from external parties, also suggest that the Edison unit's equipment was involved in the Eaton fire, though the unit hasn't found any typical indications, such as broken conductors, that would support such a link, the company said.

"While we do not yet know what caused the Eaton wildfire, SCE is exploring every possibility in its investigation, including the possibility that SCE's equipment was involved," Edison Chief Executive Pedro Pizarro said.

The Los Angeles Fire Department is still investigating both fires and suggested the link between the Edison unit's equipment and the Hurst fire, Edison said.

The fire department's investigation into the Eaton fire is continuing and is expected to take several months to complete, Edison said.

Write to Dean Seal at dean.seal@wsj.com

Videos

Lawsuit filed over Moss Landing battery fire's toxic impact

[dailyjournal.com/articles/383481-lawsuit-filed-over-moss-landing-battery-fire-s-toxic-impact](https://www.dailyjournal.com/articles/383481-lawsuit-filed-over-moss-landing-battery-fire-s-toxic-impact)

A lawsuit has been filed against multiple defendants after a massive fire at a lithium-ion battery energy storage facility in Moss Landing. The complaint claims significant environmental damage, health problems for nearby residents and widespread toxic contamination.

The Jan. 16 fire produced plumes of toxic smoke filling the sky in the Monterey County town and burned for five days, according to news reports.

The complaint, filed in Alameda County Superior Court on Tuesday, claimed the fire and its aftermath "affected 50,000 to 100,000 people in the area, led to the declaration of a local state of emergency and required the evacuation of approximately 1,500 residents, closure of schools, major roads, and significant disruptions to daily life, commerce and agricultural operations." *Mary-Eliza Schmidt et al., v Moss Landing Power company et al.*, 25CV109594 (Alameda Super. Ct., filed Feb. 4, 2025)

Knut Johnson of Singleton Schreiber LLP, based in San Diego, filed the lawsuit which details a long list of damages including costs of medical treatment for injuries sustained due to the fire, injury to personal property and relocation and evacuation expenses.

"We think that the defendants used the most dangerous batteries, stored them in the most dangerous way possible, all for more profit," Johnson said in email. "And their dangerous conduct harmed and continues to harm our clients."

The complaint demands a jury trial and targets a throng of companies including the Moss Landing battery storage facility management company, Vistra Corp, who have a string of claims levied against them. Chief among them are choosing lithium nickel manganese cobalt oxide batteries which are allegedly more prone to thermal instability, storing the batteries in a roofed building which is allegedly considered more dangerous than storing them outdoors, using an outdated water-based heat suppression system and failing to warn the public about the dangers posed by the a battery storage facility in a populated area.

Pacific Gas and Electric Company (PG&E) and electronics company LG Energy were also named in the complaint. LG Energy are accused of designing, manufacturing, supplying and installing the batteries that caught alight. The plaintiffs allege that the lithium-ion batteries were defective leading to "thermal runaway" and the resulting fire. They also claim that the batteries were distributed without adequate instructions or warnings about the potential for thermal runaway.

The complaint states that PG&E controls most of the Moss Landing battery site. It claims it planned, built, operated, and continues to operate the facility along with Vistra. The energy company is also accused of failure to warn and their acts "resulted in the fire", said the complaint.

A spokesman for PG&E said: "PG&E is aware of the lawsuit, and we are reviewing it. The fire at the Vistra Moss Landing power plant on January 16, 2025, was not a PG&E incident. The Moss Landing power plant is located adjacent to, but walled off and separate from, PG&E's Moss Landing electric substation.

"PG&E systems and personnel at our Moss Landing substation began emergency response procedures when the Vistra battery fire was detected.

"PG&E customers did not experience any outages due to the Vistra battery fire.

"PG&E is committed to providing safe, clean, and reliable energy for all, and this includes the safe operation of battery energy storage systems."

Vistra and LG Energy were contacted for comment but did not respond in time for print.

#383481

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AI's Racial Bias Claims Tested in Court as US Regulations Lag

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Kaustuv Basu, Olivia Alafriz

- Black homeowners claim insurance algorithm discriminated
- Trump order calls for AI tools free from 'ideological bias'

A lawsuit developing in the Midwest highlights an AI issue that continues to trip up companies and policymakers: how to stop algorithms fed race-free data from seeing color anyway.

"Where we live, what we do for a living, what type of activities we engage in, what we purchase, even our names all have correlations with race," said Mark Dredze, a computer science professor at Johns Hopkins University, and interim deputy director of the university's data science and AI Institute.

Watch Video At: <https://youtu.be/ZLCfasjTWvY>

WATCH: Can laws keep up with AI's fast pace?

"Not telling an algorithm a person's race doesn't prevent it from inferring that information from countless other things it may know about us," said Dredze, also a visiting researcher at Bloomberg LP.

That's at the heart of the suit from two Black homeowners in Illinois who allege that their State Farm insurance claims took longer and required more proof than identical claims from White neighbors after storm damage. The case, filed in 2022 in the US District Court for the Northern District of Illinois, survived a motion to dismiss and could grow into a class-action this year to include thousands of claimants across six states in the Midwest, said David Tracey, an attorney for the plaintiffs.

As artificial intelligence tools become more common and sophisticated, with companies relying on them for deciding who they hire or how they price their products, the possibility of unintentional bias remains real.

The European Union's AI Act addresses this by asking for "technically robust" AI systems, training models with representative data sets, and requiring companies providing AI data to trace and audit the data that is being used. Colorado enacted a law seeking to prevent discrimination through the use of algorithms in insurance practices. And New York City now requires bias audits of AI tools used for employment decisions.

At the federal level, former President Joe Biden's executive order on AI that warned of algorithmic bias was repealed by President Donald Trump, and it is unclear if accounting for AI bias against racial or ethnic groups will remain a US priority. The White House didn't respond to a request for comment.

Trump's own brief executive order states that "we must develop AI systems that are free from ideological bias or engineered social agendas."

"AI should not be biased," said Chiraag Bains, a senior fellow with the Brookings Institution. "But while Trump is focusing on ideology, the overwhelming evidence of biased AI concerns racial and gender bias: job application tools that screen out women, facial recognition systems that can't distinguish between dark-skinned faces, hospital algorithms that recommend less care for Black patients."

"I would take this as a signal that the Trump administration won't pursue civil rights enforcement against AI-based race and gender discrimination," said Bains, who previously worked on issues of AI and equity for the Biden administration.

State attorneys general and private litigants could fill the void, said Bains.

Hail and Wind

The lawsuit against State Farm cites the federal Fair Housing Act in alleging that policy claims filed by Black homeowners Jacqueline Huskey and Riian Wynn were treated differently because of their race.

"To my knowledge, this is the first suit that is based upon potential machine-learning algorithms having this effect," said Dan Schwarcz, a law professor at the University of Minnesota Law School who focuses on insurance law and regulation, talking specifically about lawsuits related to insurance.

A company spokesman denied the allegations.

"State Farm is committed to a diverse and inclusive environment, where all customers and associates are treated with fairness, respect, and dignity. We are dedicated to paying what we owe, promptly and courteously," the spokesman said in an email.

The suit says that a policy claim by Wynn related to the roof membrane of her Evanston, Ill., townhome blowing off in a storm took three months longer to resolve and required additional paperwork and interactions compared to her White neighbor.

Huskey, a resident of Matteson, Ill., alleges State Farm took four months to grant her claim in part after hail damage to her roof. In that time, allegedly longer than it took the insurer to respond to White homeowners, the damaged roof led to water damaging her kitchen and

bathrooms.

Wynn and Huskey allege that the disparities stem from State Farm's reliance on algorithmic decision-making tools in its claims review process that predict fraud and decide which claims are paid out immediately and which merit more scrutiny. They allege that the company's decision-making tools use inputs that correspond with race or learn from historic housing or claims data that is biased. And even when there is no information about race, algorithms can combine other inputs to produce discriminatory effects, the lawsuit alleges

"Algorithms can 'learn' to use omitted demographic features by combining other inputs that are correlated with race (or another protected classification), like zip code, college attended, and membership in certain groups," the lawsuit claims.

Bains argues that existing provisions such as Title VII of the 1964 Civil Rights Act are inadequate to monitor AI algorithmic discrimination, and an overarching law might help.

"What we really need is comprehensive civil rights protection," he said. "We came close this past Congress with the American Privacy Rights Act."

That bill stalled, in part, when the civil rights protections—AI impact assessment requirements or the ability to opt out of AI decision-making for housing and credit—was taken out of the bill, causing the Congressional Black Caucus to withdraw its support. Congress has yet to pass major AI legislation.

IRS Audits

Bias in algorithms can be identified by documenting each step of the modeling pipeline—from the input of data to the model used and how the output from it is used—and how each of those steps can mitigate or increase disparities, said Daniel Ho, a Stanford law professor who advised the Biden White House on AI policy.

"With the same exact training data, you can have modeling choices that may lead you to sort of decisions that have higher disparities or lower disparities," he said.

He gave the example of research he led along with those from other universities that found Black taxpayers in certain instances, like when they are claiming the Earned Income Tax Credit, were three to five times more likely to be audited than others by the Internal Revenue Service based on an algorithm.

In May 2023, the IRS acknowledged after a review that Black taxpayers were disproportionately audited in some instances, confirming findings by Ho's team. The agency said at the time that it was "overhauling compliance efforts" and that the selection criteria for the audits were being changed.

But as Bloomberg Tax reported, it's unclear whether those changes will take effect under the Trump administration.

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Dissenter Blasts 4th Circuit Majority Decision Upholding Meta's Section 230 Defense

 [law.com/therecorder/2025/02/07/dissenter-blasts-4th-circuit-majority-decision-upholding-metas-section-230-defense-](https://www.law.com/therecorder/2025/02/07/dissenter-blasts-4th-circuit-majority-decision-upholding-metas-section-230-defense-)

Sulaiman Abdur-Rahman

What You Need to Know

- The U.S. Court of Appeals for the Fourth Circuit ruled Meta Platforms Inc. has Section 230 immunity from liability in a deadly race-based attack.
- Judge Allison Jones Rushing in a dissenting opinion argued she would have revived the negligence claims against Meta.
- Gibson, Dunn & Crutcher represented defendant Meta.

A dissenting opinion in a U.S. Court of Appeals for the Fourth Circuit case suggested Meta Platforms Inc. may not enjoy absolute immunity under Section 230 of the Communications Decency Act.

Judge Allison Jones Rushing made the comments in a dissenting opinion filed Tuesday in a lawsuit alleging Meta promoted race-based hate content on Facebook that led to the June 2015 mass murders of nine Black churchgoers in Charleston, South Carolina.

Southern Med Law represented a plaintiff impacted by Dylann Roof's deadly attack at the Emanuel AME Church and filed a lawsuit in South Carolina federal court seeking to hold Meta liable under state tort claims. U.S. District Judge Richard M. Gergel dismissed the claims against Meta in 2023, and the Fourth Circuit narrowly affirmed that judgment Tuesday.

"Unlike the majority," Rushing wrote in her dissenting opinion, "I would reverse the district court's dismissal of M.P. negligence claims on Section 230 grounds and remand her claims regarding Facebook's own conduct, including its group recommendations, for further proceedings."

The plaintiff, identified in court documents as a minor person or M.P., is the daughter of the Rev. Clementa Pinckney, one of the victims shot dead by Roof.

Rushing argued Section 230 has limits and that Meta's Section 230 immunity does not bar M.P.'s negligence claims.

"Under our precedent," Rushing wrote, "Section 230 protects Facebook from liability for those editorial decisions, as the majority correctly concludes. But M.P. also alleges that Facebook culpably recommended that Roof join extremist groups on Facebook, where his

radical views were cultivated. Recommending that a user join a group, connect with another user, or attend an event is Facebook's own speech, for which it can be held liable, even under this Court's precedent."

Senior Judge Barbara Milano Keenan in the majority opinion ruled that Meta is immune from the plaintiff's state tort claims under Section 230 of the Communications Decency Act.

"M.P.'s state law tort claims suffer from a fatal flaw; those claims attack the manner in which Facebook's algorithm sorts, arranges, and distributes third-party content. And so the claims are barred by Section 230 because they seek to hold Facebook liable as a publisher of that third-party content," Keenan wrote in the majority opinion for the Fourth Circuit. "Accordingly, we conclude that the district court did not err in granting Facebook's motion to dismiss."

Chief Judge Albert Diaz joined Keenan's majority opinion.

Gibson, Dunn & Crutcher partner Jacob T. Spencer represented Meta in oral arguments before the Fourth Circuit, according to the court's decision.

Meta did not respond to a request for comment on this article, but the company acknowledged litigation risks in its most recent annual report.

"Over the last several years, the number and potential significance of the litigation and investigations involving the company have increased, and there can be no assurance that this trend will not continue," Meta said in its 2024 annual report released Jan. 30. "For example, we are facing numerous cases in the United States in which plaintiffs are attempting to avoid or limit the application of Section 230 of the Communications Decency Act to their claims and certain of those matters have survived motions to dismiss, including through the use of products liability theories."

Counsel for the plaintiff M.P. expressed disappointment in the Fourth Circuit's ruling but applauded Rushing's dissenting opinion as a potential road map for how to hold social media companies liable.

"It has been an uphill climb to hold social media companies accountable for the incredible psychological damage that their algorithms have afflicted on a whole generation of America's young people," Southern Med Law attorneys François M. Blaudeau and Marc Mandich alleged in a joint statement shared with the National Law Journal. "Section 230 precedent has provided a blanket immunity that the courts have been reluctant to overturn despite clear and convincing evidence that companies like Meta are injuring young people psychologically through changing the biochemistry of their brains."

“Judge Rushing in her admirable dissent charts a path for the eventual and necessary pulling back of this blanket immunity,” the plaintiff’s attorneys added. “That said, while we respect the court’s ruling, we do respectfully disagree with the reasons for its decision. As such, on behalf of Clementa Pinckney who lost his life along with eight other of his brethren at the hands of a young man who had radicalized online, the plaintiff will be considering further action in this matter.”

The attorneys also called on Congress to amend or repeal Section 230 and “restore common sense liability for the bad behavior and poor judgment shown by social media companies.”

Former President Joe Biden refused to commute Roof’s death-penalty sentence when he commuted the sentences of 37 of the 40 people on federal death row to life sentences without the possibility of parole.

The Fourth Circuit rendered its decision in *M.P. v. Meta Platforms Inc.*, No. 23-1880.

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Natalee Horstman

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Trending

Who Got The Work

Stephen C. Willey of Fennemore Craig has entered an appearance for Lauren Chalas in a pending trademark lawsuit. The complaint, filed Dec. 11 in Washington Western District Court by Bamert Regan on behalf of Laura Freeman, seeks a declaration of non-infringement against Challas's claims that Freeman uses a mark confusingly similar to the defendant's 'The Roving House' mark without authorization. The case, assigned to U.S. District Judge Tiffany M. Cartwright, is 3:24-cv-06015, Freeman v. Chalas.

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New York sued by 22 US states over \$75 billion climate superfund

 [reuters.com/legal/new-york-is-sued-over-75-billion-climate-superfund-2025-02-06](https://www.reuters.com/legal/new-york-is-sued-over-75-billion-climate-superfund-2025-02-06)

Jonathan Stempel

The setting sun light is reflected off waterfront developments in Williamsburg in the Brooklyn borough of New York City, U.S. January 2, 2025. REUTERS/Adam Gray/File Photo
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- Republican attorneys general oppose New York 'overreach'
- Lawsuit says superfund could cost jobs
- New York says 'corporate polluters' should pay

NEW YORK, Feb 6 (Reuters) - New York was sued on Thursday by 22 other U.S. states over a new law requiring fossil fuel companies to contribute \$75 billion over 25 years into a fund that will pay for damage caused by climate change.

Led by West Virginia and all with Republican attorneys general, the 22 states called New York's law a politically-motivated "overreach" that punishes traditional energy companies for emitting greenhouse gases many years ago even though they complied fully with applicable laws.

They said the collection of hefty payouts from coal, oil and natural gas producers violates the U.S. Constitution and is preempted by the federal Clean Air Act, and could wipe out thousands of jobs if producers are forced to shut down.

New York became the second U.S. state to create an industry-financed "superfund" to address climate change, under a law signed by Democratic Governor Kathy Hochul on December 26. Vermont's superfund took effect last July.

"We're not going to allow left-wing states like California, New York, Vermont to dictate to the American people how they're going to get their electricity," West Virginia Attorney General John McCuskey said at a press conference.

"We need to stay ahead of countries like China, India and Russia as they move forward with their coal and gas-fired power plants," he added.

The lawsuit names New York Attorney General Letitia James and two other state regulators as defendants. James' office declined to comment. The other regulators did not immediately respond to requests for comment.

A spokesperson for Hochul said the governor "believes corporate polluters should pay for the wreckage caused by the climate crisis--not everyday New Yorkers. We look forward to defending this landmark legislation in court."

West Virginia is second among U.S. states in coal production, the U.S. Energy Information Administration said.

Other plaintiffs include three coal trade groups and Alpha Metallurgical Resources (AMR.N) [↗](#), opens new tab, a large coal miner. The lawsuit is being filed in federal court in Albany, New York, the state's capital.

New York's law requires fossil fuel companies to contribute \$3 billion annually starting in 2028 to the superfund, divided based on the amount of greenhouse gases they emitted into the atmosphere between 2000 and 2018.

The law applies to companies that the state's Department of Environmental Conservation considers responsible for 1 billion tons of greenhouse gas emissions during that period.

Money would help build infrastructure such as roads, water systems and sewage systems to protect communities and coastlines from weather events such as extreme heat and flooding.

On Dec. 30, the U.S. Chamber of Commerce and the American Petroleum Institute sued Vermont to block that state's superfund. That case remains pending.

President Donald Trump, a Republican, won 70% of the West Virginia vote in November's election.

Reporting by Jonathan Stempel in New York; Editing by Daniel Wallis

How to Buy Ohio's Newest Senator

ohiodems.org/how-to-buy-ohios-newest-senator

February 7, 2025



News

February 7, 2025

Columbus, Ohio- As Ohio's newest Senator Jon Husted settles into office, lobbyists around Capitol Hill are waiting for the chance to gain his support on any number of bills. Ohioans already know that Husted can be easily bought- so we're sharing a tried and true guide on how to buy his influence.

Do:

Bribes: In 2017, FirstEnergy contributed \$1 million to a dark money group supporting Husted's primary campaign for governor. In the memo, they even wrote "Husted campaign." While Senator Husted still refuses to tell Ohioans if he knew about the money, he's been called a "good friend of FirstEnergy" and spearheaded HB6 through the legislative process. Bribery has always been the most obvious answer, but if you want to match FirstEnergy, it's at least \$1 million to buy your senator.

Cushy Board Appointments: If you're looking to get on Husted's good side more permanently, consider offering him a position on your corporation's board... with a salary. It's ok if your organization has business before the state of Ohio or any of Husted's committees. In 2022, he joined the board of Heartland Bank, which does business with the state of Ohio, while still serving in office. He's even paid a salary of \$21,600 per year.

Don't

Call his office phone: Senator Husted's voicemail box is already full due to the high volume of calls from constituents begging him to stand up and actually represent Ohioans. Unfortunately, they haven't been able to get an answer even though he's been in office for weeks now. If you're a lobbyist looking to buy his vote, you'll have to call his personal cell.

Subpoena him in a civil corruption suit: If you're looking to buy Senator Husted and you get caught, it's not a good idea to subpoena him for documents related to the case and then depose him about his role in the same case. It's clear that Husted was deeply involved in the passage of House Bill 6, despite his denying it at every turn.

###

Matt Levine's Money Stuff: Delaware Tempts Daktronics

By Matt Levine

Opinion

Delaware

See, when I was a corporate lawyer, many years ago, I thought that big companies *wanted* to be incorporated in Delaware. Most of them were, and are, and Delaware is in the business of catering to them. “Catering to corporations” means mostly catering to corporate *managers*, to founders and chief executive officers and boards of directors and controlling shareholders, since they are the ones who make decisions about where the company will be incorporated. So Delaware offers an attractive package to managers. The package is, roughly:

1. Delaware lets managers do a lot of stuff. There is a “business judgment rule” saying that, for the most part, courts will not second-guess managers’ decisions. So you can run your business without worrying too much that some random shareholder will sue you and a court will order you to do something else.
- 2. Delaware doesn’t let managers do *anything* they want. The managers have fiduciary duties to shareholders; they have to treat their shareholders fairly and put their interests first. If you do certain bad things, shareholders will sue you, and a court *will* order you to knock it off. This is good! For you, as a manager, it helps you credibly promise to investors that they will be treated well, which makes their shares more valuable, which makes them willing to invest in your company. If there was *no* oversight over your relationship with shareholders, you’d have a hard time raising money.
- 3. Delaware is *predictable*. Delaware has lots of corporate-law cases, so there are a lot of precedents saying what is and isn’t allowed. If you ask your lawyer if you’re allowed to do something, she can probably give you a pretty confident answer. Delaware has a specialized court — the Court of Chancery — for corporate disputes, with experienced judges who know a lot about corporate law. The chancery court moves quickly, so cases can be resolved quickly, and it doesn’t have jury trials, so you don’t have to worry about your merger being stopped by the unpredictable decision of some random laypeople.

Of these three things, the third strikes me as by far the most important. The particular mix of rules in Points 1 and 2 — what is and isn't allowed — isn't that important; every state offers some reasonable mix of managerial discretion and shareholder rights, and any company can adapt to any set reasonable set of rules. What matters is that you know in advance what the rules are, so you can plan for them.

This has all become controversial recently, because of a few Delaware court decisions that (1) were surprising and (2) quite *significantly* limited the power of controlling shareholders. These decisions undermine the predictability point a bit — they were surprising — but they were also just economically bad for controlling shareholders. (One was the decision that Elon Musk couldn't get a multibillion-dollar stock package that was approved by Tesla Inc.'s board of directors and shareholders, and he did really want that stock.) So it became rational for controlling shareholders to say "well, even if some other state is less predictable than Delaware, I'd rather roll the dice than be unable to run my company the way I want." And so Tesla moved to Texas, and we have talked about other companies that have moved out of Delaware or are considering it.

But you shouldn't overstate this. It's not like the story here is "Delaware is super-unfriendly to corporate management, and so companies are fleeing to anywhere else." It's that Delaware has seemed unfriendly to certain sorts of companies — often high-profile founder-controlled companies — and other states have seized the opportunity to position themselves as more founder-friendly and pick off some big companies.

Meanwhile managers could do worse than Delaware:

Daktronics Inc.'s largest shareholder says the company's board of directors is working to undermine its stockholder rights and wants a federal court to stop a reincorporation plot.

Alta Fox Opportunities Fund LP said the board is planning to have the company reincorporated from South Dakota to Delaware to thwart its calls for company-wide reform, according to a complaint Tuesday. Reincorporation would free Daktronics from South Dakota's compulsory cumulative voting, enabling shareholders to pool their votes to accomplish their interests over the board of directors'.

The investor says the electronics company and its president Reece A. Kurtenbach have breached their fiduciary duties to Alta Fox and have oppressed shareholders, according to the complaint. Alta Fox asked the US District Court for the District of South Dakota to preliminarily and permanently enjoin the defendants from further undermining it or holding a meeting to vote on reincorporation.

Here is the lawsuit, and here are proxy statements from Daktronics and Alta Fox. The basic issue is that, as the lawsuit puts it, "bedrock South Dakota law mandates 'cumulative voting' — in effect, minority stockholders can pool their votes to ensure the election of at least some directors reflecting minority stockholder interests and prevent long-term entrenchment of weak directors."

We have discussed cumulative voting before: Basically, in cumulative voting, if there are eight directors up for election, the shareholders get eight votes per share, and can allocate those votes to any director(s) they want. If you really want to elect one director, you can give all eight votes to your favorite candidate. So an activist with a big minority stake might not be able to get a whole slate of directors elected, but it can probably get *one* director elected. As Alta Fox puts it:

Alta Fox believes that cumulative voting is an important shareholder right that protects the voice of independent minority shareholders.

Or as Daktronics puts it:

Cumulative voting is a method of voting in corporate director elections that allows shareholders to allocate all their votes to one candidate or distribute them among multiple candidates, increasing the ability of one or a few minority shareholders to elect a faction of hand-picked director candidates that they believe will serve their particular interests, without broad shareholder support

They agree that cumulative voting is a way for a minority shareholder — an activist like Alta Fox — to get representation on the board of directors over management's objection; they just disagree on whether that is good or bad.

So Daktronics wants to move to Delaware (to get rid of cumulative voting) and Alta Fox wants to stop it. We talked yesterday about a similar case: Tripadvisor Inc. wanted to leave Delaware and reincorporate in Nevada, arguably because it has a controlling shareholder and Nevada is less strict about reviewing transactions with controlling shareholders. Some Tripadvisor shareholders sued, asking a Delaware court to stop the move because it was bad for shareholders. Delaware declined. If you can get shareholders to vote to leave Delaware, you can leave, even if that means you can do stuff to shareholders that Delaware wouldn't let you do.

Does the same logic work in South Dakota? Will a South Dakota court — actually a federal court in South Dakota — say that Daktronics can't leave, because leaving would reduce shareholder rights? Or is there a limit on states' ability to protect shareholder rights, where the limit is "the company can always leave"? I pretty much know the answer for Delaware; for South Dakota, who knows?

Elsewhere here is a discussion of Texas's new business court, and whether it will be "an attractive alternative to Delaware's Court of Chancery" for companies thinking about moving. There are concerns:

Delaware's Court of Chancery is celebrated for rapid and efficient decisions. Complex disputes, including merger-related injunctions, are often resolved within weeks. The absence of juries is a big reason for this speed, which helps maintain stability for litigants and financial markets. The availability of jury trials in the Business Court, however, introduces unique considerations for complex corporate litigation and could lead to substantial delays and unpredictability. Jury selection, deliberation, and the potential for appeals based on jury decisions prolong case resolution and can create outcome inconsistencies. ...

Several factors may impede the development of a robust body of precedent in Texas. In some cases, the potential for jury trials may limit the development of detailed, judge-written opinions that typically form the backbone of corporate law precedent. The shorter terms of Business Court judges (two years) may result in less consistent decisions. Additionally, the broader jurisdiction of the Business Court may dilute the focus on developing specialized corporate law precedents.

Now I really want a Tesla shareholder to sue, in Texas, over Elon Musk's pay, and have a *jury* decide if he's overpaid.

Pimco

How do you get into private credit? Like let's say you have a pot of money and you want to start lending it directly to private equity sponsors to finance leveraged buyouts. How do you start? Probably you hire some former bankers with good relationships and have them call on private equity sponsors, saying "hi, we'd like to lend you money to finance your buyouts." The sponsors are like "Sure, we can always use more money. Honestly we have a lot of people who want to finance our buyouts. But we'll put you on the list." And then they call you and say "hey, we've got a buyout deal going, want to lend us money? Full disclosure, we've called a few other people, and they'll charge us 7%. Are you in?"

Are you in? I feel like the answer is "yes"? I mean, you could say no. But you've got that pot of money and you need to spend it; you're looking to get into the private credit game and this is your chance. And if you say no, will the sponsor call you again? They've got a lot of people looking to lend them money, and what you bring to the table is ... desperation? If you are very picky about financing only the best deals, if you do careful credit analysis and push to get a good return, the sponsors can just stop calling you. There are plenty of other people to call.

Those other people — the large firms that have been in the private credit game for a while — have advantages. They probably already lend money to the sponsors' other deals, so they've got existing relationships and some negotiating leverage. Also they're just *big*; a sponsor that wants to do a lot of big buyouts will have to keep them in the mix. Those big leading private credit firms *can* say no to deals; they can push hard on terms. You are trying to break into the business, and the easiest way to break in is to be accommodating. You give the sponsors good customer service, you say yes to everything and move quickly and don't push too hard on rates or terms.

This is honestly a pretty standard way for a deep-pocketed latecomer to get into a business, but it has obvious problems. You are getting adversely selected; you are saying yes to the deals that the big incumbents have said no to. Maybe that's fine. It sort of depends on your background and temperament. If your essential skill is "I raise money from investors and deploy it," then you're doing great: You're raising a big pot of money and deploying it into the thing that investors want. If your essential skill is "I do good credit analysis," though, this will hurt. You want to do credit analysis, to get alpha by doing good deals and avoiding bad ones; you don't want to take bad deals just because you have money to spend.

(You can get around this problem, to some extent, by *buying* a big existing incumbent private credit firm, so that you don't have to break into the business starting from zero. But everyone knows that, so those firms are expensive.)

Today Bloomberg's Laura Benitez has a story about Pacific Investment Management Co., the giant bond firm, and how it has moved on from Bill Gross. Part of the answer is: *not* by getting into private credit all that much.

As private-capital titans such as Apollo Global Management Inc. make fortunes from direct lending, where funds provide more complex loans to businesses, Pimco's decision to keep its powder dry in expectation of this bubble bursting has yet to fully pay off. There's a danger of getting left behind. ...

It's been slower to expand than specialists such as Ares Management Corp. and Oaktree Capital Management, a point of contention internally, according to people familiar. While BlackRock is paying a hefty premium for its \$12 billion purchase of private-credit pioneer HPS Investment Partners, Pimco's relative caution carries a risk of it getting stuck as a lower-margin bond shop.

"The fees for liquid assets, and notably fixed income, are very tight," says Isabelle Scemama, global head of AXA IM Alts, Europe's largest alternatives manager, speaking generally about the comparative allure of private assets.

Yes right sorry the *reason* to get into private credit, for a giant credit manager, is that your customers will pay more for it. The reason not to is that you worry about the quality of the loans:

Bronte [Capital]'s [John] Hempton reckons Pimco's stance can be summed up as a belief that it's better — and safer — in the long run to be a buyer of assets rather than the firm that first makes a loan, particularly if you grab bargains when things turn ugly. The likes of Apollo, by contrast, are drawn to the fat fees from lending.

"Apollo is taking one side of the bet, that the alpha is in origination, and not in holding assets," he says. "And so it's turned itself into a giant lending machine. Pimco's taking the opposite side. And only one can be right."

Right this is the classic conundrum. Let's say you think private credit is a bubble, that investors are too enthusiastic about pouring money into it and that it will end badly, but you are not sure exactly *when* it will end badly. There are two potentially valid approaches:

1. Keep your powder dry and plan to pick up assets at 70 cents on the dollar when the bubble bursts. (Possibly by buying them on Apollo's trading platform.)
- 2. Raise as much private credit money as you can, because the fees are good and "as long as the music is playing, you've got to get up and dance."

Rebalancing

You could have a simple model of the stock market that is like:

1. Most people have 60/40 portfolios, where they put 60% of their money in stocks and 40% in bonds.
- 2. If stocks go up by 2% and bonds go down by 2%, then your 60/40 portfolio becomes a 61/39 portfolio.
- 3. Therefore you have to sell some stocks and buy some bonds to get back to 60/40.
- 4. When you sell stocks, stocks will go down; when you buy bonds, bonds will go up.

Obviously this is not literally true, but maybe it roughly describes the behavior of a lot of big investors. It is a simple theory of mean reversion: Every time the market moves, that will throw 60/40 portfolios out of balance, and they will come back into balance by trading *against* the market move. When stocks go up, 60/40 investors are overweight stocks, so they sell stocks, etc.

If this were true, you might try to profit from it. "Whenever a 60/40 investor is going to buy stocks *tomorrow*, I will buy them today, and then sell them tomorrow when they go up, and vice versa," is the basic idea. When is a 60/40 investor going to buy stocks tomorrow? If you take this theory super-literally then the answer is "if stocks are down today," but in practice they won't rebalance *every* day. If 60/40 investors have a rule like "rebalance once a month, so that we start each month with a portfolio that is exactly 60/40, and otherwise only rebalance if our portfolio is more than 62% stocks or less than 58% stocks," then you could trade against that rule. You buy stocks on the last day of the month, if stocks have been down that month, and otherwise you buy stocks if stocks have been down a lot and the 60/40 portfolios are far out of balance.

This is not investment advice, but here's this:

Investors, who adjust their stock-bond portfolios like clockwork on regular schedules, are at the mercy of front-running by fast-money speculators.

Now, a group of academics claim they've put a price tag on the resulting cost to pension funds and other market participants known for their rebalancing activity: \$16 billion a year.

Mechanical buying and selling by institutions to hold the mix of assets steady over time comes with a quantifiable downside, say researchers including Campbell Harvey of Duke University in a paper called *The Unintended Consequences of Rebalancing*. Much of it is the result of opportunistic competitors anticipating the trades and swooping in first, moving prices, they said.

Here is the paper, by Harvey, Michele Mazzoleni and Alessandro Melone; the intuition is roughly the one I laid out. "When stocks are overweight, funds sell stocks and buy bonds, leading to a decrease in equity returns of 17 basis points over the next day," is the basic point, and the rebalancings are predictable:

We compute weight deviations from portfolio targets using two rule-based rebalancing approaches, Threshold and Calendar, that reflect the investment policies of different institutions. The Threshold approach adjusts positions when portfolio weights exceed predetermined distances from targets, reflecting the idea that allowing for portfolio drifts within defined ranges helps minimize transaction costs. Furthermore, many institutional investors have regular cash flow needs at the beginning of every month (see, e.g., Etula, Rinne, Suominen, and Vaitinen, 2020). For example, mature pension funds often sell assets at month-end to raise cash for member benefit payments. The Calendar approach captures these scheduled rebalancing activities. Both Threshold and Calendar are easy to compute, available in real-time, and applicable for any frequency with available return data. The Threshold signal captures faster intra-month rebalancing, while the Calendar signal captures slower month-end rebalancing. ...

A back-of-the-envelope calculation using our predictability results estimates that the rebalancing costs borne by institutional investors can exceed 8 bps per year. For a market potentially exceeding \$20 trillion in size, rebalancing pressures could translate into an annual cost of \$16 billion, or about \$200 per U.S. households each year. ...

Finally, mechanical rebalancing offers certain investors the opportunity to front-run the predictable trades of large funds. To explore the potential economic value of these frontrunning strategies, we construct a managed portfolio that replicates the trades of an investor anticipating rebalancing activities. ... The managed portfolio constructed using these rebalancing signals delivers significant positive alphas and achieves a Sharpe ratio exceeding 1 over the 1997 to 2023 sample period.

The best part is that they went and presented this result to big pension managers, who were like “yeah sure of course”:

Many pensions acknowledged that they were aware of this phenomenon. When we explained that potential front-runners could exploit such predictability, one pension replied, “We know about that.” Others agreed. When we suggested a more dynamic rebalancing policy might reduce the potential for front-running, one pension remarked, “It is easier for us to task our alpha desk with addressing this predictability than to try to convince our investment committee to change our rebalancing policy.”

In summary, pensions in our roundtable sample rebalance mechanically based on Calendar and Threshold rules. They understand these policies induce predictability and believe that traders will front-run their rebalancing. At least some of the funds appear to front-run their own rebalancing (and potentially that of others). Finally, the funds perceive changing rebalancing policies as very challenging given institutional constraints.

“At least some of the funds appear to front-run their own rebalancing”! Really this is a story about division of labor. If you run a pension fund targeting a 60/40 portfolio, you will buy 60% stocks and 40% bonds, and then stocks and bonds will go up and down and you will be out of balance, and it will cost you money to trade to get back in balance, and it will cost you *attention* to do that trading every day. You are just running a pension fund, you are pretty indexed and passive, you are not a market-timing day trader, you have no idea when the best time to trade is. “Once a month, unless stuff gets really out of whack” is a good heuristic.

You could do better — and maybe save 8 basis points — but at some cost in time and attention and internal processes, and you could also do worse. Why bother? Let someone else do it. Let some hedge fund that is set up to think about this stuff make the 8 basis points. Or let your “alpha desk” — the people at your fund who *are* market-timing day traders — make the money.

Antigravity

This is not investment advice, but it’s a useful heuristic: If someone tells you that he has invented an antigravity propulsion device that the Department of Defense wants to buy, but he needs some capital from you to complete the prototype, you should be skeptical, because “such technology would violate the known laws of physics.” But if the amount of capital that he needs from you is *two hundred dollars*, then you should be very, very skeptical, because that violates the known laws of economics. Not to get too Chicago on you, but if he really had a viable antigravity device, he would have gotten \$200 from someone other than you.

Here’s a Bloomberg Businessweek profile of Joseph Firmage, who was a successful tech founder in the 1990s, who went on to start speculative outer-space-related businesses in the 2000s with millions of dollars from, among others, SoftBank, and who ended up filming a promotional video for his antigravity stuff in 2021 and then hitting up the video studio’s owner for cash:

[The owner] couldn’t believe her luck. Had she really chanced upon an investment that might transform humanity? “I love innovation, I love tech,” she says. “I thought, ‘Wow, that would be pretty cool to be involved in something that could do what he said it could do.’” All the while, she says, Firmage requested funds—\$200 here, \$500 there. “It was just him constantly needing extra money to finish this one part or to get this one thing done,” she remembers.

Yes.

Firmage denies any accusations of financial impropriety. “This is slander in the highest order,” he says, adding that he doesn’t run Ponzi schemes. “I do long-term projects that are hard to fund but must be done. Everybody benefits at the end.”

No. He’s currently in jail, though not for this.

Andrea Vella

One of my favorite tropes of financial journalism is when some wealthy financial industry figure is described as being very down-to-earth and humble and not like all the *other* finance guys, but the proof of that is something like “his most obvious indulgence is a Maserati Ghibli” or “he lives in a house that only cost a few million dollars.” My all-time favorite example is the hedge fund manager who is a “symbol of frugality” with “one foot inside the lucrative hedge-fund industry and one foot out of it,” which is “perhaps most plain on weekends during the summer,” when he *usually* flies commercial to his house on Nantucket, though he *sometimes* flies private. Nothing more down-to-earth than only sometimes flying private.

Today Bloomberg's Laura Noonan has a profile of Andrea Vella, the banker who left Goldman Sachs Group Inc. over his involvement in the 1MDB scandal, that beautifully subverts this trope. Vella is currently living "a life of easy affluence" in Europe, renovating his London penthouse, doing some investing, founding a nuclear power company, and also this:

Vella, who grew up in Rome, Italy, has traded the tailored suits and trophy watch he donned when he was working for Goldman in Asia for jeans and a Swatch. He says he usually flies commercial nowadays (he's a regular on low-cost Ryanair). He only travels by private jet three or four times a year, when he wants to get somewhere quickly, like to a party in Ibiza.

He only flies private when he needs to get to Ibiza quickly! Perfect.

Strategy

Love it:

MicroStrategy® Incorporated (Nasdaq: MSTR) [yesterday] announced it is now doing business as Strategy™. Strategy is the world's first and largest Bitcoin Treasury Company, the largest independent, publicly traded business intelligence company, and a Nasdaq 100 stock. This brand simplification is a natural evolution of the company, reflecting its focus and broad appeal. The new logo includes a stylized "B", signifying the company's Bitcoin strategy, and its unique position as a Bitcoin Treasury Company. The brand's primary color is now orange, representing energy, intelligence, and Bitcoin. ...

Energy, intelligence and Bitcoin. Here is chairman Michael Saylor:

"Strategy is one of the most powerful and positive words in the human language. It also represents a simplification of our company name to its most important, strategic core. Antoine de Saint-Exupery said, 'Perfection is achieved, not when there is nothing more to add, but when there is nothing left to take away.' After 35 years, our new brand perfectly represents our pursuit of perfection."

When you simplify this company to its strategic core, the strategic core is strategy. "Our strategy? Oh, it's strategy." I feel like that is *too* simplified? Obviously their strategy is Bitcoin, and you can tell because the logo looks like, not "Strategy," but "StrategyB," where the B is a Bitcoin symbol, and superscript. I guess it is "Strategy, raised to a Bitcoin," which feels accurate.

Also yesterday Tempur Sealy International Inc. changed its name to Somnigroup International Inc.:

Chairman and CEO Scott Thompson said, "We are thrilled to announce a new name to our expanded vision. The name Somnigroup is derived from the Latin *somn* meaning sleep, *omni* meaning all, and 'group' to represent our omni-channel strategy. The name Somnigroup International reflects our position as a global holding company and provider of sleep solutions with a portfolio of outstanding businesses – Tempur Sealy, Dreams and Mattress Firm – as well as the future direction of the company. We look forward to continuing to improve people's lives through better sleep for the next 100 years and beyond."

Much to love there too, but my favorite part is that the part of the name representing the omni-channel strategy is the “group” part, not the “omni” part.

Things happen

Honeywell to Break Up After Pressure From Activist Elliott. Nissan searches for new partner as \$58bn Honda merger talks collapse. HSBC Considers CEO Pay Overhaul as UK Banks Dump Bonus Caps. McKinsey Partners Debate China Presence as US Tensions Rise. TotalEnergies to Convert ADRs Into Listed Shares in New York. Brussels to exempt most EU companies from carbon border tax. Shein, Temu Retailers Slapped With 30% Levy on US-Bound Goods. Data Hoarders Are Rushing to Save Vanishing US Health Records. Egg surcharge. Club 33 drama. The kids these days have new slang. Toymaker Challenges Paramount Sale Over Use of the Word ‘Slime.’ ‘Villain for hire’ lets weak boyfriends beat him up in front of partners to appear tough, sparking concerns.

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- 1. In this case, Alta Fox owns something like 11.7% of the stock, not enough to elect a whole board, but perhaps enough to get one director elected. The board is staggered — there are eight directors serving staggered three-year terms, so only two directors are up for election this year — so that’s not a guarantee. If all eight directors were up for election, then Alta Fox could vote roughly 94% of the stock for one candidate and surely get a seat.
- 2. Consider Tiger Global in the recent tech startup boom, where the strategy was basically “do every deal, quickly, and without being annoying.” Good on the way up, less good on the way down.
- 3. It will similarly cost you, in attention and scrutiny, if you rebalance *less* often. What if you’re 65% stocks and 35% bonds when stocks crash? Looks bad.
- 4. Vella was barred from the US banking industry but never charged criminally. Disclosure, I used to work at Goldman, and my group somewhat overlapped with Vella, so I met him once or twice. The widespread belief was that he looks like George Clooney, and Noonan’s profile has a picture so you can judge for yourself.
- 5. This came out at 1 p.m. yesterday, so it snuck into the end of my newsletter but I didn’t have time to gawk at it.

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Litigation

Feb. 7, 2025, 7:47AM PST

Delaware Legal Tweaks Threaten Business Court's Famed Speed

By [Mike Leonard](#)

Deep Dive

- **New governor suggested changes to appeals, case assignments**
- **Room for some 'fine-tuning,' but major changes could backfire**

Legal reforms floated this week by Delaware's governor to fend off Elon Musk and stop the flow of corporate departures could undermine speed and certainty at the state's elite business court.

Gov. Matt Meyer (D) set up a working group that will produce specific recommendations in "weeks not months," likely including process changes for appeals of significant rulings and the way lawsuits are assigned to judges, he said in a Feb. 3 interview. The governor took office Jan. 21, amid a wave of political changes in the US that have elevated Musk's influence to new heights.

The world's richest person called the suggestions "encouraging" in a post on X this week. The billionaire and his online legions have trained much of their ire on the business court's chief judge, who has handled the recent cases against him.

Although Meyer avoided directly addressing Musk's yearlong barrage against the state's judiciary, he said many corporate leaders think repeatedly facing the same judge makes every dispute "a foregone conclusion." But forcing a new judge to get up to speed from scratch on the complex mechanics of a sprawling enterprise like Tesla Inc. would sacrifice efficiency at a court that's managed to remain famously fast despite significant resource constraints, according to Tulane University law professor Ann Lipton.

"There's a lot of speed to be gained from having one judge who's very familiar with this company and this governance structure and these documents and these investor rights," Lipton said. "What these companies really want is to get away from judges they don't like."

Chancellor Kathaleen St. J. McCormick, who leads Delaware's Chancery Court, declined to comment. Delaware Chief Justice Collins J. Seitz Jr. declined to comment through a spokesperson. A spokesperson for Meyer didn't immediately respond to a request for comment.

Trial Uncertainty

Meyer's tentative proposals came days after Meta Platforms Inc., Dropbox Inc., and Bill Ackman's Pershing Square revealed plans to potentially leave Delaware, home to nearly 70% of Fortune 500 companies. Musk has been urging other businesses to follow him out the door since he moved Tesla to Texas in response to a \$56 billion court loss, but the campaign made little headway until he stepped into a powerful role in President Donald Trump's new administration.

Delaware's corporate defense bar and companies eyeing other states have also cited substantive legal reasons for seeking a friendlier venue, complaining about a series of novel rulings that cracked down on self-dealing, scrutinized agreements handing governance rights to insiders, and clarified the standards for controlling stockholders, who face special scrutiny.

The new governor pointed to the uncertainty businesses have to contend with while they wait to learn the ultimate fate of a consequential trial court ruling. Loosening the standards for mid-case or "interlocutory" appeals, however, would likely have the paradoxical effect of worsening that legal limbo, according to University of Pennsylvania law professor Jill Fisch.

"The flip side of making Supreme Court review quicker and easier is that it would create uncertainty about every trial court decision," Fisch said.

Sweet Spot

Delaware's top court added a wrinkle to the charged reincorporation debate on Feb. 4, when it overturned a decision involving TripAdvisor Inc. that had threatened damages if companies leave for states seen as friendlier to insiders, particularly Nevada and Texas.

The ruling came on interlocutory appeal—after Vice Chancellor J. Travis Laster said damages were potentially available, but before he could decide if they were actually warranted. "The case is a nice example of why the system isn't particularly broken," Fisch said.

Of the two ideas, "fine-tuning" interlocutory appeals looks less like an overcorrection, according to Columbia University law professor Eric Talley. Delaware's courts are already considering the right factors, but there may be value in recalibrating how judges find the "sweet spot" when weighing those criteria, he said.

"When you put those things into a bowl and mix them up, how long do you leave the cake in the oven?" Talley said. "The application of the identical test, filtered through judicial policy, can evolve over time. This conversation gives the Delaware Supreme Court an invitation to revisit that. But totally rejiggering the test could cause the whole process to seize up into complete dysfunction."

'Good Leadership'

Critics have argued the spate of novel decisions in 2024 blindsided businesses by overturning common practices or imposing stricter standards that make Delaware more hostile to corporate controlling stockholders. The backlash culminated last summer in a swift push by lawmakers to overturn several rulings by McCormick and Laster.

That context makes it a bit unexpected for the governor to start with modest process changes rather than another push to directly confront the judiciary, said Lawrence Cunningham, director of the University of Delaware's Weinberg Center for Corporate Governance. But it's a welcome surprise, according to Cunningham, who said the proposals "sound like judicial branch kind of activities."

Meyer made a similar point Feb. 3, saying he hopes the courts will take the initiative and run with the ideas he's proposing. "If not, we have a decision to make about whether we're going to make legislative change or go through some other avenue, but it's premature to speculate," he said.

A carefully conceived proposal might draw support from McCormick and Seitz on its own merits, according to Cunningham. But the changes would further tax an already overworked court system, so there would need to be give and take, probably including an infusion of additional resources, he said.

"These are perfectly valid topics for the executive branch to begin a conversation on," Cunningham said. "That sounds like good leadership."

—With assistance from Jef Feeley

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Symbotic Discloses SEC Subpoena Related to Accounting Errors

By Jorja Siemons

Symbotic Inc. is cooperating with an SEC subpoena connected to accounting errors disclosed late last year, the warehouse automation company said in its latest quarterly report.

The subpoena from the US Securities and Exchange Commission relates to the company's November restatement of revenues for the year ending in September 2024, according to Symbotic's filing Wednesday. Symbotic also outlined two proposed class actions that allege the company violated federal securities laws by making "false and/or misleading statements" regarding its revenue recognition.

A request to consolidate the suits is pending, the filing said, and the company "intends to vigorously defend these cases."

Symbotic went public in June 2022 after completing a business combination with special purpose acquisition company SVF Investment Corp. 3. Last month, the robotics company announced Walmart had selected it to build a system for automating pickup and delivery centers at hundreds of its stores.

The company didn't respond to a request for comment on the subpoena. An SEC spokesperon declined to comment.

Symbotic said in a Nov. 27 filing with the SEC it had identified the errors in its revenue recognition.

A Dec. 4 filing said the company restated several quarterly financial filings because it expensed some goods and services prematurely, as well as made errors in its revenue recognition related to cost overruns on certain projects.

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Melania Memecoin Is Down 90% From Peak as Novelty Value Wanes

By Monique Mulima and Sidhartha Shukla

- First Lady's token has lost \$1.44 billion in market value
- President's token has lost almost \$11 billion in market value

Crypto enthusiasts are learning the hard way that even the US First Family's participation in a memecoin is no guarantee of success.

Melania Trump's crypto memecoin MELANIA has lost almost 90% of its value in the weeks since Donald Trump's inauguration, while the president's token TRUMP has seen its price fall around 75% from its all-time high, according to data compiled from CoinMarketCap.



CoinMarketCap

Memecoins are highly volatile and generally do not have much intrinsic value. The tokens can often depend on something going viral, but that can be short-lived, according to **Stephane Ouellette**, chief executive officer and co-founder of FRNT Financial Inc.

"The performance of TRUMP and MELANIA reflects this fleetingness," Ouellette said. "These assets have unclear purposes beyond their momentary novelty and this gives speculators little incentive to hold beyond time horizons measured in mere days."

The president's foray into memecoins was met with mixed reaction from the crypto industry. Some thought it showed his commitment to making crypto a priority, while others believed it hurt the industry at a time when it is trying to appear more credible.

Read More: Trump Memecoin Shows Limits of Crypto's Democratization Pitch

The president announced his memecoin in a Jan. 17 TruthSocial post. The token reached over \$70, but saw declines after Melania Trump launched her own coin two days later. Both tokens were distributed on the Solana blockchain.

The first lady's token reached a market capitalization of as much as \$2.1 billion. But after reaching an all-time high of \$13.73, the token now changes hands for around \$1.50.

This type of pullback in prices is standard for memecoins, but Trump's actions can affect all markets including crypto, according to **Joe McCann**, founder and CEO of Asymmetric.

"Unlike other memecoins, you have the literal president of the United States who is exceptionally good at creating viral controversy on the internet, whether you like it or not, that could have an impact on the price of his token either directly or indirectly," McCann said.

CIC Digital LLC and Fight Fight Fight LLC are the Trump-linked issuers of the president's coin. CIC Digital didn't immediately respond to requests for comment. Fight Fight Fight and MKT World LLC, the Melania-linked issuer of the first lady's coin, could not be reached for comment.

Since its launch, the Trump token has likely generated at least \$11.5 million in fees for entities linked to the president, according to risk modeling firm Gauntlet. But most wallets that bought the token made no more than \$13, according to Bloomberg analysis.

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Trump Media to Trademark a 'Made in America ETF' in Finance Push

By Annie Massa

Trump Media & Technology Group Corp. applied to trademark brands for six investment products with themes that closely track President Donald Trump's priorities in office.

The money-losing social media company is looking to debut the "Truth.Fi Made in America ETF," "Truth.Fi U.S. Energy Independence ETF" and "Truth.Fi Bitcoin Plus ETF," along with three other vehicles called separately managed accounts with the same themes on its recently announced Truth.Fi financial platform, subject to regulatory approval, according to a Thursday statement.

The company, which is majority-owned by Trump, also signed an agreement to have a small New Jersey-based firm, Yorkville Advisors, marshal the products through their approval process and oversee them, formalizing an earlier announcement of Yorkville's involvement.

The products tie in to themes President Trump has promised to promote, including by imposing tariffs on trade partners, encouraging US manufacturing, expanding oil and gas drilling in federal lands and defending the crypto industry.



Devin Nunes

Photographer: Al Drago/Bloomberg

"We aim to give investors a means to invest in American energy, manufacturing, and other firms that provide a competitive alternative to the woke funds and debanking problems that you find throughout the market," Devin Nunes, chief executive officer of Trump Media, said in the statement.

Read More: Trump's Media Firm Makes Finance Push in Latest Conflicts Test

The finance pivot for Trump Media, the parent of Trump's Truth Social platform, is part of a broader reaction against claims of censorship and "woke" values across corporate America — a debate that increasingly homes in on finance.

Investment products focused on environmental and social values permeated the financial industry in recent years. Republican-led states bashed those efforts and sued the companies that sold them, including BlackRock Inc. and State Street Corp.

Trump owns a stake in Trump Media worth \$3.5 billion, comprising the majority of his net worth, according to the Bloomberg Billionaires Index. The shares are held in a trust overseen by his son **Donald Trump Jr.**

--With assistance from **Vildana Hajric.**

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Feb. 6, 2025, 2:50 PM PST

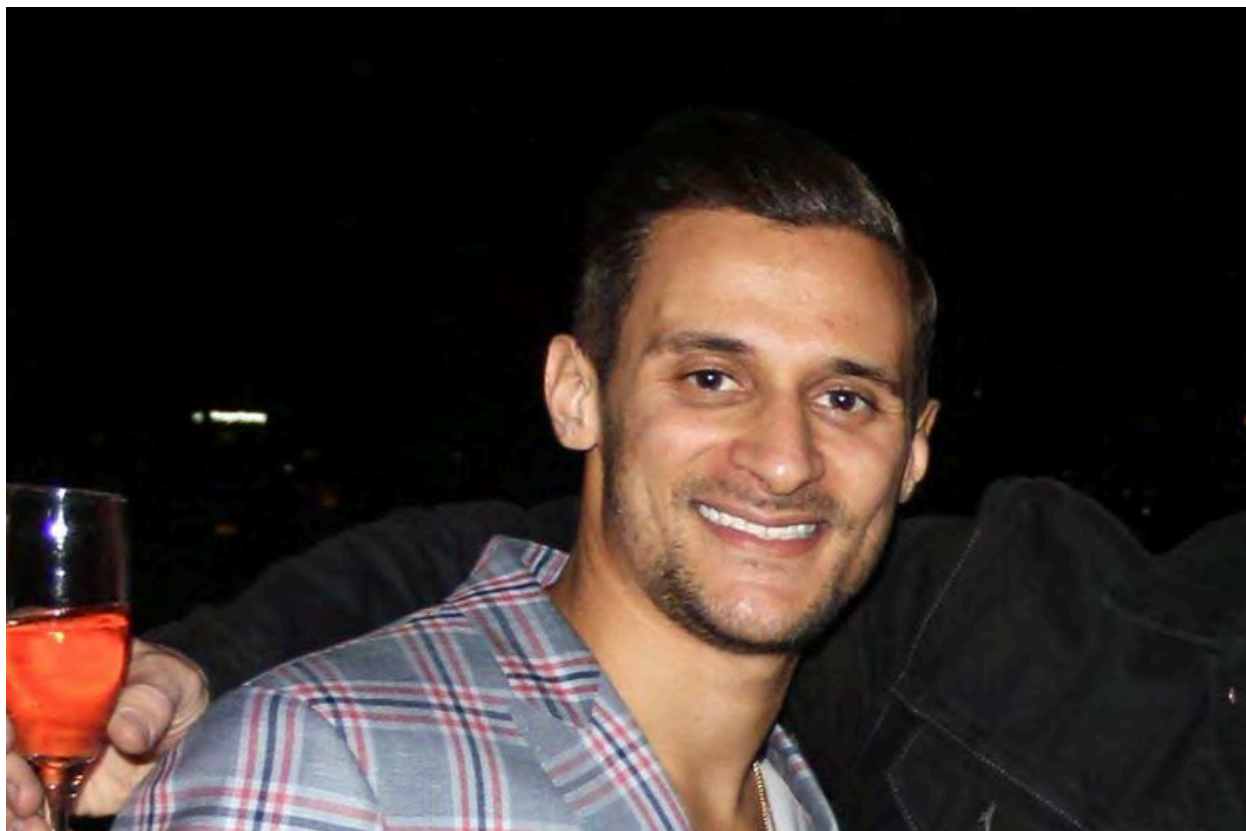
Trump's World Liberty Plans to Create 'Strategic' Token Reserve

By Teresa Xie and Muyao Shen

- WLF bought \$470,000 worth of ONDO tokens on Thursday
- Co-founder didn't say what purpose the reserve would serve

Chase Herro, co-founder of President Donald Trump's DeFi project, World Liberty Financial, said the platform plans on creating a "strategic reserve" with tokens bought.

Herro was introduced by Donald Trump Jr., who sat on a panel with World Liberty co-founders Zak Folkman, Zach Witkoff and Herro at startup Ondo Finance's inaugural summit in New York. Zach is the son of Steve Witkoff, a close-ally to Trump who helped connect the President's family to World Liberty Financial's founders, but has since been picked to be Trump's envoy to the Middle East.



Chase Herro

Photographer: Rochelle Brodin/Getty Images

Herro didn't specify what the objective would be for World Liberty to have a token reserve. The topic has been a popular one since the President pledged to form one while campaigning last year. He signed an executive action last month that called for evaluating the creation of a digital asset stockpile.

The appearance of Donald Trump's eldest son at Ondo Summit, held on Thursday at Jazz at Lincoln Center, is the latest effort by the President to show his support for the digital asset industry. Trump Jr.'s speech comes after World Liberty Financial, President Trump's DeFi project, bought \$470,000 worth of ONDO, the token associated with Ondo Finance, earlier today.

Read More: Behind the Trump Crypto Project Is a Self-Described 'Dirtbag of the Internet'

Conference attendees swarmed Trump Jr. as soon as he walked in, with many trying to get photos with the President's son. Donald Trump Jr. talked to industry members about World Liberty Financial and his excitement to work with crypto players.

Earlier this week, World Liberty Financial added tens of millions 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. Although World Liberty has been marketed as a DeFi lending platform, it hasn't become operational yet. So far, the project is known for purchasing niche tokens.

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

Since the platform's launch in October, observers have raised questions about World Liberty's potential conflicts of interest for the Trump family, given the administration's sway over regulations. Trump's sons, Donald Jr., Eric, and Barron, are all listed as Web3 Advisors to World Liberty Financial. The family has been actively promoting the project through social media and public appearances.

Ondo Finance announced plans to launch Ondo Chain, its own layer-1 blockchain. Chair of the House Financial Services Committee Patrick McHenry, acting Commodity Futures Trading Commission Chair Caroline Pham, and "crypto dad" J. Christopher Giancarlo were among some of the speakers at the conference, which discussed the future of tokenization, as well as regulation.

"The promises are being delivered on," Giancarlo said of the Trump administration's plans for the crypto industry. "It's one thing to get rid of bad policy of the last four years. It's getting to good policy that is challenging."

Meanwhile William Hinman, a senior advisor to venture capital firm Andreessen Horowitz, stressed that changes in the crypto industry in Washington won't happen overnight.

"There'll be some improvements, but I think that's gonna take time," Hinman said of the Financial Innovation and Technology for the 21st Century Act. "It's in the same way that it's gonna take time for the SEC to turn over a new leaf to really come through with some concrete evidence that now this is a more hospitable regulatory approach."

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Former Prosecutor, Now U.S. Senator, Informs Tesla That CEO Musk May Be Violating Federal Law and to "Preserve All Records"

 wallstreetonparade.com/2025/02/former-prosecutor-now-u-s-senator-informs-tesla-that-ceo-musk-may-be-violating-federal-law-and-to-preserve-all-records

By Pam Martens and Russ Martens: February 7, 2025 ~

Senator Richard Blumenthal (D-CT) is more alert to the threat of fascism than most Americans. His father fled Nazi Germany at age 18. Blumenthal also knows exponentially more than the average American about the threat of criminal conspiracies to national security: He's a Yale Law grad and previously worked as the top federal prosecutor in Connecticut as its U.S. Attorney in the Department of Justice.



Senator Richard Blumenthal

Unfortunately for Elon Musk, one of the most conflicted and inappropriate corporate CEOs on the planet to be given access by Donald Trump to the U.S. Treasury's \$6 trillion payment system (along with his equally conflicted team of 19-25 year old lackeys), Blumenthal is also the Ranking Member of the Senate Permanent Subcommittee on Investigations (PSI).

For those unfamiliar with just how deeply PSI has the ability to dig, consider the 300-page report that PSI delivered on JPMorgan Chase using hundreds of billions of dollars from its federally-insured bank to gamble in derivatives in London and lose \$6 billion. Showing just how blasé corporate boards and Congress have become to CEO malfeasance, JPMorgan Chase's Chairman and CEO, Jamie Dimon, has survived in this role through the derivatives scandal and the ensuing five felony counts for money laundering, rigging markets and a rap sheet that rivals an organized crime family.

On Wednesday, Blumenthal announced that the six companies in which Musk has a major ownership interest (or he controls) have now come into the crosshairs of the Senate's Permanent Subcommittee on Investigations. The six companies have been put on alert to "preserve all records"; to promptly answer questions posed to them by the Subcommittee and continue to do so on a biweekly basis.

Those six companies include the electronic vehicle manufacturer Tesla, which as of yesterday's market close was the seventh most valuable publicly-traded company by market cap in the U.S. at \$1.2 *trillion*. Notably, Tesla is trading at the nosebleed level of 183 times its trailing PE (price-to-earnings), making it particularly susceptible to Musk-related scandals – of which there appear to be no end.

In January and February of last year, Musk was profiled in two shocking Wall Street Journal articles regarding his use of illegal drugs. The Wall Street Journal's January 6, 2024 (paywall) article carried this assessment of Musk's drug use:

"The world's wealthiest person has used LSD, cocaine, ecstasy and psychedelic mushrooms, often at private parties around the world, where attendees sign nondisclosure agreements or give up their phones to enter, according to people who have witnessed his drug use and others with knowledge of it. Musk has previously smoked marijuana in public and has said he has a prescription for the psychedelic-like ketamine."

In October, five Wall Street Journal reporters dropped the bombshell news that Musk "has been in regular contact with Russian President Vladimir Putin since late 2022." In February of 2022, the U.S. placed Putin on a sanction list in response to his "unjustified, unprovoked, and premeditated invasion of Ukraine...."

In a November 2022 article, *Wall Street On Parade* called out Musk's reckless behavior as follows:

"...Musk has smoked marijuana on a widely circulated podcast and called the Securities and Exchange Commission 'bastards' at a TED conference because it charged Musk in 2018 with fraud for falsely Tweeting that he had secured financing for taking Tesla private at \$420 per share. The SEC case was quickly settled on September 29, 2018 with Musk and Tesla each paying \$20 million in penalties. Musk was removed as Tesla's Chairman as part of the SEC settlement and the Board was forced to 'establish a new committee of independent directors and put in place additional controls and procedures to oversee Musk's communications.' "

Clearly, those "controls and procedures" have been an abysmal failure.

Despite Musk's reported attendance at sex parties, drug use, and chats with Putin, NBC reported on Tuesday that the Trump administration has given Musk top secret security clearance. (You can't make this stuff up.)

In addition to Tesla, the five other Musk-related companies that Blumenthal has put on notice to "preserve all records" related to Musk's work inside the Trump administration are: SpaceX, his rocket and satellite company that has received \$19.8 billion in taxpayer-funded contracts from the U.S. government; Neuralink (brain-computer interface research); The Boring Company (tunnel construction); X Corp. (the social media platform formerly known as Twitter); and the artificial intelligence startup xAI.

The full text of Blumenthal's letters are here: SpaceX, X, xAI, The Boring Company, and Neuralink. In his letter to Tesla's General Counsel, Brandon Ehrhart, Blumenthal writes this:

"Elon Musk, Chief Executive Officer of Tesla, Inc., currently serves as the head of the Department of Government Efficiency ('DOGE'), while operating with the official status of 'special government employee' of the federal government. Tesla developed its Model S with support from a \$465 million low-interest loan from the Department of Energy and has received \$41.9 million in federal contracts since 2008. Over its history, Tesla has earned \$10.7 billion selling credits created by government climate programs, an amount worth approximately a third of Tesla's profits over the last decade. Mr. Musk's dual roles—running a for-profit corporation while serving in public office—not only creates glaring conflicts of interest that pose grave risks for America's most sacred institutions, but may also violate federal law....

"Mr. Musk and his team have reportedly obtained unparalleled access to sensitive government data in the two weeks since DOGE was established. Since assuming his role, Mr. Musk has seized control of a sensitive Treasury Department data and payment system, potentially giving him the ability to control which payments the Treasury Department makes and almost certainly providing him access to nonpublic information pertaining to Tesla's competitors—such as sensitive information regarding government contracts. Mr. Musk's staff have gained access to the Office of Personal Management's ('OPM') Enterprise Human Resources Integration and USAJOBS, giving him the ability to access the personally identifiable information of not just federal employees, but anyone who has ever applied for a federal government position. He has directed the heads of every agency of the federal government to email the chief of staff of OPM, a former employee of Mr. Musk, with the identities of all federal workers on probationary periods. The reckless haste with which DOGE has forced these sweeping changes may violate the E-Government Act of 2002, the Privacy Act of 1974, and the Administrative Procedure Act, among others."

Musk donated over a quarter billion dollars into PACs supporting Trump to help Trump win the presidential election last year. On the October 27, 2024 *Meet the Press* news program on NBC, Senator Bernie Sanders (I-VT) said this: "What really interests me is, if, God forbid, Trump would win, whether it would be Elon Musk running the government and Trump working for him, or the other way around."

Trump Hiring Freeze Has Agencies Ditching Law School Recruiting

By Tatyana Monnay

- Agencies skipped NYU, Georgetown, and George Washington events
- Nearly 1,000 new law graduates in 2023 took federal government jobs

Federal agencies are pulling out of on-campus recruiting events at law schools, following through on President Donald Trump's directive to freeze hiring.

More than a dozen agencies withdrew from a public interest career fair hosted by New York University's law school on Thursday and Friday, according to a NYU spokesperson. The annual event saw more than 1,700 job seekers from 20 law schools at last year. Multiple agencies also skipped a Jan. 24 law student recruiting event organized by Georgetown University and George Washington University, according to two people familiar with the situation.

Trump announced an executive order pausing hiring at federal agencies on January 20, the same day he was sworn in for a second term. The order nixed federal jobs and internships in legal and other roles across the federal government, including honors programs for recent law graduates at the Internal Revenue Service and the Justice Department.

Nearly 1,000 new law graduates landed federal government jobs in 2023, according to the National Association of Law Placement. More than 250 of the roles were in agency honors programs.

"For some of these students, the fact that these jobs were pulled may make the difference of whether they ever become a practicing attorney or not," said Nikia Gray, NALP's executive director. "This is happening at a really critical juncture in their career development."

Trump imposed the freeze for up to 90 days or until the Office of Management and Budget and other agencies issue a plan to cut the federal workforce "through efficiency improvements and attrition," according to the order. The move is part of a broader effort to slash federal payrolls by eliminating remote work and offering buyouts to government workers.

Job Scramble

On-campus interviews have long been law firms' chief recruiting method for entry-level attorney positions. It's how many law students secure their first full-time legal jobs and the summer internships that pave the way to those positions.

Some large law firms are looking to snatch up junior lawyers who lost government jobs as part of the freeze, but the openings are likely to be limited.

"It's unique in that there are some new very talented lawyers on the market that had otherwise affirmatively decided not to go to law firms, particularly those who had accepted positions in very prestigious groups in DOJ like antitrust and federal programs," said Karen Vladeck, managing partner of recruiting firm RisePoint Search Partners. "Many of them will end up going to law firms now, although there won't be space for all 3Ls affected by the layoffs across the board."

Jennifer Breen, hiring partner at Morgan Lewis, is meeting with students whose offers were rescinded while she conducts on-campus interviews for the firm's 2026 summer associate class at Cornell University.

"We've been able to identify places across the firm that we could see an opportunity to add another associate or two to our ranks to support matters and partners we have," Breen said.

Students are anxious and nervous, said Breen, who worked in the honors program at the IRS in 2021. First-year and second-year law students whose summer jobs were eliminated will have a difficult time finding replacement roles this late in the game, she said. Most Big Law firms have long filled their summer associate classes for this year, Breen said.

Litigation firm Quinn Emanuel also is interested in recruiting from this pool, said William Burck, a prominent trial lawyer and the firm's global co-managing partner.

"We have been in touch with career services offices at various law schools to help facilitate placements that are a good fit for both the candidates and our firm," Burck said. "We remain dedicated to recruiting strong up-and-coming talent and are excited about connecting with talented individuals seeking to begin their careers in private practice."

New York-based litigation boutique Elsberg Baker & Maruri is one of many firms to receive a flurry of last-minute applications

"We do a lot of trials and we give early experience and a lot of them are interested in trial work," David Elsberg, the firm's founder, said. "It's sort of a really good match for us, which is also why we've been seeing a lot of applications come in."

Elsberg says he expects to make multiple offers to students who have had federal offers rescinded for the firm's 2025 summer associate pool and its new associate class.

Elias Law Group, a leading election law firm in Democratic circles, encouraged students who lost honors program roles to apply to open attorney positions in a LinkedIn post.

"The Trump Administration's unprecedented decision to withdraw these job offers is just more proof that Trump does not want a meritocracy—he wants a government of unqualified ideologues," Elisabeth Frost, the firm's litigation chair said in a statement. "Elias Law Group is honored to have received scores of applications from these highly qualified candidates, and we hope other firms and legal employers will similarly do what they can to help give these new lawyers meaningful opportunities to start their careers."

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Banks in EU Commit to Climate Group Deserted by Wall Street

By Claudia Cohen, Sarah Jacob and Arno Schütze

Several of Europe's biggest banks have declared their commitment to the world's largest climate alliance for the industry, distancing themselves from Wall Street's sudden exit from the group.

Societe Generale SA Chief Executive Officer **Slawomir Krupa** said the French bank is "not planning to leave" the Net-Zero Banking Alliance, during a press conference on Thursday. ING Groep NV CEO **Steven van Rijswijk** told reporters NZBA remains "a very helpful forum," so "I do not see why we should leave." Commerzbank AG and Credit Agricole SA made similar statements.

The declarations of support for NZBA follow a period of crisis for the alliance, which saw its biggest US members walk away in quick succession after the Nov. 5 election. President Donald Trump has since taken a wrecking ball to the climate agenda of his predecessor, including ordering that the US leave the Paris climate agreement.

Though Europe is struggling with its own backlash against environmental, social and governance regulations, its biggest banks say they remain committed to working together to fight climate change.

Commerzbank said in a statement that staying inside NZBA is "core" to its sustainability strategy. And earlier this week, Credit Agricole CEO **Philippe Brassac** vowed to remain an NZBA member, noting that the "climate emergency has never been so strong."

NZBA's website currently shows the group has about 135 members from over 40 countries. Signatory banks commit to transition their financed emissions to align with "pathways to net zero by 2050" at the latest. They're also required to provide 2030 targets to show they're on track, and to document their progress.

Reasons to stay in NZBA include gaining access to talks with other banks over how to address financed emissions, according to European bank CEOs.

Krupa said membership in NZBA gives SocGen "the opportunity to have a deep dialogue on a complex topic to better understand our direct but also indirect emissions."

The alliance “has enabled this movement to get off the ground politically, but that’s not what has created the banks’ commitment to these environmental issues,” Credit Agricole’s Brassac said.

As long as NZBA continues to have members open to dialogue around how to tackle climate change, “there is no reason for us to leave the bank alliance,” ING’s Rijswijk said.

By Jan. 7, NZBA had bid farewell to Goldman Sachs Group Inc., JPMorgan Chase & Co., Citigroup Inc., Morgan Stanley, Bank of America Corp. and Wells Fargo & Co. The banks have said that despite leaving, they will continue to help clients transition their businesses to align with a lower-carbon future.

--With assistance from **Alastair Marsh**.

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Ackman Backs Doctor as His Fight With UnitedHealth Escalates (1)

By John Tozzi

- Investor pledges legal defense for doctor criticizing insurer
- Company disputes claims that insurer interrupted surgery

Billionaire investor **Bill Ackman** pledged to cover the legal fees for a Texas doctor in a dispute with UnitedHealth Group Inc. over her claims that the company asked her to scrub out of an operation to justify a patient's care.

Ackman, who's chief executive officer of Pershing Square Capital Management, said on X Thursday that he took down an earlier post critical of the insurer after lawyers for UnitedHealth told him that the doctor's claims that he had amplified on social media were untrue.

In a now-deleted post on X, Ackman promoted a video earlier this week from Texas surgeon Elisabeth Potter, who alleged that UnitedHealth called her out of an operation to question a patient's overnight stay. UnitedHealth has disputed Potter's account and said the insurance company would never ask a doctor to interrupt patient care to return a call.

With his posts, one of the world's most prominent investors is intensifying a dispute between a doctor and the largest US health insurer playing out on social media. US insurers faced a harsh reaction online following the December shooting death of UnitedHealth executive Brian Thompson. Potter's video went viral.

Ackman said in an X post on Thursday he has no position in UnitedHealth but that he cares "about cases when insurers act inappropriately in denying coverage which is why I took interest in this issue." A representative for Ackman didn't respond to a request for comment early Friday.

Social media has become a powerful force against insurers. Last year, after widespread outcry on social media, insurance giant Elevance Health Inc. backed off a policy to limit anesthesia coverage when surgery runs long. The insurer cited "widespread misinformation."

'Totally credible'

Ackman, in his first post on UnitedHealth's dispute with Potter, called on the US Securities and Exchange Commission to investigate the company and suggested that the insurer's "profitability is massively overstated due to its denial of medically necessary procedures."

In response, UnitedHealth reported concerns about Ackman's post to the SEC.

The company has also hired the defamation law firm Clare Locke to counter what it sees as inaccurate social media posts. Potter posted a copy of a letter she received from the firm.

Ackman said he asked the company, Clare Locke and the doctor for information to support their claims.

In a subsequent post Thursday evening, Ackman said he had spoken to Potter and found her story "totally credible." He pledged to cover her legal expenses but said he was still waiting for more information from the company to fully determine what happened.

Potter said in a phone interview Friday morning that there's documentation to support her account and "at the right time I will share that." She's retained attorneys who have responded to UnitedHealth's letter, she said.

UnitedHealth had no comment on Ackman's latest posts Thursday evening. The company has said Potter billed for the case incorrectly and that the patient didn't owe any money. UnitedHealth said the company approved coverage for the care, including an overnight stay.

(Updates with information from Ackman's subsequent post)

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Earthlink Investors' Attys Score \$28M In Merger Suit

By **Nadia Dreid**

Law360 (February 6, 2025, 8:12 PM EST) -- The attorneys who helped Earthlink investors score an \$85 million settlement with the company after they said they were tricked into approving a \$1.1 billion merger with a failing telecommunications company will be walking away with almost \$28 million for their trouble.

Robbins Geller Rudman & Dowd LLP has been assigned as lead counsel in the case and will be receiving 32% of the settlement fund, after U.S. District Judge James M. Moody Jr. signed off on an **order** Thursday approving the firm's request for attorney fees and expenses.

In doing so, the Arkansas federal judge agreed that the firm "achieved the settlement with skill, perseverance, and diligent advocacy."

Specifically, the order awards the firm \$27.2 million in attorney fees and \$636,422.45 in expenses.

It comes three months after the case was slated to go to trial in November. The settlement itself was reached two months before that, in September, when class attorney David Knotts of Robbins Geller told Law360 that the case had "survived a bankruptcy and overcame quite a few other roadblocks attempted by an aggressive set of defendants."

Knotts credited his client — Earthlink investor Robert Murray — and the firm's "never-say-die litigation team that persevered for six years to secure this victory for stockholders."

The lawsuit kicked off in early 2018, when Murray — seeking to represent all Earthlink investors — filed suit in federal court accusing the internet service provider of misleading him and his fellow shareholders into approving a \$1.1 billion deal with Windstream that gave them just 49% ownership of the combined company.

The litigation was paused after Windstream filed for Chapter 11 bankruptcy protections in 2019, and it stayed that way until Windstream's exit from Chapter 11 in 2021.

But according to the shareholders, the bankruptcy proceedings provided evidence to their benefit and revealed that the deal was a worse one than they'd known when they originally filed their claims. Windstream was "crumbling" by the time it bought Earthlink but managed to hide its financial troubles long enough to complete the transaction, the suit claimed.

At the time the deal was reached, the investors said it was the biggest securities class action recovery ever achieved in the Eastern District of Arkansas and the second-largest across Arkansas federal courts in general.

The investor class is represented by David Knotts, Randall Baron, Rick Atwood, Noam Mandel, Desiree Cummings and Jonathan Zweig of Robbins Geller Rudman & Dowd LLP, Randall Pulliam and Hank Bates of Carney Bates & Pulliam PLLC and Brett Middleton of Johnson Fistel LLP.

Windstream, its current and former board members and Earthlink are represented by Noelle Reed, Wallis Hampton and Virginia Milstead of Skadden Arps Slate Meagher & Flom LLP and Gary Marts of Wright Lindsey & Jennings LLP.

Earthlink's former board members are represented by Peter Stokes and Richard Krumholz of Norton Rose Fulbright.

The case is Murray v. EarthLink Holdings Corp. et al., case number 4:18-cv-00202, in the U.S. District Court for the Eastern District of Arkansas.

--Editing by Rich Mills.

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Block's Dorsey, Others Face Derivative Suit Over AML Woes

By **Emilie Ruscoe**

Law360 (February 6, 2025, 11:47 PM EST) -- Officers and directors of Square and Cash App parent company Block Inc. face a shareholder derivative complaint over alleged anti-money laundering compliance failures weeks after the company reached an \$80 million settlement of related claims with state banking regulators.

In a complaint filed Wednesday in California federal court, Block investor Viraj Patel took aim at the company's brass, including Twitter co-founder Jack Dorsey, with claims they breached their fiduciary duties by concealing Block's allegedly lax customer due diligence practices, leaving the company vulnerable to regulatory scrutiny and litigation.

By failing to put adequate safeguards in place, Patel said, Block "allowed the company to become a haven for unlawful activities" such as money laundering, trafficking of people and drugs, and terrorism financing, among other things.

Patel pointed to a series declines in trading prices for Block shares allegedly precipitated by revelations about the company's anti-money laundering oversights, starting with the March 2023 release of a short seller's report citing anonymous former Block employees. Following the release of that report, the investor said, trading prices for Block shares fell 15%, from just nearly \$73 to under \$62, in a single day, the investor claimed.

The company's August 2023 disclosure of U.S. Securities and Exchange Commission and U.S. Department of Justice probes came right before the company saw trading prices fall 14%, from about \$74 to about \$64, the investor said.

News reports in February and May 2024 detailed federal investigations of certain anti-money laundering practices at Block, the investor said, and those reports respectively caused trading price drops of 5%, from over \$69 to under \$66, in February, and 8%, from \$73 to under \$67 in May, Patel claimed.

In January, the Conference of State Bank Supervisors **announced** the company's \$80 million settlement of claims the bank's anti-money laundering and Bank Secrecy Act compliance measures fell short, and the company was separately fined \$175 million by the Consumer Financial Protection Bureau, in part for allegedly **creating** "the conditions for fraud to proliferate on its popular payment platform." The company has neither admitted nor denied any wrongdoing.

Block was hit later in January with a proposed investor class action in California federal court **alleging** its lax protocols created a "haven for criminal and illicit activities," exposing the company to potential classwide liability, Patel said Wednesday.

Market records show that since Block's 2015 public market debuts, trading prices for its shares have gone as high as \$268 as the company experienced what Patel described in the suit as "explosive growth."

The company closed out Thursday trading at \$86.50, up significantly from the lows cited in Patel's suit.

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

Patel is represented by Jon A. Tostrud of the Tostrud Law Group PC, Timothy J. MacFall and Samir Aougab of Rigrodsky Law PA and Joshua H. Grabar of the Grabar Law Office.

Counsel information for the defendants wasn't immediately available Thursday.

The case is Patel v. Dorsey et al., case number 4:25-cv-01262, in the U.S. District Court for the Northern District of California.

--Additional reporting by Jon Hill, Lauren Berg and Rachel Scharf. Editing by Jay Jackson Jr.

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The Post-Macquarie Securities Fraud-By-Omission Landscape

By **Kevin Broughel, Sarah Eichenberger and Zoe Lo** (February 6, 2025, 4:04 PM EST)

On April 12, 2024, the U.S. Supreme Court **issued** a unanimous decision in *Macquarie Infrastructure Corp. v. Moab Partners LP*, resolving a long-standing circuit split over whether and to what extent securities issuers can be liable for pure omissions under Section 10(b) of the Exchange Act.[1]

While the Supreme Court's opinion ostensibly distinguished inactionable "pure omissions" from actionable "half-truths," the line between the two concepts in practice is far less clear than the Supreme Court's semantic division.

Indeed, a brief survey of recent cases shows that Macquarie's application has presented challenges for lower courts parsing statements that often fall within the gray area of "misleading by omission."

Background

Section 10(b) of the Exchange Act and U.S. Securities and Exchange Commission Rule 10b-5(b) make it unlawful for securities issuers "to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." [2]

Historically, securities plaintiffs have alleged Section 10(b) and Rule 10b-5(b) violations by citing purported omissions of information required by Item 303 of Regulation S-K. Item 303 mandates disclosure of "any known trends or uncertainties that have had or ... are reasonably likely to have a material favorable or unfavorable impact" on an issuer's sales, revenues or income. [3]

In this regard, a typical complaint would allege that an issuer's failure to disclose "known trends or uncertainties" in accordance with Item 303 violated Rule 10b-5(b), even in the absence of an affirmatively misleading statement.

The viability of this pure omissions theory of liability ended in April 2024, with the justices holding in *Macquarie* that pure omissions are not actionable under Section 10(b) and Rule 10b-5(b). [4]

The Supreme Court observed that Rule 10b-5(b) "prohibits omitting a material fact necessary 'to make the statements made ... not misleading.'" [5] Therefore, the "Rule ... covers half-truths, not pure omissions" and "requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'" [6]

In so holding, the Supreme Court contrasted Rule 10b-5(b) with Section 11(a) of the Securities Act, which imposes liability for registration statements that "contain[] an untrue statement of [] material fact or omit[] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." [7] The Supreme Court found the absence of "similar language in [Section] 10(b) [and] Rule 10b-5(b)" to be a "telling" indicator of legislative intent, and, in all events, a rejection of pure omissions liability under Rule 10b-5(b). [8]



Kevin Broughel



Sarah Eichenberger



Zoe Lo

The Post-Macquarie Landscape

While the Supreme Court's ruling foreclosed pleading a Rule 10b-5(b) claim based on pure omissions, the decision did not drastically reduce the number of securities class actions filed in the second half of 2024.[9] This is not entirely surprising, as relatively few securities fraud class action complaints are based solely on purported Item 303 omissions.

Instead, Macquarie has affected how Rule 10b-5 omission cases are pled, forcing plaintiffs to redirect their focus toward alleging misleading half-truths rather than pure omissions. However, as the justices themselves pointed out during oral argument, the line between pure omissions and misleading half-truths can be elusive.[10]

Indeed, Macquarie's progeny have grappled with the thorny question of whether a complaint pleads misleading half-truths, or pure omissions masquerading as half-truths. Although the decisions to date have been varied, a few guiding principles have emerged.

There must be a meaningful relationship between statements made and those allegedly omitted.

Where omitted statements have no meaningful relationship to affirmative statements, courts have been unwilling to find actionable half-truths.

For example, in *Chew v. MoneyGram International Inc.*, investors alleged that the defendant company misleadingly portrayed its financial outlook and performance metrics by failing to disclose purported compliance shortcomings.[11]

The U.S. District Court for the Northern District of Illinois **concluded** on Sept. 30 that this alleged omission was not actionable because the company's "statements about [its] overall performance metrics ... bore no meaningful relation to [its] compliance efforts or fraud-detection systems." [12] The court also rejected any fraud claim based on purported Item 303 omissions, because the plaintiffs "d[id] not articulate how Item 303 applies to any particular statement defendants are alleged to have made." [13]

Similarly, in *Crivellaro v. Singularity Future Technology Ltd.*, the U.S. District Court for the Eastern District of New York determined on Dec. 17 that various alleged omissions about the company's internal controls and its CEO were all "untethered to any affirmative statement" by the defendants, and thus could not give rise to an actionable claim.[14]

The alleged omitted information must be material.

Applying prior Supreme Court precedent, decisions since Macquarie reflect that courts will only find that an omission creates an actionable half-truth where the undisclosed fact is material, i.e., where there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," according to the Supreme Court's seminal 1988 decision in *Basic Inc. v. Levinson*. [15]

For example, in *Maso Capital Investment Ltd., v. E-House (China) Holdings Ltd.*, the U.S. Court of Appeals for the Second Circuit on June 10 **affirmed** the lower court's dismissal of a pure omission claim. There, defendants allegedly failed to disclose "parallel projections" purportedly showing higher profits than disclosed management projections.[16]

Quoting Macquarie, the Second Circuit stated that "Rule 10b-5(b) does not proscribe pure omissions," but instead prohibits half-truths by "requir[ing] disclosure of information necessary to ensure that statements already made are clear and complete." [17] The allegedly omitted projections did not meet Macquarie's litmus test where plaintiffs "provide[d] no details as to who created [the projections], for what purpose they were prepared, and to whom they were made available." [18]

In other words, the parallel projections did not make the disclosed management projections misleading, let alone materially so, where the plaintiffs had not alleged any facts demonstrating that the parallel projections were created by, or even shared with, the company.

In contrast, in *Alger Dynamic Opportunities Fund v. Acadia Pharmaceuticals Inc.*, the plaintiffs alleged that the defendants misleadingly presented the results of a clinical study by omitting negative information contradicting the studies' favorable findings.[19]

On Oct. 31, the U.S. District Court for the Southern District of California held that because the defendants "'state[d] the truth only so far as it goes, while omitting [the] critical qualifying information," the complaint sufficiently alleged that the defendants' statements about the study were actionable half-truths.[20]

Characterizations will be scrutinized.

Disclosures that characterize the breadth or size of an issue can be fodder for an omission claim.

In *Roofers Local No. 149 Pension Fund v. Amgen Inc.*, the plaintiff alleged that the defendants hid the full extent of the liability the company was facing when it omitted that the IRS was seeking billions from it.[21] The defendants argued that their failure to disclose this information could not have been misleading given the company's characterization of the amount in dispute as, among other descriptions, "significant" and "substantial." [22]

In citing *Macquarie*, the U.S. District Court for the Southern District of New York on Sept. 30 **disagreed** with the defendants, concluding that the defendants' failure to disclose the specific amount the IRS was seeking rendered its disclosure of the tax dispute "neither 'clear' nor 'complete'" because the defendants' "vague characterizations of the amounts the IRS was seeking as 'significant,' 'substantial,' and potentially 'material'" failed to communicate the magnitude of the potential liability. [23]

Item 303 omissions can still be actionable when tied to other statements.

Last, one should not misconstrue *Macquarie* to mean that all Item-303-based omissions are nonactionable. An omission claim will survive a motion to dismiss, even post-*Macquarie*, if it is adequately alleged that the omission of information required to be disclosed under Item 303 renders other affirmative statements misleading.[24]

Ramifications

In sum, while *Macquarie* has narrowed the scope of liability for securities fraud claims premised on omissions, it has not eliminated it, and courts will continue to grapple with differentiating inactionable pure omissions from actionable half-truths.

A court's evaluation of whether a complaint sounds in impermissible pure omissions, and is thus barred by *Macquarie*, or alleges actionable half-truths is a particularized inquiry that turns on the nature, importance and context of the statements purportedly made misleading.

Issuers should therefore be cognizant of the risk of nondisclosure when the facts at issue are potentially significant and could be viewed as having a close factual nexus to existing statements. In addition, companies should be thoughtful about the form of disclosure, and weigh the relative costs and benefits of using descriptors like "significant" and "substantial" against more granular disclosures to describe the magnitude of potentially material events.

Finally, litigants facing Section 10(b) and Rule 10b-5 omission claims should closely scrutinize allegations attempting to cast omissions as excluding critical or significant qualifying information from existing disclosures, and aggressively seek dismissal when the purported omission is insignificant or unrelated to the identified disclosures.

Kevin P. Broughel and Sarah Eichenberger are partners, and Zoe Lo is an associate, at Katten Muchin Rosenman LLP.

Katten associate Alexis San Martin contributed to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] **Macquarie Infrastructure Corp. v. Moab Partners L.P.** , No. 22-1165, 601 U.S. 257, 266 (Apr. 12, 2024).

[2] 17 C.F.R. § 240.10b-5(b).

[3] 17 C.F.R. § 229.303(b)(2)(ii).

[4] **Macquarie Infrastructure Corp.**, 601 U.S. at 266.

[5] *Id.* at 263.

[6] *Id.* at 264 (citing 6 Oxford English Dictionary 857 (1933) def. 3).

[7] *Id.* (quoting 15 U.S.C. § 77k(a)).

[8] *Id.* at 265.

[9] See generally <https://securities.stanford.edu/filings.html>.

[10] https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1165_9m6j.pdf at 7:21-8:14.

[11] **Chew v. Moneygram Int'l Inc.** , No. 18-cv-7537, 2024 WL 4346522, *7 (N.D. Ill. Sept. 30, 2024).

[12] *Id.*

[13] *Id.* at *26.

[14] **Crivellaro v. Singularity Future Tech. Ltd.** , 2024 WL 5146051, at *3-5 (E.D.N.Y. Dec. 17, 2024).

[15] **Basic Inc. v. Levinson** , 485 U.S. 224, 231-32 (1988).

[16] **Maso Cap. Inv. Ltd. v. E-House (China) Holdings Ltd.** , No. 22-355, 2024 WL 2890968, *2, *4 (2d Cir. June 10, 2024).

[17] *Id.* at *4 (quoting **Macquarie Infrastructure Corp.**, No. 22-1165, 601 U.S. at 264.)

[18] *Id.* at *3.

[19] **Alger Dynamic Opportunities Fund et al. v. Acadia Pharm. Inc. et al.** , No. 24-cv-451, 2024 WL 4647297, *12 (S.D.Ca. Oct. 31, 2024).

[20] *Id.* See also **In re: Nat'l Instruments Corp. Sec. Litig.** , 2024 WL 4108011, *5 (S.D.N.Y. Sep. 6, 2024) (dismissing in part Section 10(b) and Rule 10b-5(b) claims premised on undisclosed third-party offers to purchase the issuer that allegedly rendered stock repurchase disclosures misleading because the disclosures did not imply that the repurchases occurred at the highest possible price, but finding that an insider trading claim under Section 10(b) had been adequately pled).

[21] **Roofers Local No. 149 Pension Fund v. Amgen Inc.** , 2024 WL 4354809, *11 (S.D.N.Y. Sept. 30, 2024).

[22] *Id.*

[23] *Id.* at *12.

[24] **Sjunde AP-Fonden v. v. Gen. Elec. Co.** , 17-cv-8457, 2024 WL 2124504, *1 (S.D.N.Y. May 10, 2024) (denying application for leave to dismiss omission claim based on Item 303 because plaintiffs had "identified the specific sections of [the] Class Period filings ... that they allege were rendered misleading by the alleged Item 303 omissions" such that dismissal was not warranted).

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GSK's Zantac Woes Gave Investors Heartburn, Suit Says

By **Katryna Perera**

Law360 (February 6, 2025, 4:50 PM EST) -- The maker of heartburn and acid reflux relief tablet Zantac has been hit with a shareholder suit in Pennsylvania federal court alleging that the company suffered stock price losses after it was revealed that for nearly 40 years the company knew that Zantac contained high levels of a cancer-causing compound.

Plaintiff Roofers Local No. 149 Pension Fund filed a **complaint** on Tuesday against drugmaker GSK PLC, its CEO Emma Walmsley, former Chief Financial Officer Iain Mackay and the company secretary, Victoria Whyte.

The suit is on behalf of a proposed class of all purchasers of GSK American Depositary Receipts between Feb. 5, 2020, and Aug. 14, 2022.

According to the complaint, Zantac was GSK's most popular product for many years. Zantac is the brand name for ranitidine, which was developed in the 1970s by GSK's predecessor, Glaxo.

"By 1987, it was the world's best-selling drug. Over the next two decades, Zantac was used by millions of patients and generated billions of dollars for Glaxo and GSK. GSK continued to market Zantac in the U.S. until 2017," the complaint said.

However, the pension fund alleged that from the time Zantac launched in the U.S., Glaxo and GSK were aware of and possessed an internal company report showing that ranitidine could create a highly carcinogenic compound called N-nitrosodimethylamine, or NDMA.

According to the complaint, in 1982, a Glaxo scientist named Richard Tanner found that ranitidine interacted with nitrites, a common chemical found in many foods, to create 232,000 nanograms of NDMA.

"The U.S. Food and Drug Administration would later determine that the recommended acceptable intake was 96 nanograms — less than 0.05% of what Dr. Tanner had found," the complaint said.

But Glaxo and GSK kept the report buried until 2019, when an independent laboratory tested Zantac and found NDMA in "every batch of every medication" that it tested. These results were reported to the FDA and the public, and in the fall of 2019, GSK suspended the distribution of Zantac and initiated a voluntary recall, the complaint said. The FDA then requested in April 2020 that manufacturers stop selling Zantac and any generic alternatives.

GSK was subsequently hit with several personal injury and product liability lawsuits in the following years by cancer patients, and many of the suits were consolidated into a multidistrict litigation, according to the complaint.

The pension fund claims that throughout the proposed class period, the defendants misrepresented to investors that GSK had removed Zantac from the market "[b]ased on information available at the time and correspondence with regulators."

"GSK also stated that it was 'continuing with investigations into the potential source of NDMA.' Defendants also assured investors that 'GSK, the FDA, and the EMA [European Medicines Agency] have all independently concluded that there is no evidence of a causal association between ranitidine

therapy and the development of cancer in patients,' findings that were 'consistent with other ranitidine data published prior to 2019,'" the complaint said. "Finally, defendants claimed that they could not 'quantify or reliably estimate the liability.'"

In reality though, GSK was "fully aware" of the source of NDMA and had been for nearly 40 years, the complaint said.

"While defendants asserted that 'data published prior to 2019 claims' failed to establish a link between Zantac and cancer, they failed to disclose that GSK possessed unpublished data — the Tanner Report — that did exactly that," the complaint said. "Furthermore, the representations about defendants' ability to 'quantify or reliably estimate the liability' deceived investors, who did not know that GSK had for decades concealed an internal study that implicated the company's liability to Zantac users."

The truth began to come to light in August 2022, when a Deutsche Bank report stated that it seemed "very possible" that GSK and other Zantac distributors "will incur the risk of some degree of shared liability, with the only real questions being what the magnitude of liability may be."

The complaint said that even though GSK had repeatedly claimed to investors that scientific research did not support a connection between Zantac and cancer, and therefore the company did not face significant liability, the Deutsche Bank report forecast that the total liability could be between \$5 billion and \$10 billion.

According to the complaint, "as the market absorbed this information," the price of GSK's ADRs declined by \$4.30 per share, or more than 10%, from a closing price of \$40.03 on Aug. 9, 2022, to \$35.73 on Aug. 11, 2022.

A second stock price drop occurred on Aug. 15 when GSK admitted that it could provide guidance and that its liability exposure was between \$1 billion and \$10 billion, the complaint said, and an eventual **\$2.2 billion settlement** in the MDL "fell squarely within that range."

The complaint said these disclosures caused GSK ADRs to decline an additional \$1.08, or 3%, from a closing price of \$36.03 on Aug. 12, 2022, to \$34.95 on Aug. 15, 2022.

"All told, these disclosures erased nearly \$2.3 billion in shareholder value," the complaint said.

The suit seeks damages, attorney fees and a jury trial. Representatives for the parties did not immediately respond to requests for comment on Thursday.

The pension fund is represented by Ryan T. Degnan and Naumon A. Amjed of Kessler Topaz Meltzer & Check LLP, Hannah Ross, Avi Josefson and Scott R. Foglietta of Bernstein Litowitz Berger & Grossmann LLP and Lyndsey K. Bates of AsherKelly PLLC.

Counsel information for the defendants was not immediately available.

The case is Roofers Local No. 149 Pension Fund v. GSK PLC et al., case number 2:25-cv-00618, in the U.S. District Court for the Eastern District of Pennsylvania.

--Editing by Rich Mills.



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AI Will Soon Transform The E-Discovery Industrial Complex

By **Todd Itami** (February 6, 2025, 3:10 PM EST)

The e-discovery industrial complex will be transformed by generative artificial intelligence sometime soon.[1] Our current paradigm of data handling will vanish and be replaced by fully integrated enterprise solutions.

This article examines the current state of the industry and the anticipated outcomes of this shift, while acknowledging the tough journey ahead.

Currently, the challenging intersection of legal and technical domains, combined with limited technical expertise among lawyers, has led to an e-discovery data market dominated by specialist vendors commanding premium rates for data services.[2] These vendors employ some of the most knowledgeable legal tech professionals in the world. This high skill bar contributes to high fees because of the significant complexity required for many e-discovery tasks.



Todd Itami

But artificial intelligence is set to revolutionize this landscape, making processes easier, faster and more accurate. This transformation means less reliance on cumbersome workflows and more focus on what truly matters: delivering value to clients. There are many steps between where we are today and where we will end up.

Of course, every case requires fact-specific workflow design, so this article focuses on general ideas.

E-Discovery Gets Harder

Identifying, collecting and reviewing relevant information is hugely burdensome and technically challenging. Truly, books could be written on why the task is so hard and expensive.

The entire scheme of enterprise information technology was not created with e-discovery in mind. Enterprise information systems are designed to execute their primary functions and interact with other systems synergistic or adjacent to those primary functions — not to make lawyers happy.

Identifying exactly the right data for discovery, let alone exporting it in a forensically sound fashion, was not top of mind during enterprise development of the past two decades. Indeed, the very nature of certain very effective data structures does not lend itself to collection and review in any sort of targeted fashion.[3]

Some platforms are better than others, but for the most part, the platforms have focused on delivering value to clients outside of the e-discovery context.

Before generative AI, data was already growing exponentially in size, complexity and diversity. Consider the following points:

- Data growth rates in terms of absolute size are increasing year over year. Much has been written on this volume-based point.

- Data is becoming more complex: Productivity platforms and various types of content management tools have become increasingly cross-compatible. And it's more than hyperlink cross-pollination — most major platforms now provide plugins or modules for direct integration with other programs, including competing components.
- Data is more diverse: New data sources present new challenges for collecting data for e-discovery. Novel features create novel metadata and data structures that can be technically difficult to capture or reproduce in a way that allows for relevance review. For example, short messaging is constantly a pain point for review platforms as message complexity, encryption, ephemerality, and multimodal integrations present problems light years beyond viewing cool emojis. 🤔

These data novelties create interesting second-order problems in e-discovery aside from simple extraction and review. For example, new collaborative software features and less department-based organization of people could blur the lines as to what counts as custodial data in a particular case. This could be problematic for jurisdictions that have default rules with a set numbers of custodians per side as a means of defining discovery boundaries.

In sum, e-discovery is getting technically and legally harder, not easier.

Generative AI will, at first, just throw gas on this e-discovery fire.[4] Speaking broadly, the current unprecedented wave of investment in generative AI will complicate the situation by:

- Creating even more data, because high-quality content can now be generated automatically;
- Creating novel forms of data, e.g., inputs, outputs, data structures, etc.; and
- Boosting the diversity of both AI and non-AI apps by significantly lowering the cost of, and barriers to, software development.

And here you thought it was getting crazy in 2024!

2025 E-Discovery: A Blunt Instrument

The legal industry grapples with the technical challenges of e-discovery through brute force. Even the most basic document type in corporate America — email — must usually be overcollected and processed into a discovery database to ensure that nothing potentially relevant is missed.[5]

And most other data sources follow this same workflow: very broad collection, filtering, processing and normalization into a database, and then culling, usually with elaborate sets of search terms, before attorneys lay eyes on document No. 1.

To give you an idea of scope, large firms usually have hundreds of cases with millions of files collected, tens of cases with tens of millions collected, and a few cases where collected files are counted in the hundreds of millions. I wish I were exaggerating.

And while every case is different, the armchair consensus in the industry is that less than 5% of collected data is ultimately produced to the opposing party or used in an internal investigation.

Initial broad culling — deduplication, filtration of system files and substantive search term narrowing — usually results in at least an 80% reduction in volume. After that, the documents are reviewed for relevance, which usually results in an additional 75% reduction in document count. But wait, it gets better.

Again, this is a gross generalization, but the punchline is that maybe 5% of what is produced — i.e., 0.25% of the gross — is actually generally relevant to the case, with only a fraction of that data being important to the outcome of the case.

Let me put this another way: If you told me that 1% of data collected for a major case was truly outcome-determinative, I would be more surprised than the time I found out that I had been unintentionally dating a particularly convincing AI for five months.

Not only is the system inefficient from a "data in, data out" perspective, it has also been monetized at every step of the process. Some vendors are better than others, but over the last decade, someone somewhere in the industry has managed to charge per-gigabyte, often monthly-recurring, fees for:

- Initial collection — device-level, enterprise-level, etc.;
- Processing — staging database-in;
- Hosting — staging database;
- More processing — staging data promoted to review;
- More hosting — review database;
- More processing — production imaging; and
- More processing — loading other parties' productions.

With some vendors, all of these data moves gets a charge. And we are ignoring both the per-document analytics fees for specialized tools, and the hourly rates for technicians that many vendors charge on top of these compute and hosting fees. Vendors even sometimes charge a final fee — in addition to hourly work — to shut the whole thing down.

To be clear, I don't think this billing schema is some sort of salesperson gambit. This is just the way that industry pricing evolved — in part because of the extremely low margin for error in each of these steps.[6]

Nevertheless, this pricing culture is well above the cost for equivalent secure, fast and reliable data services in other industries. And that fact makes the e-discovery industrial complex particularly vulnerable to outside forces, courtesy of the coming AI wave.

The AI Endgame

In my view, this current discovery data paradigm will be rendered mostly obsolete by generative AI.

The relics of old — data identification primarily through interviews, collecting extraordinary quantities of data, myriad technical collection difficulties, search terms, human document review workflows, pricing culture, etc. — will be displaced by outputs directly from the systems managing the data.

Sometime soon-ish, parties will agree on a written scope of discovery, give the scope to the enterprise systems holding the data, and the system will provide a set of documents that will require little, if any, attorney review.[7]

Not only will the platforms themselves identify and package the relevant documents, but the data delivery will be accompanied by automatically generated legal work product and analysis. That, my friends, is the endgame.

But this endgame will not be realized overnight — this journey from industrial complex to turnkey will happen in stages, outlined below.

1. Early Days

In the first stage, AI will simply be an efficiency enhancer, replacing human reviewers and drastically improving quality. This is happening right now.

2. Nascent New Value

In the second stage, review platforms will integrate AI in more sophisticated ways. Advanced integrators will go beyond relevancy and privilege document review, and will truly engage the variety of structured and unstructured outputs.

This will include the integration of human review tasks that technology-assisted review could never accomplish: logging, data extraction, reporting, sophisticated quality control, identification of recalcitrant personally identifiable information and automatic relation of disparate data sources, to name a few.

But fantastic new value will start to emerge that would be unimaginably cost-prohibitive in 2024. AI will be able to accomplish tasks that would have previously required thousands of hours of review by lawyers with comprehensive institutional knowledge and case background.

3. A New Era

In the end, generative AI will collapse the stages of the e-discovery life cycle. This is where the assembly-line view of the e-discovery cycle will no longer make sense.

Right now, it is unclear how this will play out, how much segmentation there will be in the industry and who the players will be. What is clear is that current state of play will become a mere memory.

Collateral Development

Large language model development will fuel other types of much-needed software development important to the legal industry. Some of the stickiest problems described above will be ameliorated, not because chatbots achieve sentience, but because other applications obviate the need for certain steps in the e-discovery workflow.

There are many examples here that I would love to discuss, but maybe the best one is content indexing.[8] For AI to efficiently "see" the data on your systems, it must be indexed. On the e-discovery side, we process huge amounts of data into staging databases precisely to solve the indexing and search problems.

As mentioned above, obscure file types; optical text recognition, or OCR; and data unitization issues create complications. But AI developers want to give the models access to this data.

When enterprise systems improve on-platform indexing — either through native capabilities or integration of indexing-specific applications — this will greatly benefit the legal tech community. Suddenly, data will be accessible and reliably searchable in-place using legacy technologies and AI alike.

This is just one example of how the rising tide of AI will float many legal tech boats (and bots).

And don't forget that the deep neural network breakthrough will produce its own set of non-LLM tools that will help with the discovery process. This huge potential should not be overlooked. For example, new handwriting analysis models have proven to significantly outperform traditional OCR programs in many use cases. It's not a chatbot, but it will be an impactful technology for lawyers in many cases.

Conclusion

The blunt instrument of 2025 discovery will soon become a laser scalpel. The industrial complex will still have its place.[9] But more importantly, the real winners will be the clients.[10]

Todd Itami is of counsel and director of artificial intelligence and e-discovery solutions at Covington & Burling LLP.

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[1] The e-discovery industrial complex includes a set of services and software employed during large litigations and investigations. Legal professionals rely on these services to accomplish a primary task:

production of large quantities of information responsive to discovery requests.

[2] In keeping with my commitment to a software-agnostic approach, any perceived references to specific products are not intended to endorse or highlight any specific solution, product, or company.

[3] A simplified example: many messaging apps, despite beautiful and intuitive user interfaces, store individual messages in combined tables on the user's device with every new message sent or received placed on a new row in a big table. You can imagine that it could be challenging to parse such tables at scale into discrete conversational threads for attorneys to review, all while preserving the esoteric metadata associated with each message. That is, assuming you have a way to pull the table out of the application in the first place!

[4] Side bar: It is wholly unhelpful that many have treated GenAI applications as an alien form of life requiring special rules for every aspect of use. I see this phenomenon as unnecessarily complicating the situation in a space where—spoiler alert—existing frameworks are perfectly capable of handling these new tools from governance, confidentiality, privacy, and information security perspectives. Don't get me wrong, proper handling of artificial intelligence is both hugely important and not easy; but we certainly don't need to completely reinvent the governance and acceptable-use wheels.

[5] In some cases, the burden of conducting a full-blown forensic collection may not be appropriate for the needs of the case.

[6] Hourly rates for professionals at vendors are also underpriced, in my opinion.

[7] I hope to unpack this in future articles. Streamlining this process will eventually upset the current balance of proportionality and cause us to reconsider the entire flow of civil discovery. The speed of the e-discovery investigation phase alone will greatly change the pace and focus of a litigation or investigation. I am conscious of other critical factors like attorney-client privilege review, but I am excluding them here to keep things simple.

[8] Content indexing reads the content of files and builds an "index" of the content. This index allows programs and other tools, like LLMs, to quickly and efficiently "see" the substance of the file to avoid repeatedly digging through each file, line by line, with every search or interaction. This indexing process can be as simple as a text-based inverted index that functions very similarly to a book index, or as complicated as converting letters, words, or phrases into numbers (embeddings/vectors). These processes are getting smarter in exciting ways that will help lawyers grapple with traditionally difficult data types like very long documents, very short documents, and documents with repeated or dirty data.

[9] In fact, I believe individuals currently on the inside of the complex are some of the best-equipped people to take us on the incredible journey that awaits.

[10] Clients will receive higher quality work for less money, value and legal analysis that was never before possible, and increased time and energy to focus on the most important and challenging aspects of legal disputes, rather than focusing on how to get the data from point A to point B.



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Allstate Collected, Sold Driver Data, Suit Alleges

By Celeste Bott

Law360 (February 6, 2025, 6:26 PM EST) -- Allstate unlawfully collected the driving data of at least 45 million policyholders through software integrated in third-party mobile apps, using information about their driving behavior as a basis for denying coverage, hiking up auto insurance premiums, or dropping them from coverage altogether, according to a proposed class action filed in Illinois federal court Wednesday.

Brought by 25 named plaintiffs, the 114-page complaint alleges their mobility data was tracked by the insurance giant through their use of Life 360 and other apps. Allstate then used it to inform its own underwriting, and profited by selling access to the "world's largest driving behavior database," according to the lawsuit.

The drivers claim that Allstate — through subsidiary Arity, a "mobility data and analytics company" founded by the insurer in 2016 and also named as a defendant — created a software development kit to be integrated into cellphone applications, capable of extracting large volumes of consumer data from the sensors within users' smartphones, "under the false pretext of providing necessary functionality."

"Defendants encouraged the adoption of their SDK by paying these app developers millions of dollars to integrate defendants' software into their apps and by providing developers bonus incentives based on the size of their dataset," the drivers claim.

That means when proposed class members downloaded certain third-party mobile apps, they were unknowingly downloading Allstate's software, allowing the insurer to siphon off trillions of miles of their data, according to the suit.

"Defendants used this 'driving behavior' data to create individualized driver profiles based on driving habits and movement," they said. "Defendants illegally collected this information without informing or seeking consent from the millions of Americans, including plaintiffs and class members, that their data was continuously being extracted and sold."

Allstate's database of driver behavior is not only illegal, but likely inaccurate, the drivers argue, because it relies on their phones without getting any sort of confirmation that the cellphone user is the one driving.

"As such, much of the information upon which insurers are increasing premiums may not have been generated while the user was in fact driving," they said. "Much of this ill-gotten data may have been generated while the user was riding mass transit or riding in a taxi."

The suit also asserts that under Allstate's agreements with app developers, it had varying levels of control over the privacy disclosures and consent language those third-party apps presented to consumers.

"Defendants made no effort to directly obtain consumer consent themselves, knowing full-well that consumers would roundly decline to use an app if they knew it would track their every movement and ascribe it as driving behavior that would then be sold to insurers to increase consumers' insurance rates," the plaintiffs said.

The named plaintiffs seek to represent a nationwide class of drivers, and subclasses of people who reside in Illinois, Alabama, Arizona, California, Florida, Georgia, Indiana, Kentucky, Louisiana,

Montana, Mississippi, Missouri, North Carolina, New York, Ohio, Pennsylvania, Texas, South Carolina, Utah, Wisconsin and Washington.

They bring claims under the Federal Wiretap Act, the Stored Communications Act, the Computer Fraud and Abuse Act and the consumer protection laws of the above-mentioned states.

A similar class action **was filed** in Illinois federal court last month by named plaintiff Demetric Sims, who alleged Allstate secured his driving data via the SiriusXM radio app.

Both Illinois actions resemble **a lawsuit** that Texas Attorney General Ken Paxton filed in January against Allstate and Arity. Paxton said in a statement accompanying the lawsuit that his office's investigation "revealed that Allstate and Arity paid mobile apps millions of dollars to install Allstate's tracking software."

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

The proposed class is represented by Gary M. Klinger of Milberg Coleman Bryson Phillips Grossman PLLC and Thomas E. Loeser and Jacob Alhadeff of Cotchett Pitre & McCarthy LLP.

Counsel information for Allstate could not be immediately determined Thursday.

The case is Arellano et al. v. The Allstate Corp. et al., case number 1:25-cv-01256, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Ganesh Setty and Allison Grande. Editing by Kelly Duncan.

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Judge Questions Firm's Candor In Apple, Amazon Docs Row

By **Greg Lamm**

Law360 (February 6, 2025, 8:45 PM EST) -- A Washington federal judge said on Thursday there was "troubling shifting" around Hagens Berman Sobol Shapiro LLP's explanation of texts and emails with a client who disappeared from a proposed class action targeting Amazon and Apple, while also saying it might not matter because the firm found substitute plaintiffs.

During a hearing, U.S. District Judge Kymberly K. Evanson considered whether the firm has to give Apple and Amazon privileged client communications with former lead plaintiff Steven Floyd, which include seven text, email and phone exchanges the technology giants say could bolster their argument that the suit should be tossed because Floyd told his attorneys to drop the case in January, months before an amended complaint was filed with new plaintiffs.

Judge Evanson said plaintiff attorneys have the flexibility in a class action to substitute plaintiffs when appropriate.

"But I have not seen a case where we have this issue of potential questions about candor and disclosure," Judge Evanson said. "Did plaintiff counsel have the obligation — if that was in fact the case that Mr. Floyd said 'I don't want to continue with this case any more' — to tell the defendants and to tell the court?"

Ben Harrington of Hagens Berman said that, if Floyd had withdrawn in January 2024, the firm still would have had the authority to amend the complaint with new plaintiffs, which is what happened in May.

If that were the case, the motion to amend could have been styled as a motion to substitute, Harrington said. But the outcome would have been the same, he added, saying Apple and Amazon did not have a legal basis to break Hagens Berman's privilege with a client.

"Counsel is seeking to have us release attorney-client communications to an adversary, but to what end?" Harrington said, noting that what Floyd may have said would be enough to support dismissing the case.

An **amended complaint** filed in May replaced former lead plaintiff Floyd with two other lead plaintiffs. Hagens Berman said it made the substitution because Floyd had stopped responding to his attorneys.

But in urging the court to force Hagens Berman to turn over January 2024 communications between the firm and Floyd, Apple and Amazon contend that Hagens Berman never had Floyd's permission to file the amended complaint — a fact, the tech giants said, that warrants throwing out the new complaint.

Judge Evanson questioned whether it matters at this point what Floyd's emails said, given the fact that plaintiffs have leeway to substitute plaintiffs.

"Notwithstanding the fact that there is some troubling shifting around the representations with respect to what Mr. Floyd wanted to do and when, and I acknowledge that," the judge said. "But does that matter?"

Apple attorney Mark A. Perry of Weil Gotshal & Manges LLP said that if Floyd simply stopped communicating with Hagens Berman, then the defendants were not going to re-argue the plaintiffs' motion to amend the complaint.

But Perry questioned if Floyd simply went dark on his attorneys, saying evidence had "trickled in" that seemed to indicate the plaintiff instructed Hagens Berman in January to get him out of the case, to shield him from discovery or to stop litigating.

If Floyd told his lawyers he wanted the case shut down, Hagens Berman had a duty to its client to follow his instructions, Perry said.

"It's not credible, Your Honor, that they did not know," Perry said. "Clearly, something happened so dramatic they went and found new plaintiffs. They knew what [Floyd] wanted to do. The question is whether it had any effect on this litigation."

The antitrust claims in the proposed class action focus on a deal that allows only Apple-approved third-party vendors to sell iPhones and iPads on Amazon's e-commerce platform.

The consumer complaint alleges the agreement has restricted competition and artificially inflated prices. Apple and Amazon, meanwhile, say it keeps prices lower and protects consumers from counterfeits.

The proposed class is represented by Steve W. Berman, Theodore J Wojcik, Barbara A. Mahoney, Ben Harrington and Benjamin J. Siegel of Hagens Berman Sobol Shapiro LLP.

Amazon is represented by John Goldmark and MaryAnn Almeida of Davis Wright Tremaine LLP, Jonathan E. Nuechterlein, Benjamin M. Mundel and Jon Dugan of Sidley Austin LLP, and William C. Lavery of Clifford Chance LLP.

Apple is represented by Mark S. Parris of Orrick Herrington & Sutcliffe LLP, Mark A. Perry, Eric S. Hochstadt, Brian G. Liegel and Morgan MacBride of Weil Gotshal & Manges LLP, and Jeremy Roller of Arete Law Group PLLC.

The case is Floyd et al. v. Amazon.com Inc. et al., number 2:22-cv-01599, in the U.S. District Court for the Western District of Washington.

--Editing by Melissa Treolo.

UFC Fighters Get Final Approval For \$375M Settlement

By **Elaine Briseño**

Law360 (February 6, 2025, 6:48 PM EST) -- A Nevada federal judge granted final approval Thursday to a \$375 million settlement in a more than a decade-long class action in which fighters accused UFC of suppressing their wages, according to a lead attorney on the case.



UFC and over 1,000 former fighters received final approval to a nearly \$400 million settlement of a class action antitrust suit lodged in 2014 accusing the organization of suppressing fighters' wages. (AP Photo/Gary McCullough)

The plaintiffs filed a memo Jan. 30 seeking final approval of the settlement for a class of more than 1,100 former UFC fighters. This deal resolves the antitrust lawsuit filed by fighter Cung Le in 2014, but leaves the organization facing down similar accusations in a lawsuit filed by Kajan Johnson in 2021.

Berger Montague Chairman Eric Cramer, an attorney for the fighters in both cases, first confirmed the settlement in a post on the social platform X, saying they had "achieved some measure of justice" and will continue the battle in the Johnson case.

"This precedent setting result brings to a close a 10-year legal battle for economic justice for these athletes," Cramer told Law360 on Thursday. "We will be working hard over the coming weeks to ensure that every single fighter in the class makes a claim and gets the money that is rightfully theirs."

As part of the settlement, 35 fighters will get the highest payout of more than \$1 million and around 100 will receive more than \$500,000, Cramer said. The remaining fighters will net approximately \$50,000 to more than \$250,000.

The parties initially reached a \$335 million settlement in March, which included both the Le and Johnson lawsuits, but it was rejected through a July 30 minute order. U.S. District Judge Richard F. Boulware II expressed doubts about the settlement during a hearing in June, conveying concern about the dollar figure and that it would resolve lawsuits at different points in the legal process. He said he wanted to see "life changing" money for the fighters, who have gone through 10 years of litigation.

The Johnson plaintiffs were removed from the settlement and a new payout proposed in an effort to secure the court's blessing. Judge Boulware gave **preliminary approval** of the settlement in October.

Cramer told Law360 on Thursday that the plaintiffs and lawyers were "thankful that Judge Boulware presided over this case with an unusual degree of thoughtfulness and care."

A representative for UFC did not immediately respond to a request for comment.

The fighters are represented by Eric L. Cramer, Michael Dell'Angelo, Ellen T. Noteware, Patrick F. Madden, Najah A. Jacobs and Joshua P. Davis of Berger Montague, Richard A. Koffman, Benjamin D. Brown, Daniel H. Silverman and Daniel Gifford of Cohen Milstein Sellers & Toll PLLC, Joseph R. Saveri, Kevin E. Rayhill, Christopher K.L. Young and Itak Moradi of Joseph Saveri Law Firm LLP, Don Springmeyer of Kemp Jones LLP, Robert C. Maysey and Jerome K. Elwell of Warner Angle Hallam Jackson & Formanek PLC, and Crane Pomerantz of Clark Hill PLC.

The UFC is represented by Christopher S. Yates, Aaron T. Chiu, Sean M. Berkowitz, Laura R. Washington and David L. Johnson of Latham & Watkins LLP, William A. Isaacson, Jessica E. Phillips, Brette M. Tannenbaum and Yotam Barkai of Paul Weiss Rifkind Wharton & Garrison LLP, and Donald J. Campbell and J. Colby Williams of Campbell & Williams.

The cases are Le et al. v. Zuffa LLC, case number 2:15-cv-01045, and Johnson et al. v. Zuffa LLC et al., case number 2:21-cv-01189, both in the U.S. District Court for the District of Nevada.

--Additional reporting by Lauren Berg. Editing by Alex Hubbard.

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TikTok Moderators Alleging Harm Face Uphill Cert. Battle

By **Bonnie Eslinger**

Law360 (February 6, 2025, 8:59 PM EST) -- A California federal judge suggested on Thursday there might be too many individualized issues to certify a class of thousands of current and former TikTok content moderators in a suit alleging the social media platform is responsible for mental health issues the workers developed after being exposed to graphic content.

U.S. District Judge Vince Chhabria didn't issue a ruling after Thursday's hearing in San Francisco, but he indicated at the start that he was leaning toward the argument from TikTok Inc. and its parent ByteDance Inc. that the claims can't proceed on a classwide basis because of the multitude of individualized issues that would need to be resolved.

In their filing opposing the class certification motion, TikTok also said choice of law issues involving numerous states preclude certification of the proposed nationwide class. Judge Chhabria said argument on that point wasn't necessary.

"My sense is that there may be enough problems with the motion for class certification that it should be denied, even without regard to the multistate issue," the judge said.

The judge also told the parties that he wasn't sure those who were injured needed to have their case litigated with a class action.

"To the extent that injury is real, to the extent they really got [post-traumatic stress disorder], and I have no doubt that people did, that may be an additional reason for denying class certification," the judge said.

Lead plaintiff Reece Young's suit alleges that ByteDance and TikTok are liable for the mental health issues and psychological damage resulting from having to view grisly videos that included graphic depictions of necrophilia, bestiality, violence and child sex abuse. The defendants should have taken steps to protect against that harm, mitigate the risk and provide support for those who developed disorders as a result of their work, he said in his motion for class certification.

The companies argued back that the moderators were employed by third-party vendors and that they couldn't show that TikTok owed a duty to those workers because they couldn't show on a classwide basis that it exercised control over their work.

A lawyer for TikTok, Lauren Blas of Gibson Dunn & Crutcher LLP, said the evidence shows that the performance metrics, which controlled the workers' productivity, were different for different vendors. Young, she added, even used different software to moderate content from that provided by TikTok, she said.

Furthermore, she said, the moderators would be expected to have different experiences with the content since they were given options and tools on how to handle it.

"It's not as though one's sitting there, kind of receiving the content and you do nothing about it," Blas said. "You could blur facial features, you could do grayscale, you could mute audio."

Judge Chhabria noted that those tools weren't available in March 2020, the beginning of the class period.

Blas said some came online in 2021 and more in 2022.

In addition to the different ways the software was used, the way the moderators responded to the content was also individualized, Blas said.

"Did you take a break if you found it distressing? Did you talk to your manager?" Blas said, adding that moderators had the option to switch to a stream of less traumatic content.

Young's counsel, Steven Williams of Steven Williams Law PC, said that his client disputes that the tools were available to workers by 2022.

For evidence about TikTok retaining control, Williams pointed the court to the vendor agreements.

"Every aspect of the software that's used is controlled by TikTok," Williams said. "They got their equipment and software from TikTok."

Judge Chhabria said even if the moderators' work involved using TikTok's software, it appeared that there were other factors to consider like how many breaks they take.

"Wouldn't there need to be evidence that TikTok actually did exercise control over all that stuff too?" the judge asked.

Williams said he didn't believe the standard was that TikTok had to have complete control.

The judge posed a hypothetical scenario to Williams about a construction contractor being asked by a client to use a dangerous drill on a project, but there were different things that workers can do on the job to significantly mitigate the risk of injury of using the drill, such as wearing protective equipment. Did the client exercise and retain control over the construction staffers' work, the judge asked.

Williams said in that scenario the contractor is mitigating the risk of harm to keep it from happening whereas in the TikTok case the social media giant has caused the harm in the first place.

Blas also argued that with the proposed class period, it would be impossible to find common harm because TikTok has put new tools in place over the years, including automatic filtration so some content isn't seen by moderators.

And she said there's no evidence that exposure to the content causes mental health harms.

The judge said to assume that being exposed to the disturbing images increases the risk of mental health harm.

"I'm not saying it will harm them, but I think it does increase the risk that you will experience harm," the judge said.

Last year, Judge Chhabria **trimmed the suit**, keeping the negligence claim but dismissing the cause of action under California's Unfair Competition Law, because Young was hired to do contracted moderation work for TikTok by Atrium Staffing Services in Tennessee.

Similar allegations of harm have been lodged against other social media companies. Facebook agreed in 2020 to **pay \$52 million** to resolve claims it ignored workplace safety standards and allowed content moderators to sustain psychological trauma from the graphic images they see on the job. And YouTube struck a **\$4.3 million deal** in 2022 to end a proposed class action also accusing it of failing to protect moderators.

The moderators are represented by Steven N. Williams and Kai'Ree K. Howard of Steven Williams Law PC.

TikTok and ByteDance are represented by Jesse A. Cripps, Lauren M. Blas, Leonora Cohen and Viola H. Li Of Gibson Dunn & Crutcher LLP.

The case is Reece Young et al. v. ByteDance Inc. et al., case number 3:22-cv-01883, in the U.S. District Court for the Northern District of California.

--Additional reporting by Gina Kim. Editing by Brian Baresch.

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Buyers Want Kratom Cos. Addiction Suit To Go On

By **Jonathan Capriel**

Law360 (February 6, 2025, 9:48 PM EST) -- Two California kratom manufacturers shouldn't be allowed to escape a lawsuit claiming they failed to warn about the "highly addictive" nature of their products, a proposed class of consumers argued, pointing to a podcast where a company executive suggested their products were more potent than morphine.

Thang Botanicals Inc. and FTLS Holdings LLC argued their products' labeling adequately disclosed potential health risks in consuming their products and asked a California federal court to dismiss the proposed class action. But, on Wednesday, the multistate group of buyers pushed back on this bid, saying the fine-print warnings and website disclaimers the companies lean on to get them out of this suit fall woefully short of their duty to disclose.

In fact, Thang and FTLS knew their products were deeply habit-forming in ways they did not put on packaging or labeling. Instead, Gregory Dalli, their chief financial officer, "proudly" touted their synthesized kratom tables — known as 7-Hydroxymitragynine or 7-OH — can go toe-to-toe with some opioids, the consumers' said in their opposition filing.

"7-Hydroxymitragynine in specific is a really perfect key for the MU opioid receptor, and the reason why that is such an important thing is you don't need to take as much of it to get an effect versus if you look at morphine," Dalli said during a September appearance on the Kratom Advocacy Podcast, according to the lawsuit.

The consumers claim that Thang and FTLS were fully aware their products activated opioid receptors and did not warn buyers of this fact. Additionally, the companies' argument that they didn't have "exclusive knowledge" of kratom's addictive nature is bunk.

"It is ridiculous for [the companies] to argue they lacked the requisite knowledge, when the company's owner was boasting about how 7-OH is an opioid on a public podcast just months prior," the suit said.

The consumers' motion urged U.S. District Court Judge Trina L. Thompson to deny Thang and FTLS's motion to dismiss. But, if she does find fault with the lawsuit, they asked to be allowed to amend their complaint.

The consumers all blame Thang and FTLS, collectively doing business as 7ΩHMZ, for their kratom addiction. The plaintiffs — identified only as M.A., A.S., N.A. and J.R. — all claim to have suffered severe withdrawal symptoms, with some having to check into rehab facilities or get prescriptions for drugs used to treat addiction, according to the suit.

The lawsuit, filed in federal court in San Francisco in October, accuses the companies of misleading consumers by failing to disclose that their 7-OH tablets are highly addictive and function similarly to opioids.

In January, Thang and FTLS filed its motion to dismiss, arguing, in part, that the plaintiffs failed to establish deception that would fool a reasonable consumer. The companies claim that the product labels specifically warned people to go to their website, which had a disclaimer that explicitly mentioned a risk of addiction, according to the motion to dismiss.

But such a "boilerplate disclaimer" is totally inadequate because the products being peddled are so hazardous to human health, the consumers argued.

"Defendant's fine print back-of-the-label 'warning' does not apprise consumers of the specific and severe health risks associated with 7-OH use," the opposition motion said. "As Plaintiffs allege in the complaint, the entire contents of the warning on the Products' packaging is a bog-standard disclaimer — written in miniscule text — that consumers should consult a healthcare professional before use and that defendants are not liable for [the] misuse of this product, and which then directs consumers to a legal disclaimer page on defendants' website where a more complete disclosure is buried in the middle of more fine print."

The consumers noted that the product packaging and overall appearance makes it seem like a "vitamin supplement" when in reality it's "similar to opioids."

The consumers are represented by Neal J. Deckant and Luke Sironski-White of Bursor & Fisher PA and Todd D. Carpenter and Scott G. Braden of Lynch Carpenter LLP.

The companies are represented by Daniel S. Silverman, Bryan J. Weintrop and Amit Rana of Venable LLP.

The case is M.A. et al. v. Thang Botanicals Inc. et al., case number 3:24-cv-07029, in the U.S. District Court for the Northern District of California.

--Editing by Andrew Cohen.

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Tom's 'Natural' Kids Toothpaste Has Lead, Arsenic, Dad Says

By **Rae Ann Varona**

Law360 (February 6, 2025, 10:26 PM EST) -- Tom's of Maine and its parent company Colgate-Palmolive have "egregiously" failed to disclose that its "Silly Strawberry" children's toothpaste has dangerous levels of lead and arsenic, a New York dad alleged in a proposed false advertising class action filed Thursday in New York federal court.



Tom's of Maine's fluoride-free "Silly Strawberry" children's toothpaste contains unsafe levels of lead and arsenic, according to a proposed class action. (Court documents)

Douglas White of Staten Island, New York, asserted in the new lawsuit that the companies improperly, deceptively and misleadingly labeled and marketed the kids toothpaste by not disclosing the presence of the neurotoxins.

White cited independent testing by lead poisoning and consumer goods safety advocacy group Lead Safe Mama, which earlier this week reported the toothpaste having 240 parts per billion of lead and 40 ppb of arsenic. According to the group, the level at which "action should be taken" is 5 ppb for

lead and 10 ppb for arsenic.

"The product's contamination is particularly egregious given the potentially severe and irreversible consequences of lead and arsenic consumption," White asserted in his complaint.

White said that the levels found were not only "extremely elevated" for adults, but they were also "staggeringly much more dangerous for children," who he claimed are "known to innocently consume" Tom's of Maine's toothpaste.

White seeks to represent both a nationwide class of consumers who purchased the toothpaste in the U.S. and a subclass of consumers who purchased the toothpaste in New York.

White alleges deceptive business acts or practices and false advertising in violation of the New York Business Law, as well as negligence per se and unjust enrichment.

The Centers for Disease Control and Prevention states that lead exposure can result in serious harm to children's health. It says that adverse health effects include brain and nervous system damage, slowed growth and development, learning and behavioral problems, and hearing and speech problems.

A CDC public health statement on arsenic states that children exposed to inorganic arsenic may experience the same effects as adults such as stomach and intestine irritation, blood vessel damage, skin changes and reduced nerve function.

White asserted in his complaint that he bought the strawberry-flavored children's toothpaste many times in brick-and-mortar stores in Staten Island for his child. He said he wouldn't have had he known about the alleged lead and arsenic contamination.

Tom's of Maine's toothpaste, he said, is in "no way safe for human consumption and [is] entirely worthless."

White also asserted in his complaint that Tom's of Maine and Colgate are "no strangers to contamination of their toothpaste products."

He noted that the U.S. Food and Drug Administration recently found that other products the companies sold under the Tom's of Maine brand were contaminated with dangerous "mold-like" substances.

An FDA inspector had sent a "warning letter" to Colgate-Palmolive CEO Noel Wallace in November, summarizing "significant violations" of manufacturing practice regulations at its Tom's of Maine drug manufacturing facility in Sanford, Maine.

Tom's of Maine has been hit with false advertising lawsuits before, including a **2022 lawsuit** filed in Illinois state court alleging that toothpaste advertised as being natural contained synthetic ingredients like glycerin, xylitol, hydrated silica, sorbitol and sodium lauryl sulfate. The company faced **similar allegations** in a California federal court in 2020, before a judge tossed the suit in February 2021. In 2015, Tom's of Maine agreed to pay **\$4.5 million** and to change its labeling practices to settle a proposed class action lodged over heavily processed ingredients like sweetener xylitol and cleaner compound sodium lauryl sulfate allegedly found in some of its personal care products.

Tom's of Maine also isn't the only toothpaste brand to be accused of duping consumers.

In June, two mothers **accused** RiseWell LLC of falsely advertising its kids toothpaste as "natural" and "safe to swallow," claiming that there were 750 more "forever chemicals" found in the toothpaste than in kale researchers had found alarming levels in. The mothers, however, voluntarily dismissed their lawsuit in late July, according to the case's docket.

Counsel for White did not immediately respond to a request for comment Thursday, nor did Tom's of Maine.

White is represented by Philip J. Furia and Jason P. Sultzer of Sultzer & Lipari LLP.

Counsel information for Colgate and Tom's was not immediately available.

The case is Douglas White v. Colgate-Palmolive Co. et al., case number 1:25-cv-00662, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Celeste Bott and Mike Curley. Editing by Bruce Goldman.

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Travelers' \$6M Data Breach Settlement Nabs Final OK

By **Elizabeth Daley**

Law360 (February 6, 2025, 8:17 PM EST) -- A New York federal judge gave a final stamp of approval to a \$6 million deal ending a proposed class action alleging Travelers failed to protect people's personally identifiable information prior to a 2021 data breach.

In an **order** signed Wednesday, U.S. District Judge Vincent L. Briccetti said the insurer would owe \$2 million in attorney fees as well as over \$331,000 in litigation and administrative expenses, to be taken from the class settlement fund. The settlement amount was determined in August, according to court records.

Named plaintiff Jennifer Rand, as the settlement class representative, would be awarded \$10,000 from the settlement fund, the order said.

According to court documents, Rand argued that The Travelers Indemnity Co.'s business practices injured her by compromising her privacy. The insurer said in a letter to Rand and others that personally identifiable information, or PII, was disclosed to cybercriminals who accessed the data via an online portal used by its insurance agents to obtain quotes.

Hackers "used the credentials of a limited number of agents to access the portal to obtain information sourced from a third party," the letter sent by Travelers said.

The insurer created its online quote system "to auto-populate responses to requests for insurance quotes with certain PII obtained from third-party data providers, including driver's license numbers, and to disclose that PII to whomever submitted the request," Rand's 2022 amended complaint said. "If not for Traveler's intentional configuration and design of its systems, it would not have disclosed plaintiff's and class members' PII to non-parties."

According to the proposed class action, the New York state attorney general reported that 88,858 individuals were affected by the data breach and 3,912 of them are in the state. And in February 2021, Travelers was put on notice by a New York State Department of Financial Services cybersecurity fraud alert to company officers that hackers were exploiting cybersecurity flaws on websites to steal nonpublic information, the suit said.

For the purposes of the settlement, the judge defined all class members as those "of the United States who were sent notice that their personal information was accessed, stolen, or compromised as a result of the data incident, as reflected on the class list." The class excluded those with certain connections to Travelers or to the judge as well as those who opted out of the settlement.

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

Rand is represented by Thomas J. McKenna of Gainey McKenna & Egleston and by Amanda Grace Fiorilla, Anthony M. Christina and Christian Levis of Lowey Dannenberg PC.

Travelers is represented by Christopher J. Borchert, Kristine McAlister Brown and Donald M. Houser of Alston & Bird LLP.

The case is Rand v. The Travelers Indemnity Co., case number 7:21-cv-10744, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Joyce Hanson. Editing by Nick Petruncio.



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Meta AI Used 'Astonishing' Load Of Pirated Works, Writers Say

By **Hailey Konnath**

Law360 (February 6, 2025, 11:59 PM EST) -- Meta Platforms allegedly downloaded tens of millions of pirated copyrighted works from peer-to-peer networks to train its Llama artificial intelligence product, and its employees repeatedly discussed this "illegal" strategy with lawyers, with one engineer writing, doing so "from a corporate laptop doesn't feel right," according to internal communications unsealed in copyright infringement litigation Wednesday.

Comedian Sarah Silverman and authors suing Meta Platforms Inc. included excerpts from redacted versions of the communications — the "most damning evidence to date" — as part of their request for a California federal magistrate judge to reconsider a discovery ruling from last month. That motion has since been partly denied, though U.S. Magistrate Judge Thomas S. Hixson did agree to privately review certain materials.

The motion — and the newly unsealed communications — stem from more than 2,000 documents Meta turned over just hours before fact discovery closed in December, according to the authors' filing, a sealed version of which was initially filed Jan. 15. Those documents show that Meta and its in-house counsel opted to abandon licensing efforts in favor of obtaining copyrighted works from so-called shadow libraries of pirated materials by torrenting them — or obtaining them through peer-to-peer networks, "despite knowing that the strategy was of tenuous legality," the authors said.

"The magnitude of Meta's unlawful torrenting scheme is astonishing," the authors said.

Relatedly, the new evidence also shows that Meta torrented at least 81.7 terabytes of data across multiple shadow libraries "just last spring," they said. Before that, Meta had already torrented 80.6 terabytes of data solely from Library Genesis, aka LibGen, which Meta acknowledged was pirated, according to the motion. And it shows that Meta "had attorney-client communications furthering this unlawful activity," the authors argued.

In one internal communication, Meta engineer Nikolay Bashlykov expressed concern about using Meta IP addresses "to load through torrents pirate content," according to an appendix to the authors' motion.

"Torrenting from a corporate laptop doesn't feel right," Bashlykov wrote, adding a laughing crying emoji at the end.

Bashlykov also at one point suggested that Meta use a VPN, or virtual private network, to hide that it was downloading LibGen data, per the filing.

"Can we load LibGen data using Meta IP ranges? Or should we use some vpn?" he wrote.

Melanie Kambadur, a research manager on Meta's Llama team, also expressed concern on a message chain, the authors' filing shows.

"I don't think we should use pirated material," she wrote. "I really need to draw a line there."

The **copyright suit** was filed by Silverman and other high-profile authors, including Ta-Nehisi Coates and Junot Diaz, in July 2023. They say they never gave Meta permission to use the copyrighted works purportedly contained in datasets used to train versions of the Llama language learning model.

Last month, U.S. District Judge Vince Chhabria **unsealed various filings** Meta had hoped to keep under wraps, calling the sealing requests "preposterous." The unsealed documents reveal new details that the authors have learned in discovery, including allegations that Meta CEO Mark Zuckerberg approved the company's use of a dataset from LibGen to "train" Llama despite concerns among Meta's AI executive team and other top Meta engineers that the online database is "a dataset we know to be pirated."

The LibGen database has been around for the past decade and allows users to search for academic texts by major publishers without paying for them. It's mostly used by students and has also been the target of high-stakes copyright infringement litigation. Last year, a New York federal judge entered default judgment against the website's owners after they failed to appear in court.

Also last month, an attorney representing Meta in the copyright litigation **dropped the company as a client**, citing Zuckerberg's "descent into toxic masculinity and Neo-Nazi madness," according to a LinkedIn post. Mark Lemley of Lex Lumina PLLC said in the post that he "fired Meta as a client."

"While I have thought about quitting Facebook, I find great value in the connections and friends I have here, and it doesn't seem fair that I should lose that because Zuckerberg is having a midlife crisis," Lemley wrote.

According to the motion unsealed Wednesday, much of the discovery Meta turned over in December "contradicts prior testimony of Meta witnesses." The authors said the documents were seemingly withheld for months even though many of them include the same speakers, key terms and subjects as documents Meta earlier turned over.

In one correspondence, Joelle Pineau, vice president of AI research at Meta, questioned a colleague's statement that "using pirated material should be beyond our ethical threshold."

"You think it's problematic to use even for this phase?" Pineau said, according to the authors' filing.

That colleague, program manager Alex Presani, responded that "SciHub, ResearchGate, LibGen are basically like PirateBay or something like that, they are distributing content that is protected by copyright and they're infringing it."

Director of engineering Sergey Edunov wrote in another document, "if we license one single book, we won't be able to lean into fair use strategy. So we will have to drop all of the LibGen and books datasets[.]"

According to the authors, another document shows that Meta employees decided not to use Facebook infrastructure to download data from pirated databases so as to "avoid ... risk of tracing back the seeder/downloader ... from FB servers."

Multiple responses from in-house lawyers in the Meta communications were redacted, plus an entire section on "legal risk" that was part of a document containing discussion of what would happen if regulators learn that Meta trains Llama on pirated copyrighted data, the authors said.

Meta and counsel for the plaintiffs didn't immediately respond to requests for comment late Thursday.

The plaintiffs are represented by Joseph R. Saveri, Cadio Zirpoli, Christopher K.L. Young, Holden Benon and Aaron Cera of Joseph Saveri Law Firm LLP, David Boies, Joshua Irwin Schiller, Max Pritt and Jesse Panuccio of Boies Schiller Flexner LLP, Bryan L. Clobes and Alexander J. Sweatman of Cafferty Clobes Meriwether & Sprengel LLP, Daniel J. Muller of Ventura Hersey & Muller LLP and Matthew Butterick.

Meta is represented by Bobby Ghajar, Mark Weinstein, Kathleen Hartnett, Judd Lauter, Elizabeth L. Stameshkin, Phillip Morton, Cole A. Poppell, Matthew Brigham, Juan Pablo Gonzalez and Colette Ghazarian of Cooley LLP and Angela L. Dunning of Cleary Gottlieb Steen & Hamilton LLP.

The case is Richard Kadrey et al. v. Meta Platforms Inc. et al., case number 3:23-cv-03417, in the

U.S. District Court for the Northern District of California.

–Additional reporting by Ivan Moreno, Jasmin Boyce and Dorothy Atkins. Editing by Michael Watanabe.

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Sam Altman Calls Musk's Claim Of Ban On Rivals 'False'

By **Jared Foretek**

Law360 (February 6, 2025, 7:57 PM EST) -- OpenAI CEO Sam Altman said the key claim made in a preliminary injunction request from Elon Musk in their ongoing investment spat is false, saying in a new declaration that he never told OpenAI investors that they wouldn't be able to invest in the company if they also invested in Musk's xAI.

According to Altman's **declaration**, filed on Wednesday, the only ultimatum given to investors was that they would not be granted access to OpenAI's confidential information if they also had "non-passive investments" in the company's competitors, like Musk's artificial intelligence company.

"I understand that plaintiffs claim that I told investors in the October 2024 funding round that their ability to invest in OpenAI was contingent on forgoing investment in OpenAI's competitors, including xAI," Altman said. "That claim is false. I did not tell any investor in the October 2024 funding round that their ability to invest in OpenAI was subject to that condition, nor to my knowledge did anyone else at OpenAI."

Musk's claim that Altman was trying to freeze out would-be investors from funding xAI came in a preliminary injunction motion filed in November, asking U.S. District Judge Yvonne Gonzalez Rogers to stop Altman, OpenAI and Microsoft from enforcing "or furthering agreements not to invest in OpenAI's competitors, such as xAI," and from using "competitively sensitive information" stemming from any board interlocking between OpenAI and its largest investor, Microsoft. A hearing on the motion was held Tuesday in California federal court, but Judge Rogers has yet to rule on it.

The sides have been in a pitched legal battle since March, when Musk accused Altman and OpenAI of manipulating him into being a founding investor in the company's partial nonprofit structure when in reality the company was functioning as a for-profit. In November, just before the preliminary injunction motion, Musk filed an amended complaint for fraud, breach of contract and antitrust violations against Altman and OpenAI, **adding** both Microsoft and his former business partner Reid Hoffman as defendants.

According to Musk, OpenAI and Microsoft have been engaged in "rampant self-dealing" while nearly monopolizing the generative artificial intelligence market, using a broad network of investors and interlocking board members to keep would-be investors from funding other AI startups. Without taking a position on the lawsuit's claims, both the U.S. Department of Justice and the Federal Trade Commission **weighed in** on the concerns about board overlap in January, telling the court that just because the interlocking directorates may have ended, that doesn't mean that any Clayton Act claims stemming from the overlap should be mooted.

In his new declaration, Altman defended the restrictions on confidential information access for individuals invested in both OpenAI and its competitors, saying that such provisions are par for the course in the industry.

"That restriction is necessary to protect against the misuse of OpenAI's competitively-sensitive information, and I understand it is industry standard for that reason," he said.

But, Altman insists, he never told investors that they'd have to choose between competitors like xAI and his own firm.

"In explaining these restrictions on investors' information rights, I did not say that investors would lose their ability to invest in OpenAI if they chose to fund xAI or any other competitor," he said in the declaration.

Earlier this week, Microsoft and OpenAI separately **filed motions to dismiss** Musk's suit, saying the "conclusory allegations" "lack the necessary factual or legal support" to move forward, and that Musk was looking for help from the courts to make xAI more competitive.

"Boiled all the way down, the complaint asks the court to intervene in plaintiffs' favor to improve their position in an intensely competitive industry," OpenAI wrote.

The two sides will be back in court in May to argue the motion to dismiss.

Representatives for Musk did not immediately respond to a request for comment Thursday.

Musk is represented by Marc Toberoff and Jaymie Parkkinen of Toberoff & Associates PC.

Altman and OpenAI are represented by Jordan Eth and David J. Wiener of Morrison Foerster LLP, and William Savitt, Sarah K. Eddy and Nathaniel Cullerton of Wachtell Lipton Rosen & Katz.

Microsoft and Hoffman are represented by Russell P. Cohen, Andrew J. Levander, Howard M. Ullman, John A. Jurata Jr. and Nisha Patel of Dechert LLP.

The case is Musk et al. v. Altman et al., case number 4:24-cv-04722, in the U.S. District Court for the Northern District of California.

--Additional reporting by Bryan Koenig and Bonnie Eslinger. Editing by Adam LoBelia.



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DOJ To Weigh Criminal Action Against Cos. With DEI Policies

By **Sarah Jarvis**

Law360 (February 6, 2025, 8:21 PM EST) -- The U.S. Department of Justice will consider bringing criminal and civil investigations against companies over their diversity, equity and inclusion policies, according to a new memorandum from Attorney General Pam Bondi.

In a Wednesday **memo**, Bondi told department employees the DOJ's Civil Rights Division will "investigate, eliminate and penalize illegal [DEI] and DEIA preferences, mandates, policies, programs and activities in the private sector and in educational institutions that receive federal funds."

The memo instructs the Civil Rights Division and the Office of Legal Policy to submit a joint report with recommendations aimed at encouraging the private sector to end "illegal discrimination and preferences," including DEI policies. Among other things, that report should include proposals for criminal investigations and "up to nine potential civil compliance investigations."

The memo follows an executive order issued by President Donald Trump last month directing that federal contractors be required to certify as part of the contracting process that they don't maintain any DEI programs that violate anti-discrimination law — and that agency contracts eliminate any references to DEI.

The Jan. 21 order, titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," wiped away various other executive orders issued in recent decades that were aimed at promoting workplace diversity and included a lengthy section requiring the attorney general and agency leaders to provide recommendations for deterring DEI programs in the private sector.

Jason C. Schwartz, co-chair of the labor and employment group at Gibson Dunn & Crutcher LLP, said in a statement to Law360 that Wednesday's memo increases the stakes by directing both civil and criminal enforcement related to DEI programs.

"Virtually every major company in America is now doing an urgent reexamination of its DEI programs to confirm that they are legally compliant," Schwartz said.

The Jan. 21 order was just one of several Trump signed in the opening days of his second term that **took aim at** diversity programs and LGBTQ+ rights promulgated by the Biden administration while supporting his declaration that official U.S. policy will recognize "only two genders."

The razed Biden-era orders included those that required DEI programs in the federal workforce and instructed agencies to interpret anti-bias law in line with the U.S. Supreme Court's 2020 decision in **Bostock v. Clayton County** , which held that Title VII protects workers from sexual orientation and gender identity bias.

Bondi's memo comes days after the City of Baltimore and a coalition of academic and restaurant advocacy groups **sued the Trump administration** over the push to end DEI programs, alleging his executive orders are unlawfully vague and subvert Congress' constitutional power.

--Additional reporting by Patrick Hoff and Lauren Berg. Editing by Emily Kokoll.