

Johnson & Johnson investors defend class action over reports of asbestos-laden baby powder

 [courthousenews.com/johnson-johnson-investors-defend-class-action-over-reports-of-asbestos-laden-baby-powder](https://www.courthousenews.com/johnson-johnson-investors-defend-class-action-over-reports-of-asbestos-laden-baby-powder)

Jackson Healy



FILE - This Oct. 21, 2019, photo shows Johnson's Baby Aloe & Vitamin E Powder in Salt Lake City. Johnson & Johnson reports financial results Tuesday, April 14, 2020. (AP Photo/Rick Bowmer, File)

PHILADELPHIA (CN) — In appeals court on Tuesday, pharmaceutical magnate Johnson & Johnson challenged investors who say the company concealed asbestos contamination in its baby powder and other talc products, fraudulently inflating its products' value.

New Jersey federal Judge Zahid Quraishi certified the class in December 2023, finding that the class period concluded when Reuters published a Dec. 14, 2018, exposé examining internal J&J documents showing the company knowingly hid instances of asbestos contamination in its products.

That exposé, along with five prior partial corrective disclosures, directly correlated with ensuing declines in J&J stock valuation, Quraishi ruled. Thus, Quraishi wrote, J&J's purported falsehoods created a price impact on the investors' assets, allowing the class action to proceed.

J&J, which denies asbestos contamination in its talc products, promptly appealed.

As a three-judge Third Circuit panel heard J&J's appeal on Tuesday, practically the entire hearing revolved around one key question — what qualifies as new information?

Representing J&J, attorney Rob Hochman argued that the Reuters article failed to present any new information and therefore could not be considered the case's final corrective disclosure. Instead, Hochman posited that a Bloomberg article uncovered evidence indicating purported asbestos contamination of J&J talc and the company's purported decadeslong cover-up over one year earlier.

“Plaintiffs pled that originally,” Hochman told the panel, suggesting the investors declined to use the Bloomberg article as a corrective disclosure because the 2018 Reuters article created a more significant market disruption, from which they could more strongly assert a price impact on their assets.

Hochman continued, relying on the efficient market hypothesis — the idea that asset prices reflect all available information — to suggest that even if a price impact did exist, the investors’ descriptions of their proposed partial corrective disclosures might render their class period so small that many of the litigants would fail to qualify.

“You have to take the good with the bad,” Hochman said. “They have all sorts of facts where they rely on small sources...they say can move the market because it has false statements. But then when it comes time for them to pay the price of how the efficient market hypothesis absorbs things, they say, ‘Oh no, no — it doesn’t have to be really new, and maybe people were evaluating differently.’ But opinions, and reporters’ opinions like the Reuters opinion, that doesn’t count.”

Circuit Judge L. Felipe Restrepo — a Joe Biden appointee — questioned Hochman on whether information could qualify as a corrective disclosure if it remains “unintelligible or opaque to the average participant in the market.”

While Hochman argued any such consideration is irrelevant, Chung suggested otherwise, noting that existing legal precedent specifically defines corrective disclosure as the moment in which a company’s falsehood becomes “publicly known.”

Chung continued, referencing J&J’s prior court-ordered document releases in which the company made available tens of thousands of unorganized and unlabeled files containing information indicating the company knew of asbestos contamination in its talc products.

Describing these releases as “document dumps,” Chung suggested accessing relevant information among filler files might be so difficult that it cannot be considered public knowledge.

“That might be publicly available, but that’s not what [legal precedent] says,” Chung told Hochman. “[Legal precedent] says ‘publicly known.’”

Hochman countered Chung’s notion, suggesting the difficulty of accessing the information is irrelevant so long as the information is ultimately available to the relevant parties.

“We assume that people whose job it is to follow the marketplace are doing their jobs,” Hochman said. “And if it doesn’t take anything to monitor these websites, to monitor the trials — if that’s the job that you have — we assume you do your job right... The marginal cost of doing that job is zero, and that’s why it all counts.”

Representing the investors' class, attorney Joseph Daley pushed back on the notion that the 2018 Reuters article merely rehashed existing information.

"The defendants here insist that Reuters had nothing new, and that's not true," he told the court panel. "We know it's not true."

Daley continued, noting that one of J&J's experts at trial conceded that the company's decision to ignore recommendations for more accurate asbestos testing methods was first disclosed by Reuters.

Chung cast doubt on this assertion, however, noting that a separate article published over a year earlier than Reuters' used the same source to show that J&J neglected to use more accurate testing.

Still, Daley argued, J&J has failed to disprove price impact, providing insufficient evidence to meet its burden.

"They have none," Daley said. "There's no citation to a page in the appendix where they come forward and say, 'XYZ shows that we have disproved price impact.'"

In lieu of evidence, Daley argued, J&J's arguments amount to little more than "casting some aspersions."

"They've made some showing, but they haven't carried their burden of severing that link between their misconduct and then the obvious price impact that happens at the end of the class period," he said.

Circuit Judge Patty Shwartz, a Barack Obama appointee, joined Tuesday's panel.

J&J is also awaiting a decision in bankruptcy court that could force a settlement for tens of thousands of mass tort litigants who say the company's baby powder caused them to develop ovarian and other cancers, preventing them or future individuals from seeking justice in court.

With over 62,000 plaintiffs currently demanding compensation from J&J's subsidiary J&J Consumer Inc. — which produced the talc baby powder — the subsidiary began shielding its assets using a controversial legal tool known as the "Texas Two-Step."

Step one of the Two-Step involves registering the subsidiary in Texas before taking advantage of the state's unique "divisive merger" law, which allows a company to split into two entities — one that assumes all liabilities and one that retains nearly all assets. This prevents all litigants from demanding legal compensation from the asset-laden entity.

In step two of the Texas Two-Step, the liability-bearing entity files for bankruptcy — which freezes all related lawsuits, halting all litigants' attempts to receive compensation in court.

Once the legal maneuver is complete, opponents argue, a company can use that red tape to pressure litigants into accepting lesser payments via a settlement.

While a federal judge struck down J&J's first two attempts at the Texas Two-Step, the company's latest attempt remains pending in the U.S. Bankruptcy Court for the Southern District of Texas. If the company is successful, litigants will be entitled to an approximately \$9 billion settlement.

Categories / Appeals, Consumers, Economy

Subscribe to Closing Arguments

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

Zillow, Investor Clash Over Class-Wide Reliance Case on Appeal

- Zillow said it rebutted presumption of reliance with mismatch
- Investor said Zillow has radical 2021 Goldman ruling view

An investor said Zillow Group Inc. relied on a “myopic” definition of a 2021 Supreme Court decision when seeking to decertify the class alleging the real-estate website misled shareholders on its house-flipping business prospects.

That Supreme Court ruling, involving Goldman Sachs Group Inc., found a defendant can rebut a presumption of classwide reliance by showing a gap between a generic corporate misstatement and corrective disclosure, said investor Jeremy Jaeger’s answering brief filed in the US Court of Appeals for the Ninth Circuit on Monday. A gap, he said, that’s “extreme enough to sever any relation between the misstatement and the stock price drop following the corrective disclosure.”

But Zillow’s appeal raises a “mismatch test that is so radical, it would functionally declare a mismatch (and deny certification) in almost all securities cases,” he said.

A prior 1988 Supreme Court decision in *Basic Inc. v. Levinson* allows courts considering class status to presume stocks trading in an efficient market take in all public information, including material misrepresentations, and that investors rely on the price’s integrity—a fraud-on-the-market presumption of reliance.

The Supreme Court told an appellate court in 2021 to recheck whether disputed statements were too generic to have affected Goldman’s stock price amid a long-running class certification fight. The Second Circuit dismantled class status in 2023, saying a mismatch in how generic a disputed statement is compared to a corrective disclosure can defeat a presumption of price impact under the 2021 Supreme Court decision.

Zillow asked the Ninth Circuit in its January opening brief to reverse an August decision granting class status and remand with instructions to decertify—or at least vacate and have the district court apply post-Goldman standards.

US District Court for the Western District of Washington Judge Thomas S. Zilly said in his order granting class status that Zillow and executives failed to demonstrate that alleged misrepresentations and later corrective disclosures didn't impact the stock price, entitling Jaeger to a presumption of reliance under Basic.

Zillow told the Ninth Circuit it sufficiently demonstrated a mismatch. "Indeed, none of the purported corrective disclosures even mentioned the alleged misstatements," the brief said. Zilly "incorrectly applied the far more forgiving plausibility standard for demonstrating loss causation" and didn't consider all record evidence on price impact, Zillow said. The Ninth Circuit hasn't weighed in post-Goldman, leaving room for lower courts to err, it said.

Zillow's optional reply brief is due by the end of April.

Skadden, Arps, Slate, Meagher & Flom LLP and Perkins Coie LLP were on the brief for defendants-appellants Zillow, co-founder and co-executive chairman Richard N. Barton, former chief financial officer Allen W. Parker, and CEO Jeremy Wacksman.

Hagens Berman Sobol Shapiro LLP is class counsel and Kessler Topaz Meltzer & Check LLP is additional counsel for the plaintiff-appellee.

The case is Jaeger v. Zillow Group, Inc. , 9th Cir., No. 24-6605, answering brief filed 3/10/25 .

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

To contact the editor responsible for this story: Kiera Geraghty at kgeraghty@bloombergindustry.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Lawyers That Won 'Worthless' Proxy Concessions Must Give Up Fees

- Accord challenger prevails in long-running dispute
- Underlying suits questioned Akorn proxy disclosures

Counsel for Akorn Inc. investors must return \$332,500 in attorneys' fees for filing frivolous lawsuits against the now-defunct drugmaker seeking pre-merger disclosures, a federal court ruled.

Judge Thomas M. Durkin said he would also consider requiring the lawyers to cite the finding in future merger-related demand letters and suits, to disclose their retainer agreements, and to disclose so-called mootness fees in similar suits. Durkin, of the US District Court for the Northern District of Illinois, issued the order Monday.

Ted Frank, an attorney and frequent class action objector, sought to intervene in the six largely resolved proposed suits—five of them class actions—that had sought additional disclosures in Akorn's proxy documents for its proposed merger with Fresenius Kabi AG. The merger fell apart before Akorn's 2023 bankruptcy. Frank said the attorneys' fees extracted from Akorn unjustly enriched the investors' counsel because their claims were frivolous.

The judge cited to a prior ruling in which, he said, the court found that "the disclosures sought in the three complaints at issue were not 'plainly material' and were worthless to the shareholders."

The US Court of Appeals for the Seventh Circuit approved Frank's quest for sanctions in April 2024, describing mootness fees as occurring when a corporation quickly makes the requested proxy disclosures and pays the plaintiffs' attorneys' fees. The court weighed in after Frank appealed the lower court ruling denying his bid for intervention but allowing him to participate as a friend of the court. Two of the affected firms also appealed, challenging the reopening of the dismissed suit.

Back in the lower court, investor Shaun House and his law firm, Monteverde & Associates PC, opposed the sanctions, arguing that Monteverde "has recovered tens of millions of dollars for shareholders" and has never been sanctioned. There "is nothing 'improper' about seeking attorneys' fees based upon improved disclosures," House and Monteverde said.

Plaintiffs in three cases in which the attorneys disclaimed their fees after Frank initially challenged them also responded, but without specifying which firms filed suit for those investors. The attorneys who authored the briefs are with Faruqi & Faruqi LLP, Levi & Korsinsky LLP, Long Law LLC, and RM Law PC.

Durkin rejected Frank's proposal for monetary penalties in addition to the returned fees, but ordered further briefing on the other suggested additional sanctions.

Akorn and members of its leadership were represented by Jones Walker LLP, Polsinelli PC, and Cravath, Swaine & Moore LLP. Frank was represented by the Hamilton Lincoln Law Institute, with which he is affiliated.

The case is *Berg v. Akorn Inc.*, N.D. Ill., No. 1:17-cv-05016, 3/10/25 .

To contact the reporter on this story: Martina Barash in Washington at mbarash@bloomberglaw.com

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

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Musk launches appeal to restore \$56 billion Tesla payday

 [reuters.com/business/autos-transportation/musk-launches-appeal-restore-56-billion-tesla-payday-2025-03-11](https://www.reuters.com/business/autos-transportation/musk-launches-appeal-restore-56-billion-tesla-payday-2025-03-11)

Tom Hals

Tesla CEO Elon Musk looks at U.S. President Donald Trump as he speaks to the media, at the White House in Washington, D.C., U.S., March 11, 2025. REUTERS/Kevin Lamarque
Purchase Licensing Rights , opens new tab

- Musk argues lower court made legal errors in rescinding pay package
- Lower court judge deemed pay package unfair to Tesla shareholders
- Musk's appeal claims wrong legal standard was applied

WILMINGTON, Delaware, March 11 (Reuters) - Elon Musk kicked off his appeal to try to restore his \$56 billion payday from Tesla on Tuesday, claiming a lower court judge made multiple legal errors in rescinding the record compensation.

The 2018 pay package resulted in spectacular growth for the electric vehicle maker and yet it was determined by the lower Court of Chancery to be unfair to shareholders, who voted twice to approve the plan, Musk argued.

Stay up to date with the latest news, trends and innovations that are driving the global automotive industry with the Reuters Auto File newsletter. Sign up [here](#).

"That counterintuitive result defies settled principles of Delaware law, sound corporate governance, and common sense," said the opening appeal brief by Musk and the current and former Tesla directors who are defendants in the case.

In January 2024, Chancellor Kathaleen McCormick rescinded the pay package of stock options, calling it "unfathomable." She said it was unfair to Tesla shareholders because the directors who approved it were beholden to Musk and Tesla withheld key information from investors before they voted to approve it.

In June, Tesla got shareholder approval for the pay package for a second time, but the judge rejected that as grounds for reversing her ruling.

The pay package had awarded Musk options to buy around 303 million Tesla shares at around \$23 each if the company hit performance and valuation goals. Tesla stock closed Tuesday at \$230.58.

Tesla has said creating a new pay package of similar value could result in a charge of \$25 billion, making the appeal an important avenue for restoring Musk's compensation and keeping his attention on Tesla.

Musk has said that he wants a greater stake in Tesla or he might develop products outside of the company. The appeal comes as he is dedicating time to President Donald Trump's

government efficiency effort, known as DOGE, which has sparked demonstrations outside Tesla dealerships. The stock has fallen sharply in recent weeks.

In the appeal brief, Musk and the other defendants said McCormick wrongly applied a very difficult legal standard known as entire fairness to assess the pay package.

She arrived at that standard by finding Musk, who owned 21.9% of the stock at the time the board approved the pay package, controlled the pay negotiations, according to the brief. In addition, she wrongly determined that ordinary business relationships among directors made them conflicted and she erroneously faulted Tesla's disclosures ahead of the 2018 shareholder vote, according to the brief.

Applying the entire fairness standard amounted to granting a "license to sue" to Tesla shareholders, the brief said. The lawsuit was brought by Richard Tornetta, a Tesla investor who owned nine shares when he filed the case in 2018. The lawsuit benefits Tesla, not Tornetta, in what is known as a derivative suit.

Musk blasted the pay decision and has encouraged other companies to follow Tesla and SpaceX and reincorporate out of Delaware. A handful have left the state or said they might, including Meta Platforms [↗](#), opens new tab(META.O) [↗](#), opens new tab, TripAdvisor (TRIP.O) [↗](#), opens new tab and Trump's media company.

Fears that a trickle of companies will turn into a stampede, which has been dubbed "DExit," prompted the state's legislature to consider amending its corporate law to better protect controlling shareholders from lawsuits.

Reporting by Tom Hals in Wilmington, Delaware; Editing by Stephen Coates

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

Big Law Firms Urge Delaware Legislature to Pass Sweeping Amendments to Corporate Law

 [law.com/delbizcourt/2025/03/11/big-law-firms-urge-delaware-legislature-to-pass-sweeping-amendments-to-corporate-law-](https://www.law.com/delbizcourt/2025/03/11/big-law-firms-urge-delaware-legislature-to-pass-sweeping-amendments-to-corporate-law/)

Ellen Bardash

Twenty-one Big Law firms expressed support for Delaware Senate Bill 21, which proposes controversial changes to the state's corporate code, in a letter sent Tuesday to legislators and Gov. Matt Meyer.

Among the signatories of the letter in support of the bill, which is scheduled to be considered Wednesday afternoon before the Senate Judiciary Committee, are 19 AmLaw 50 firms, including Kirkland & Ellis, Latham & Watkins and Skadden, Arps, Slate, Meagher & Flom.

"The bill will help streamline corporate decision-making and transactional execution while continuing to elevate important procedural protections, like the use of special committees and unaffiliated stockholder votes, that have been central features of Delaware law for decades," the letter stated. "We view SB 21 as an important step in maintaining Delaware's status as the jurisdiction of choice for sophisticated clients when they create companies."

Also signing on the letter were Cleary Gottlieb Steen & Hamilton; Cravath Swaine & Moore; Davis Polk & Wardwell; Debevoise & Plimpton; Freshfields LLP; Fried, Frank, Harris, Shriver & Jacobson; Gibson Dunn & Crutcher; Goodwin Procter; King & Spalding; McDermott Will & Emery; Milbank LLP; Paul, Weiss, Rifkind, Wharton & Garrison; Ropes & Gray; Sidley Austin LLP; Simpson Thacher & Bartlett; Sullivan & Cromwell; Willkie Farr & Gallagher and Weil Gotshal & Manges.

"Over its long history at the epicenter of American corporate law, Delaware has repeatedly adjusted its approach in order to modernize and respond to market developments. S.B. 21 is consistent with that continuing tradition. Indeed, Delaware's responsiveness to stakeholders is one of the keys to its leadership as the jurisdiction of choice for many U.S. corporations, public and private alike," the letter said.

The bill is not universally supported by corporate law practitioners, and five attorneys who represent shareholders in Delaware litigation sent a 12-page letter to legislators last week: Greg Varallo of Bernstein Litowitz Berger & Grossmann, Ned Weinberger of Labaton Keller Sucharow, Justin Reliford of Scott+Scott, Joel Friedlander of Friedlander & Gorris and Christine Mackintosh of Grant & Eisenhofer.

"Advocates of this bill say that Delaware is at risk of losing corporate business because Delaware law is too unpredictable," the letter stated. "But erasing 40 years of case law would not make Delaware look like a stable or predictable place to do business. It would make

Delaware look like a state where Elon Musk can change the law because he lost a case. That might be attractive to Elon Musk but it is not attractive to anyone else."

That section of the letter alludes to the Chancery case in which a Tesla shareholder's claims led to rescission of Musk's compensation plan, a case which is currently pending appeal before the Delaware Supreme Court. Critics of SB 21 have linked the bill to that case due to Richards, Layton & Finger being involved in the drafting of the former and Musk's legal team in the latter.

Richards, Layton & Finger President Lisa Schmidt has also published a letter to the legislature, stating the firm was asked to participate in the drafting of SB 21 due to its longstanding involvement and expertise in Delaware's corporate law, not on behalf of any of its clients.

"Our elected officials invited one of our attorneys with extensive experience drafting corporate legislation to assist a group of highly respected former members of Delaware's judiciary and prominent academics to help draft measured reforms that would provide additional clarity for directors, officers, and stockholders," Schmidt wrote.

NOT FOR REPRINT

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

Corporate Law Overhaul Heads to Lawmakers After Passing Bar (1)

- Bar association executive committee was expected to endorse
- Committee instead takes no position as bill goes to lawmakers

A hotly contested corporate law overhaul will get its first legislative hearing Wednesday, a day after a Delaware bar committee expected to back the bill instead took no position.

The measure would lower the legal guardrails around insider deals, restrict shareholder access to the texts and emails of company leaders, and strengthen a presumption that board members are independent of one another. The changes are aimed at placating controlling stockholders like Elon Musk—who has slammed the court system that cost him his \$56 billion pay package—after news of several corporate departures raised concerns about a “DExit” wave.

The Delaware State Bar Association’s executive committee signed off on a public statement in favor of state Senate Bill 21 by its Corporation Law Section, but it took the unusual step of telling the corporation section to indicate it speaks only for itself, according to a committee member who asked not to be named because its deliberations are confidential.

Although the committee wasn’t formally asked to approve SB21 itself, that’s “irregular,” the executive committee member told Bloomberg Law on Tuesday, saying it had been years since the 28-person body declined to take a position under analogous circumstances. The move came a day after the Corporation Law Section voted 160-57 to recommend the proposal.

The DSBA disputed that characterization in a public statement late Tuesday, calling it a “false narrative.” It’s misleading to portray the executive committee’s position as a non-endorsement because the Corporation Law Section didn’t actually seek the committee’s endorsement, only permission to make its own recommendation to lawmakers, according to the statement.

“The executive committee approved the request by the Corporation Law Section without dissent,” the bar association said.

The statement cited a section of the DSBA bylaws dealing with instances “when a Section or Committee makes a recommendation on legislation or the public expression of its views on a matter of public policy but the Executive Committee has determined to take no position.” The bylaws also direct the committee “to minimize any confusion of the public with respect to the differing public positions.”

The provision allows the executive committee to impose conditions on any bar committee speaking “on its own behalf.” That’s the clause the committee invoked Tuesday, when it told the Corporation Law Section not to tout the backing of the full bar association, according to the member who spoke to Bloomberg Law.

Representatives of the DSBA executive committee didn’t immediately respond to a request for further comment.

Although it’s true the executive committee wasn’t asked to do more than authorize a recommendation by the Corporation Law Section, that’s what’s so unusual, said retired University of Delaware law professor Charles Elson. In past years, the committee itself has always directly proposed corporate law amendments, rather than merely standing back and allowing the subsidiary body to speak for itself, according to Elson.

“It’s just another example of a really flawed process that’s produced a really flawed bill,” he said, referring to the legislation’s fast-tracked rollout, which initially bypassed the Corporation Law Council, a subcommittee of the Corporation Law Section that typically drafts statutory amendments.

“You can twist it any way you want,” Elson said. “From the bar’s perspective, I don’t think they want any part of it. If you give this process a seal of approval, then you’ll never have a real process again.”

The bill, backed by Gov. Matt Meyer (D), is dividing Delaware’s tight-knit corporate community. It’s expected to sail through the state Senate, where it’s set for a Judiciary Committee hearing Wednesday. But a coalition of opponents, led by shareholder attorneys and institutional investors like pension funds, is gearing up for a fight in the General Assembly.

Opponents of the measure are now floating 11th hour compromise versions, although they’re unlikely to make much headway unless the bill loses legislative momentum.

(Updates March 11 story with bar association statement and additional reporting throughout.)

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

To contact the editors responsible for this story: Andrew Harris at aharris@bloomberglaw.com; Carmen Castro-Pagán at ccastro-pagan@bloomberglaw.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Dealmaking Scrutiny Overhaul Draws 11th Hour Compromise Bids

Deep Dive

- Fast-tracked measure expected to pass Delaware Senate easily
- Opposition looks to slow bill's momentum in General Assembly

Opponents of a legal overhaul advancing in America's corporate capital are scrambling to float compromise versions before Delaware lawmakers begin voting on the changes as soon as this week.

State Senate Bill 21 in its current form would lower judge-made guardrails around insider deals, restrict shareholder access to the texts and emails of company leaders, and strengthen a presumption that board members are independent of one another. The changes are aimed at mollifying controlling stockholders such as Elon Musk—who has lambasted the court system that cost him his \$56 billion pay package—after news of several corporate departures to other states raised concerns about a “DExit” wave.

The legislation is expected to sail through the state Senate, where it's set for a hearing Wednesday after clearing its first hurdle March 10. It also has the support of Gov. Matt Meyer (D). But a coalition of opponents is gearing up for a fight in the General Assembly. SB21 hit a snag Tuesday, when the state bar association's executive committee—in an unusual step—took no position on it.

Shareholder attorneys, institutional investors, and scholars have opposed the bill and its aggressive rollout, which initially bypassed the ordinary legislative drafting channels.

“There hasn't been a lot of reaching out,” said Columbia University law professor Eric Talley. “There seems to be a lot of digging in.”

The alternative backed by shareholder attorneys may not get a serious look unless the opposition succeeds in slowing SB21's progress, according to University of Pennsylvania law professor Jill Fisch.

The proposal by the plaintiffs' bar “doesn't appear to me to be a basis for compromise,” said Widener University law professor Lawrence Hamermesh, a drafter of the version that's now advancing. “In my view it's time for the General Assembly to vote.”

More than 20 law firms representing “corporations, their directors and officers, and a wide range of investors” signed an open letter Tuesday supporting the bill in its current form.

‘Go Bananas’

The competing proposal began circulating within hours of its approval March 10 by a state bar committee that voted nearly 75% for the current version. The alternative measure would lower the bar for shareholders to get insider texts and emails, make rebutting the presumption of director independence more straightforward, clarify that certain landmark precedents remain good law, and ensure Delaware’s Chancery Court retains the full scope of its jurisdiction under the state constitution.

But making texts and emails more available looks less like a compromise than an outright reversal of proposed reforms to the state’s records access law—known as Section 220—that would lead “back to the same staggeringly expensive and time-consuming mess it’s in today,” Hamermesh said.

The version released by members of the plaintiffs’ bar would also partly rewrite a section restricting heightened legal scrutiny to take-private deals that forcibly cash out minority investors. The change—outlining “extraordinary transactions” functionally similar to take-privates—would close a loophole that could have swallowed the general rule, said Talley, who has offered his own alternative to SB21.

“If it’s one side of this arbitrary line, you get all kinds of scrutiny, and if you’re on the other you get a complete hall pass,” he said. “It’s a succulent temptation to go bananas on transactional design.”

Controlling Stockholder Definition

One thing the newest proposal leaves intact is the bill’s definition of a controlling stockholder: a person or entity with at least a one-third stake or the ability to designate a majority of directors. The bill’s supporters say the definition is about bringing predictability to an issue judges have tended to resolve on case-by-case basis, such as in the ruling last year that said Musk’s wide-ranging influence over Tesla Inc. made him its controller despite only a 22% stake.

Keeping those provisions in the bill reflects a good-faith effort to get to yes by addressing “the actual concerns expressed by the defense bar,” according to Friedlander & Gorris PA partner Chris Foulds.

But the category’s rigidity is a problem, said Fisch, who has come out against recent court decisions that require heightened scrutiny of even routine transactions involving controlling stockholders, such as CEO pay decisions. Rather than limit who’s a controller, the bill should have restricted that type of elevated scrutiny to meaningful conflicts of interest, she said.

It makes little sense for the definition to exclude preferred investors who sign agreements giving them authority over matters traditionally left to the board, according to Fisch. “There’s value in greater clarity, but greater clarity makes it harder to be fact-specific,” she said. “Instead of streamlining the analysis, the legislation tries to put in bright-line rules to take these decisions away from the courts.”

Talley said SB21 could backfire by undercutting the elite judiciary that has made Delaware home to nearly 70% of Fortune 500 businesses.

"That seems like, in an act of desperation, shooting yourself in the foot," he said. "It might actually accelerate the rate at which companies leave."

Delaware's Brand

Proposals introduced by Talley and his Columbia colleague Jeffrey Gordon, meanwhile, would make the whole legislation opt-in. The approach is consistent with the broader brand in Delaware, which has "patented" a system of "enabling rather than mandatory" legal principles, according to Talley.

"Elon Musk doesn't want any judge second-guessing him, and his stockholders believe he can do no wrong," he said. "They want the version that gives him the most wiggle room. But what about the folks who think their founders are just humans? We can let the market decide which model works better, rather than having backroom scriveners cram the same rule down everyone's throats."

Hamermesh rejected the premise that corporate law should offer a separate system for iconic founders.

"I don't accept the distinction about visionaries like Musk, if he's even a visionary," Hamermesh said. "This legislation is not simply about concern on the part of billionaires."

To contact the reporter on this story: Mike Leonard in Washington at mleonard@bloomberglaw.com

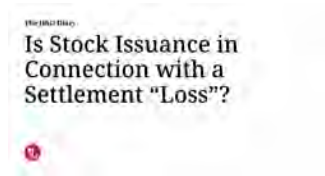
To contact the editors responsible for this story: Drew Singer at dsinger@bloombergindustry.com; Andrew Harris at aharris@bloomberglaw.com

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Is Stock Issuance in Connection with a Settlement “Loss”?

K [dandodiary.com/2025/03/articles/d-o-insurance/is-stock-issuance-in-connection-with-a-settlement-loss](https://www.dandodiary.com/2025/03/articles/d-o-insurance/is-stock-issuance-in-connection-with-a-settlement-loss/)

March 11, 2025



By Kevin LaCroix on March 11, 2025

Posted in D & O Insurance



The typical D&O insurance policy provides coverage, subject to all of its terms and conditions, for an insured’s payment of “Loss.” The policy typically provides that “Loss” includes settlements. But what happens if in settling a lawsuit a policyholder issues stock rather than paying cash? Does the stock issuance represent “Loss” within the meaning of the policy? In an interesting recent opinion, the Delaware Superior Court held that AMC Entertainment Holding’s issuance of stock in connection with the settlement of a stockholders’ claim *did* represent “Loss” within the meaning of the applicable policy. As discussed below, the court’s opinion raises some interesting questions. The Delaware court’s February 28, 2025, opinion can be found [here](#).

Background

AMC sought to engage in certain share transactions. Certain AMC shareholders objected to the transactions and filed suit. The shareholder suit ultimately was settled by AMC’s agreement to issue to the plaintiffs nearly 7 million shares of its common stock and to pay the plaintiffs’ attorneys fees. After certain adjustments to the parties’ settlement agreement, the Delaware Chancery Court approved the settlement. AMC recorded the settlement payment as a contingent liability and as an expense in its books and valued the payment as a \$99.3 expense based on the estimated fair market value of the shares.

The D&O Coverage Issues

At relevant times, AMC maintained a program of D&O insurance consisting of a layer of primary insurance and several layers of excess insurance. The various carriers contended that the settlement was not covered under their policies, taking the position, among other things, that the stock payment did not represent a “Loss” under the policy, and contending further that the insurers had not consented as required under the policy to the settlement as it was adjusted in order to obtain court approval. AMC sued the insurers in Delaware Superior Court seeking a judicial declaration of coverage.

One excess insurer – the sole insurer defendant remaining in the action – and AMC filed cross motions for summary judgment.

The Relevant Policy Language

The term “Loss” means “damages, judgments, settlements, pre-judgment and post-judgment interest or other amounts (included punitive, exemplary or multiplied damages, where insurable by law) that any Insured is legally obligated to pay and Defense Expenses, including that portion of any settlement which represents the claimant’s attorneys’ fees.”

The February 28, 2025, Opinion

In a February 28, 2025, Opinion, Delaware Superior Court Judge Meghan A. Adams granted AMC’s summary judgment motion in part, and denied the insurer’s motion in part, holding that AMC’s issuance of stock in connection with the settlement *did* represent “Loss” under the policy, but holding further that disputed questions of material fact remained with respect to the question of whether or not the insurers had consented to the adjusted settlement.

The Court quickly addressed the insurer’s argument that the stock portion of the settlement does not represent “Loss.” The insurer had tried to argue that because the shares of stock are not money which can be “paid,” the policies do not cover the settlement. AMC, the insurer argued, *issued* stock but did not *pay* any amount that reaches the excess carrier’s layer. Judge Adams noted that the policy’s definition of “Loss” contains no language limiting its application to cash payments. The word “Pay” as used in the definition, the court said, is not a defined term, adding that “insurance policies should be interpreted to favor broad coverage.” Judge Adams said that the court “will not insert a restricting clause into the Policy which provides that only cash settlements are covered ‘Loss’.”

Judge Adams also noted that Delaware law recognizes the close similarity between stock and cash, and also observed that the policy’s “bump up” provision, which precludes coverage for amounts representing additional consideration paid in settlement of merger related actions, had been held to apply additional consideration paid in the form of stock.

Judge Adams said that the settlement payment, including stock, satisfies the policy’s definition of “Loss,” and that the insurer’s “technical, linguistic arguments to the contrary do not persuade the Court.”

The insurer did have one additional argument, which is that, whatever else “Loss” may mean, it has to involve some form of financial or economic harm or detriment. AMC’s issuance of stock, the insurer argued, caused AMC no harm. AMC countered that it had recognized a permanent loss in its accounting because it issued new shares for the settlement, and it argued further that it suffered an opportunity cost in providing its shares for the settlement.

Judge Adams said, with respect to the insurer’s “economic loss” argument, that the policy does “not condition coverage on a showing of economic harm or financial detriment.” Rather, the court said, “Loss occurs anytime AMC makes a covered payment.” The court’s holding that “Loss” definition was satisfied by the settlement “demonstrates that coverage under the Policies is invoked, regardless of AMC’s economic harm.”

Discussion

It does seem, as the court found, that there is nothing in the definition of “Loss” saying that a payment has to be in the form of cash money in order to constitute a “Loss.” And I can understand the court’s observation that the insurer’s argument – that is, that AMC “issued” rather than “paid” the stock – could be viewed as “technical, and linguistic.”

All of that said, I can also understand the argument that the term “Loss” includes within its meaning an imbedded notion that in order for anything to fairly be characterized as “Loss” that it must involve an economic harm or financial detriment. After all, as the court itself observed before launching into its coverage analysis, not only must the policy be considered as a whole, but the policy’s terms must be “given their plain and ordinary meaning.” I think it could reasonably be argued that the plain and ordinary meaning of the word “Loss” inherently includes “loss” – that is, some financial detriment or harm – and further that all of the specific items included in the definition of “Loss” are self-evidently items of financial loss or harm.

The trained advocate part of my brain also immediately sees the problem with this economic harm argument. The first of course is that “Loss” is a defined term, it has been given by the contractual parties a specific, defined meaning. The term must be given the specific meaning given to the term by the parties’ contract. And in that respect, Judge Adams is correct that there is nothing express in the definition of the term “Loss” to suggest that economic harm has be shown for an item to be characterized as “Loss.”

The other counterpoint to the economic loss argument is the one that AMC raised, which is that it *did* sustain an economic consequence in issuing the shares, in terms of opportunity cost (which is of course an economic term meant to describe the loss of an future opportunity – here, the ability of the company to issue those same shares in the future). The company also did take a bookkeeping charge recognizing the accounting consequences of the share issuance, which makes it even harder to argue that there the share issuance in the settlement involved no harm or detriment.

I will say this, though: once again I find that the most important part of any coverage opinion by a Delaware court is the point where the court repeats the Delaware law principle that “Insurance policies should be interpreted to favor broad coverage.” This principle explains

why so many insurance disputes in Delaware courts – including this one – result in decisions favoring policyholders.

Contractual parties in almost every other commercial context deal with these kinds of concerns by inserting choice of law and choice of forum provisions in their policies. It is to me one of the great D&O insurance mysteries of our times why more carriers are not trying to insert choice of law and choice of forum provisions in their policies.

Supreme Court may limit class certification through Article III standing requirement

 [reuters.com/legal/legalindustry/supreme-court-may-limit-class-certification-through-article-iii-standing-2025-03-10](https://www.reuters.com/legal/legalindustry/supreme-court-may-limit-class-certification-through-article-iii-standing-2025-03-10)

Daniel Levin, Bethany Kristovich, Colin Devine

A security guard walks down the steps of the U.S. Supreme Court in Washington, U.S., July 19, 2024. REUTERS/Kevin Mohatt/File Photo Purchase Licensing Rights , opens new tab

March 10, 2025 - The Supreme Court is set to decide a question that has vexed lower courts and class action practitioners for years: Can a class be certified if some members did not suffer any injury and therefore lack Article III standing? If not, defendants have a powerful tool to avoid certification or to force plaintiffs to narrow class definitions.

The Supreme Court is poised to decide that question in *Laboratory Corporation of America Holdings v. Davis*, after explicitly leaving it open in two prior class certification decisions: *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 460 (2016), and *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 n.4 (2021).

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

Labcorp v. Davis raises the Article III question through an ADA (Americans with Disabilities Act) discrimination lawsuit alleging that self-check-in kiosks in Labcorp's diagnostic labs were inaccessible to blind patients. The district court certified a class of all blind patients who were tested in one of the defendant's labs equipped with self-check-in kiosks.

Labcorp put on evidence that some blind patients did not care to use the self-check-in kiosks and preferred to check in with the human receptionist, meaning they suffered no injury. But, relying on the 9th U.S. Circuit Court of Appeals' en banc holding in *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651 (9th Cir. 2022), both the district court and 9th Circuit concluded that the presence of uninjured class members did not prevent class certification.

The Circuits are split three ways on whether the presence of uninjured class members defeats certification. The 9th Circuit's view, that a class may be certified with any number of uninjured class members so long as one or more of the central issues in the case are common and can be said to predominate, departs from other circuit courts, which have held that Article III prohibits class certification where the class includes members who did not suffer any injury.

Yet other Circuits have agreed with the 9th Circuit that Article III does not bar certification but have instead held that Rule 23's predominance standard limits the number of uninjured class members to no more than a "de minimis" amount.

The question now is how far the Supreme Court will go in embracing or rejecting the view that Article III imposes limits on class certification. And, if Article III does not bar certification if there are any uninjured class members, how many uninjured class members is too many under Rule 23's predominance standard?

Whatever approach the Supreme Court adopts will have far-reaching implications for class certification.

The purist approach: Article III prohibits certification of classes that contain uninjured class members.

The Court may adopt the "purist" approach that would prohibit certification of any class that contains uninjured class members. The 2nd and 8th Circuits have adopted this approach.

The 8th Circuit, for example, recently denied certification to a proposed class of all purchasers of certain models of ATVs with alleged heat defects, because some class members' ATVs did not actually melt or suffer any other injury from the heat. *Johannessoehn v. Polaris Indus. Inc.*, 9 F.4th 981, 987 (8th Cir. 2021). The class could not be certified because it was "defined in such a way to include individuals who lack standing."

Proponents of this approach argue that Rule 23 cannot relax the threshold federal jurisdiction question of whether a plaintiff has suffered an injury in fact. The Rules Enabling Act, which empowers the Court to prescribe the Federal Rules of Civil Procedure, including for class certification under Rule 23, makes clear that those rules cannot alter substantive rights.

That means a class action plaintiff cannot have greater rights than he would if he pursued his lawsuit individually. But allowing uninjured class members to participate in a class action would do just that, because the court would otherwise have no jurisdiction to consider their claims. Even if uninjured plaintiffs are filtered out at a later stage in the case — the solution proposed by the flexible approach — adjudicating the defendant's liability before they are removed would constitute an impermissible advisory opinion.

Certifying classes with uninjured class members also has important practical effects. Most class actions rise or fall on the certification decision. Once a class is certified, extensive discovery and the specter of massive potential liability causes most defendants to settle, even if many of the class members' claims are not meritorious. If class sizes are inflated with uninjured class members, that increases the pressure on defendants to settle by increasing the claimed damages.

If the purist approach becomes the law of the land, it would arm defendants with a powerful argument at the certification stage. Defendants already focus on whether some class members were uninjured in an attempt to defeat predominance under Rule 23(b)(3). But applying an Article III screen at the class certification stage would defeat many putative class claims that lump together class members impacted by the alleged illegal activity and those who, although they may have been exposed to the activity, were unaffected by it.

Many modern classes, particularly in the consumer protection, products, and environmental realms are defined broadly, and defendants can often muster evidence that certain class members or types of class members were not affected by the defendant's conduct. Plaintiffs seeking certification would need to carefully tailor their proposed class definitions to include only injured class members.

The flexible approach: Article III is not the relevant inquiry on class certification, but Rule 23's predominance requirement may limit certification of classes with uninjured class members.

The Court could instead follow the more "flexible" approach adopted by some circuits. That approach does not automatically bar certification under Article III, but leaves district courts to determine whether the presence of uninjured class members causes individualized issues to predominate in the particular case and use other procedural mechanisms to remove them before the court provides any relief.

Courts in this camp apply different rules regarding the number of uninjured class members that would cause individualized issues to predominate under Rule 23 — some say anything more than a "de minimis" number (the 1st and D.C. Circuits), while others say there is no such number as long as common issues predominate generally (the 9th and 7th Circuits) — but they agree that Article III does not control at the certification stage. These circuits defer the consideration of standing to a later, post-certification phase of litigation.

Proponents of the flexible approach argue that the fact of injury and the amount of damages are merits determinations that would be premature on class certification. Because Rule 23 requires a certification decision at "an early practicable time," in most cases the evidence will not be sufficiently developed at the certification stage.

Those who favor this more flexible approach argue that courts can use other procedural mechanisms to make sure they do not award relief to any uninjured class members. That could mean narrowing the class definition based on the evidence, granting summary judgment on certain class members' or subsets of class members' claims, or bifurcating trial into phases concerning the defendant's liability and individualized determinations of injury or damages.

If the Supreme Court adopts this approach, it will likely need to wade further into how many uninjured class members is too many under Rule 23. The defendant in LabCorp argued that many putative class members could not show any injury, and the 9th Circuit rejected the "de minimis" rule applied by some circuit courts, holding that certification is proper as long as there are common questions that predominate over individual questions, including individualized questions about injury.

If the Court endorses the 9th Circuit's approach, class action plaintiffs will have strong arguments for certification any time they can show some consistent defense act or practice (such as using an allegedly inaccessible check-in kiosk), regardless of whether the practice actually injured most class members. The result is likely to be more class actions filed — particularly in those circuits that had followed more strict rules — and more class settlements.

Labcorp v. Davis is a key case to watch. It could put Article III standing front-and-center in class certification decisions, or it could relegate the question of uninjured class members to the back burner.

- Suggested Topics:
- Legal Industry
- Attorney Analysis
- Litigation

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

Daniel B. Levin

Daniel B. Levin is a partner in the Los Angeles office of Munger, Tolles & Olson LLP. A seasoned litigator and former deputy chief of criminal appeals in the U.S. Attorney's Office for the Central District of California, he focuses his practice on complex litigation, with a particular focus on class actions and mass torts, and white collar defense and investigations. He can be reached at Daniel.Levin@mto.com.

Bethany Kristovich

Bethany Kristovich is a partner in the Los Angeles office of Munger, Tolles & Olson LLP. Her practice is focused on complex civil litigation, with a particular emphasis in high-stakes trials and appeals, including in the professional responsibility, consumer protection, product defect and mass tort contexts. She can be reached at Bethany.Kristovich@mto.com.

Colin A. Devine

Colin A. Devine is a partner in the Los Angeles office of Munger, Tolles & Olson LLP, where he focuses on complex civil litigation, internal investigations and white collar criminal defense. He defends companies facing high-stakes, multidistrict litigation, mass torts and class actions across a range of industries. He can be reached at Colin.Devine@mto.com.

Judge: 'Evidence Is Lacking' to Impose Warning on HPV Vaccine Gardasil

 [law.com/2025/03/11/judge-evidence-is-lacking-to-impose-warning-on-hpv-vaccine-gardasil](https://www.law.com/2025/03/11/judge-evidence-is-lacking-to-impose-warning-on-hpv-vaccine-gardasil)

Amanda Bronstad

What You Need to Know

- More than 200 lawsuits demand warnings on Gardasil labels about an autoimmune disease called Postural Orthostatic Tachycardia Syndrome, or POTS, and Primary Ovarian Insufficiency, or POI, which is ovarian failure.
- U.S. District Judge Kenneth Bell, who is overseeing the Gardasil multidistrict litigation in the Western District of North Carolina, concluded there wasn't enough scientific evidence for Merck to add a warning on the Gardasil label without approval from the U.S. Food and Drug Administration.
- The decision comes less than a month after the first planned trial, in Los Angeles Superior Court, was postponed due to concerns that potential jurors would be influenced by newly appointed U.S. Department of Health and Human Services Secretary Robert F. Kennedy Jr., a vaccine skeptic who partnered with Wisner Baum on Gardasil litigation.

In a significant blow to plaintiffs suing over the HPV vaccine Gardasil, a federal judge on Tuesday sided with Merck & Co. Inc. on its implied preemption defense.

More than 200 lawsuits demand warnings on Gardasil labels about an autoimmune disease called Postural Orthostatic Tachycardia Syndrome, or POTS, and Primary Ovarian Insufficiency, or POI, which is ovarian failure. But U.S. District Judge Kenneth Bell, who is overseeing the Gardasil multidistrict litigation in the Western District of North Carolina, concluded the scientific evidence was lacking, especially for Merck to add a warning on the Gardasil label without approval from the U.S. Food and Drug Administration.

"The governing federal regulations are complex; however, the question before the court ultimately comes down to this: did Merck have enough 'newly acquired information' (evidence that had not already been submitted to the FDA) that a qualified scientist could reasonably conclude that there was a casual association between taking Gardasil and contracting POTS or POI?" the judge wrote. "This regulatory test is undoubtedly difficult to apply in many circumstances. Not so here."

The FDA approved Gardasil in 2006 as a widely used vaccine against Human Papillomavirus to prevent cervical cancer. The ruling technically applies to 16 bellwether plaintiffs, but Bell clarified that his order "shall be applied to plaintiffs in the MDL other than the bellwether

plaintiffs.”

His decision comes less than a month after the first planned trial, in Los Angeles Superior Court, was postponed due to concerns that potential jurors would be influenced by newly appointed U.S. Department of Health and Human Services Secretary Robert F. Kennedy Jr., a vaccine skeptic who partnered with Wisner Baum on Gardasil litigation.

A Merck spokesman called the evidence that Gardasil does not cause POTS or POI is “consistent and overwhelming.”

“The court noted that HPV vaccines are ‘remarkably effective,’ and that Gardasil is ‘a vaccine that has prevented innumerable deaths from cancer,’” spokesman Bob Josephson said in a statement. “This resounding order comes weeks after the plaintiff abruptly requested an adjournment of the only Gardasil case to proceed to trial in exchange for no money from Merck. That adjournment was requested after Merck had an opportunity to present evidence during plaintiff’s own case-in-chief demonstrating Gardasil’s favorable safety profile. In short, the courtroom developments spanning from California to North Carolina continue to reaffirm the positive safety and efficacy profile of Gardasil as reflected in its label.”

Morgan & Morgan’s Paul Pennock, in New York, who is co-lead plaintiffs’ counsel with Rachel Lanier, of Lanier Law Firm in Los Angeles, and Bijan Esfandiari, of Los Angeles-based Wisner Baum, said his team will be appealing the order.

"We believe that the court failed to recognize that vaccine adverse event data bases (VAERS and VigiBase), numerous case studies and Merck internal data clearly showed a reasonable evidence of a causal association between Gardasil and autoimmune conditions like POTS and POI," he wrote in a statement. "Further, limiting its analysis to pre-2011 data is, we believe, in error, especially in light of the significantly elevated reporting of POTS and POI since 2011. In our view, the evidence shows that POTS was reported in post-HPV vaccination over 100 times more than *all* other vaccines. The bottom line is that there was a large volume of evidence that we think was misapprehended by the court. We are optimistic that Court of Appeals will recognize that this preemption decision should be reversed."

A ‘Slender Reed of Evidence’

Bell’s ruling comes about three years after the Gardasil multidistrict litigation was created. Merck moved to toss the cases last year on summary judgment based on implied preemption.

But the judge found a “slender reed of evidence” establishing that Gardasil caused the conditions alleged by the plaintiffs.

Paul Pennock of Morgan & Morgan.

Courtesy photo

“Plaintiffs ignore the real harm that is risked by adding unwarranted warnings to a vaccine,” Bell wrote. “Federal law requires more than speculative inferences prior to adding dire warnings to lifesaving vaccines that discourage their use. The law requires reasonable scientific evidence of a causal association between the vaccine and the alleged harm. As described at length above, that evidence is lacking here.”

Merck also filed a separate summary judgment motion based on general causation.

In a separate order on Tuesday, Bell deemed that motion moot.

In a footnote to Tuesday’s preemption order, Bell wrote, “The court need not and does not decide that issue here because the threshold defense of preemption is independently dispositive of bellwether plaintiffs’ remaining claims.”

Merck prevails in US safety litigation over Gardasil HPV vaccine

 [reuters.com/business/healthcare-pharmaceuticals/merck-prevails-gardasil-safety-litigation-2025-03-11](https://www.reuters.com/business/healthcare-pharmaceuticals/merck-prevails-gardasil-safety-litigation-2025-03-11)

Jonathan Stempel

The Merck logo is seen at a gate to the Merck & Co campus in Rahway, New Jersey, U.S., July 12, 2018. REUTERS/Brendan McDermid/File Photo Purchase Licensing Rights , opens new tab

- Federal law preempts failure-to-warn claims
- Plaintiffs saw link to heart rate, ovarian problems
- Lawyer for plaintiffs had no immediate comment

March 11 (Reuters) - A federal judge ruled in favor of Merck (MRK.N) , opens new tab in litigation accusing it of concealing the risks of Gardasil, a vaccine to prevent cervical and other cancers caused by the human papillomavirus and one of the drugmaker's best-selling products.

The decision made public on Tuesday by U.S. District Judge Kenneth Bell in Charlotte, North Carolina applies to more than 200 lawsuits in the nationwide case.

Keep up with the latest medical breakthroughs and healthcare trends with the Reuters Health Rounds newsletter. Sign up here.

So-called bellwether plaintiffs who received Gardasil between 2012 and 2021 said the vaccine caused them to suffer excessive increases in heart rates or premature ovarian failure, and that Merck should have added warnings to the labels.

But the judge said that by 2013, the latest the plaintiffs said warnings were needed, Merck and scientists had only a "paucity" of evidence suggesting a causal connection between Gardasil and the alleged symptoms.

He said that meant the Rahway, New Jersey-based drugmaker had no authority to add the requested warnings under federal law, which preempted the plaintiffs' state law-based failure-to-warn claims.

"Federal law requires more than speculative inferences prior to adding dire warnings to lifesaving vaccines that discourage their use," Bell wrote in a 35-page decision. "That evidence is lacking here."

A lawyer for some plaintiffs had no immediate comment, having yet to review the decision.

Merck said it was "extremely pleased," and that Gardasil remains safe and effective "as reflected in its label."

Gardasil and Gardasil 9 are together Merck's second best-selling product, with global sales of \$8.58 billion in 2024. U.S. patent protection expires in 2028.

The U.S. Centers for Disease Control and Prevention recommend Gardasil for 11- and 12-year-olds to prevent cervical and other cancers caused by the human papillomavirus.

Nearly 160 million doses were distributed in the United States through the end of 2022, federal data show. The vaccine was first approved in the U.S. in 2006.

U.S. Health and Human Services Secretary Robert F. Kennedy Jr., a longtime vaccine skeptic, had been a lawyer of record for the plaintiffs in some Gardasil cases against Merck, though he is no longer involved.

The case is In re Gardasil Products Liability Litigation, U.S. District Court, Western District of North Carolina, No. 22-md-03036.

Reporting by Jonathan Stempel in New York; Editing by Chris Reese and Bill Berkrot

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

Second Circuit revives Holocaust victim heirs' artwork ownership claims

 [courthousenews.com/second-circuit-revives-holocaust-victim-heirs-artwork-ownership-claims](https://www.courthousenews.com/second-circuit-revives-holocaust-victim-heirs-artwork-ownership-claims)

Nika Schoonover

The heirs of an Austrian Jewish performer claim the Art Institute of Chicago improperly acquired a World War II-era drawing by Egon Schiele stolen by Nazis in Vienna.

The Art Institute of Chicago on September 30, 2021. (Wikimedia/Ajay Suresh)

MANHATTAN (CN) — A Second Circuit panel on Tuesday reversed a lower court's decision to dismiss a lawsuit from heirs of an Austrian Jewish performer, in which they claim The Art Institute of Chicago stole a World War II-era drawing by Egon Schiele that rightfully belongs to them.

Fritz Grünbaum's heirs say the piece, titled "Russian Prisoner of War," was stolen from his home when he was kidnapped in Vienna before being imprisoned and murdered at the Dachau concentration camp. According to the heirs, the museum failed to properly trace the artwork's origins — which would have required the piece to be returned to his family.

The museum, in contrast, maintains the artwork wasn't "looted by the Nazis" and was instead purchased from Grünbaum's sister-in-law. A lower court previously dismissed the complaint, finding the heirs were barred by the three-year statute of limitations because the piece was acquired by the museum in 1966.

U.S. District Judge John Koeltl also denied the heirs' motion to file a second amended complaint, which would have altered the date the statute of limitations would go into effect.

But the panel agreed with the heirs that the Holocaust Expropriated Art Recovery Act of 2016, signed into law by former President Barack Obama, could revive the statute of limitations in this case and that the court should have allowed them to file an amended complaint to address those issues.

"The second amended complaint plausibly alleges that the HEAR Act saves plaintiffs' claims, and while further factual development may or may not support that allegation, the question is not beyond doubt," the panel said in its decision.

The panel also disagreed with Koeltl's decision to dismiss the heirs' complaint based on a previous decision in which a separate individual was deemed the rightful owner of a different Egon Schiele drawing once owned by Grünbaum.

In the 2012 case, a Second Circuit panel found the drawing rightfully belonged to David Bakalar, who purchased the piece in 1963 at a New York gallery, despite the Grünbaum heirs' claims they were the rightful owners.

According to Tuesday's panel, the lower court should not have dismissed the complaint based on the Bakalar decision despite the artworks coming from the same collection.

Bakalar acquired the drawing "in good faith" at the art gallery, the panel said, while the heirs claim the Art Institute was on notice that the artwork might have been stolen.

"These differences between the Art Institute of Chicago and Bakalar bear directly on the prejudice each defendant faced as a result of the delay in pursuing relief," the panel said.

The panel remanded the case back to the lower court for further proceedings.

Raymond Dowd, an attorney with Dunnington Bartholow representing the heirs, said they're very pleased with the panel's decision.

"This is an important interpretation of the HEAR Act, and it's the first of its kind to focus on the issue of museum due diligence in acquiring Nazi-era artworks," Dowd said.

U.S. Circuit Judge Guido Calabresi, a Bill Clinton appointee; U.S. Circuit Judge Sarah A.L. Merriam, a Joe Biden appointee; and U.S. District Judge Jed S. Rakoff, also a Clinton appointee sitting by designation, all participated in the panel's decision.

Follow @NikaSchoonover
Categories / Appeals, Arts

Subscribe to Closing Arguments

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

US judge in brokerage antitrust case faces recusal bid over political donations

 [reuters.com/legal/government/us-judge-brokerage-antitrust-case-faces-recusal-bid-over-political-donations-2025-03-11](https://www.reuters.com/legal/government/us-judge-brokerage-antitrust-case-faces-recusal-bid-over-political-donations-2025-03-11)

Mike Scarcella

A view of the judge's chair in an empty court room in the New York Supreme Court, February 3, 2012. REUTERS/Chip East Purchase Licensing Rights , opens new tab

March 11 (Reuters) - A national real estate brokerage has asked a U.S. judge in Missouri to withdraw from hearing a major antitrust lawsuit after disclosures showed plaintiffs' lawyers in the case previously donated to political campaigns involving the judge's wife.

Howard Hanna Real Estate Services in a court filing , opens new tab on Monday said ethics rules require the recusal of U.S. District Judge Stephen Bough, whose wife is an attorney and at-large councilmember for Kansas City, Missouri.

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

Howard Hanna is among several defendants in the lawsuit, which was filed by home sellers in 2023 and accused brokerages of conspiring to inflate the commission that sellers pay in residential real estate sales.

The donations from plaintiffs' lawyers to the judge's wife "create an appearance of impropriety" for the court, Howard Hanna said. The company has denied violating U.S. antitrust law.

Howard Hanna declined to comment, as did Bough, through his court chambers.

In a statement, a lead lawyer for the plaintiffs, Michael Ketchmark, said on Tuesday that "the attack on the court lacks merit."

Ketchmark said "there's nothing wrong with supporting a candidate for city council" and that Howard Hanna delayed raising its disqualification bid "until after it lost all its motions trying to escape accountability in Missouri."

Howard Hanna's legal team at WilmerHale includes former Bill Clinton-era U.S. solicitor general Seth Waxman.

Pittsburgh-founded Howard Hanna markets itself as the country's largest family-owned real estate brokerage, employing 15,000 sales associates in nearly 500 offices. The firm said it ended 2023 with more than \$37 billion in closed sales volume.

The lawsuit against Howard Hanna and other brokerages was filed by plaintiffs lawyers who had just won a landmark class action jury verdict in Bough's courtroom in a related antitrust lawsuit.

Since that October 2023 verdict, home sellers have secured more than a billion dollars in settlements with major brokerages and the real estate industry's chief trade group. The verdict spurred a wave of similar lawsuits against brokerages around the country. Bough had disclosed the donations from members of the plaintiffs' team in the earlier class action.

"The ethics rules make it abundantly clear if I know someone is donating to my wife, then I need to put them on the conflicts list," Bough said at a hearing last year in that case.

He said at the hearing that he had just learned that one of the members of the plaintiff's team had donated to his wife. The judge also said some of the large defense law firms in the Kansas City area donated to his wife.

At the hearing, Bough said he would be "more than glad to step down," but none of the parties asked for his recusal at the time.

The case is Don Gibson et al v. National Association of Realtors et al, U.S. District Court for the Western District of Missouri, No. 4:23-cv-00788-SRB.

Read more:

Lawyers cry foul over \$34 million eXp settlement with US home sellers
Home listing service ends antitrust lawsuit against US realtors' group
Judge approves US realtor group's \$418 mln sales commission settlement
Reporting by Mike Scarcella

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

- Suggested Topics:
- Government
- Regulatory Oversight

Citing 'Significant Revenue' Loss, Perkins Coie Sues Trump Admin Over Executive Order

 [law.com/nationallawjournal/2025/03/11/perkins-coie-fires-back-over-executive-order-suing-trump-administration](https://www.law.com/nationallawjournal/2025/03/11/perkins-coie-fires-back-over-executive-order-suing-trump-administration)

Abigail Adcox

This article has been updated with more details from the complaint and docket.

Perkins Coie on Tuesday filed a lawsuit against the Trump administration, calling the president's executive order targeting the firm “an affront to our Constitution and our adversarial system of justice.”

The 43-page complaint asks a Washington, D.C., federal court to immediately stop implementation of Trump's executive order, pending the firm's preliminary injunction motion. U.S. Judge Beryl Howell, assigned to the case, set a hearing for Wednesday afternoon to consider Perkins Coie's temporary restraining order request.

The complaint says Perkins Coie “has already lost significant revenue due to the loss of clients” who cut engagements with the firm since the order was issued Thursday. Perkins Coie will continue to lose client business if the order stands, losses that would “jeopardize its long-term health,” the suit said.

The complaint claims the executive order's purpose was to “bully those who advocate points of view that the President perceives as adverse to the views of his Administration.”

“The firm is comprised of lawyers who advocate for clients; its attorneys and employees are not activists or partisans. But Perkins Coie's ability to represent the interests of its clients—and its ability to operate as a legal services business at all—are under direct and imminent threat. Perkins Coie cannot allow its clients to be bullied,” the complaint reads.

Trump's executive order on Thursday revoked security clearances for employees at Perkins Coie and called for terminating any existing government contracts with the firm and contractors that use the firm as legal counsel. The order also barred employees of the firm from entering federal government buildings and called for a review of the firm's DEI policies.

Business Impact

The complaint outlines the wide-reaching effects the executive order could have on the law firm if it is allowed to stand as is, noting it has already caused several clients to terminate, or think of terminating their legal engagements with the firm.

Among Perkins Coie's clients are Boeing, Microsoft, and Booz Allen Hamilton, all of which have federal contracts.

If the order were to continue and cause current and prospective clients to stop their business with the firm, "it would put the firm's solvency and very existence at risk," said David Burman, a Perkins Coie senior partner, in court documents.

For instance, if the firm lost its top 15 clients — each of whom is a government contractor or a corporate affiliate of one — "the revenue loss would be devastating" because this group represented about a quarter of Perkins Coie's revenue in 2024, Burman said.

The complaint goes on to list several examples of firm clients either reconsidering their engagements or terminating them as a result of the executive order.

"A major government-contractor client for over 35 years withdrew its work from Perkins Coie in light of the Order as of March 7. Shortly before the Order, that client had added Perkins Coie to its preferred-provider program, and annual billings to the client have often been in the millions of dollars," the complaint reads.

Another client informed the firm that it cannot represent them "in any litigation or before the relevant federal agency," the suit added.

"Some clients have reported very concerning messages from government officials directing them to report business with Perkins Coie, and others are concerned about that possibility," the complaint said.

A group of four clients have withdrawn all work from the firm "due to their need to engage with various federal agencies" including the Department of Justice and Drug Enforcement Administration, the suit says.

"Perkins Coie's largest clients want to keep using the firm, but are reviewing the relationship, their government contracts, and other government interactions, and have indicated that they will need to make decisions shortly," the suit adds.

The complaint states that the firm's largest practice groups by head count are its commercial litigation, business, and intellectual property groups, which accounts for approximately 75% of attorneys at the firm, in which the vast majority of work is performed for clients "who have had, or are competing for, business with the government."

In comparison, the smallest practice by headcount is political law, which has eight attorneys and 19 others affiliated with the practice, the complaint says.

"The Order imposes these punishments on the entire law firm even though the attorneys involved in the purported misconduct numbered a mere handful of the more than 1,200 attorneys in the firm, and even though the two attorneys the Order appears to target have not been with the firm for years," the complaint reads.

The two attorneys alluded to are Michael Sussmann and Marc Elias, both of whom worked as lawyers for Hillary Clinton's 2016 campaign and are now at other law firms.

The complaint also argues that the executive order has "adversely affected" the firm's ability to recruit and retain employees.

Some candidates, the complaint says, "have questioned the economic health of the firm and whether there will be layoffs."

Rule of Law

Perkins Coie said it's "committed to a resolute defense of the rule of law, without regard to party or ideology, and therefore brings this lawsuit to declare the Order unlawful."

The complaint calls the order "punishments" as "retaliation" for representing clients deemed Trump's adversaries.

"Many law firms represented candidates, parties, and related political committees and organizations in the 2016 and 2020 campaigns," the complaint reads. "But the Order targets only one firm—Perkins Coie—because the President views it, more than any other firm, as aligned with the Democratic Party by reason of its representation of the 2016 Clinton presidential campaign and its successful handling of challenges brought by the Trump campaign seeking to overturn the results of the 2020 election, as well as victories the firm won for its clients in a significant number of voting rights cases, including cases where Perkins Coie succeeded in upholding existing laws, in connection with the 2020 election."

Trump's executive order specifically details Perkins Coie's reported role in the commission of the Steele Dossier, its work for activist donors such as George Soros, and its involvement in lawsuits against the Trump administration.

The complaint was signed by Williams & Connolly partner Dane Butswinkas, as well as 13 other lawyers appearing for Perkins Coie.

The firm has dedicated a webpage to its response to the executive order, including links to its legal filings, firm statements, and statements from outside legal observers in support of the firm.

"Today, we filed a legal action to prevent enforcement of an unlawful Executive Order targeting our firm," a firm spokesperson said. "The order violates core constitutional protections, including the rights to free speech and due process, and undermines all clients' right to select counsel of their choice. We were compelled to take this step to protect our firm and safeguard the interests of our clients."

NOT FOR REPRINT

Perkins Coie Drags Trump Administration Clear To Hell In New Lawsuit

 abovethelaw.com/2025/03/perkins-coie-drags-trump-administration-clear-to-hell-in-new-lawsuit

March 11, 2025

(Photo by MANDEL NGAN/AFP via Getty Images)

Last week, Perkins Coie was called out by the Trump administration for retribution. They were the subject of an executive order that purported to revoke security clearances for employees of the firm, called for the termination of government contracts with the firm, and called for a review of the DEI policies of Perkins Coie (and other unnamed firms). We learned the firm lawyered up — with Williams & Connolly — and today they dropped a complaint

The complaint wasn't written by a "bunch of pussies." No, the filing goes for the jugular. I mean — this is from paragraph 1 of the complaint:

The Order is an affront to the Constitution and our adversarial system of justice. Its plain purpose is to bully those who advocate points of view that the President perceives as adverse to the views of his Administration, whether those views are presented on behalf of paying or pro bono clients. Perkins Coie brings this case reluctantly. The firm is comprised of *lawyers* who advocate for *clients*; its attorneys and employees are not activists or partisans. But Perkins Coie's ability to represent the interests of its clients—and its ability to operate as a legal-services business at all—are under direct and imminent threat. Perkins Coie cannot allow its clients to be bullied. The firm is committed to a resolute defense of the rule of law, without regard to party or ideology, and therefore brings this lawsuit to declare the Order unlawful and to enjoin its implementation.

Legal filings aren't often a *fun* read, but this one delivers. It goes hard on the Trump administration's violation of separation of powers: "[T]he Order's peculiar title betrays its oddity as an Executive Order, for its purpose is not executive in nature. Rather, the Order reflects a purpose that is judicial—to adjudicate whether a handful of lawyers at Perkins Coie LLP engaged in misconduct in the course of litigation and then to punish them." And it just goes on — calling out the "retaliatory aim" which is "intentionally obvious to the general public and the press" and seeks "to chill future lawyers from representing particular clients."

But for my \$.02, the hardest hit is the graph that just slams every single constitutional protection the EO violates. It's a long block quote but very much worth it.

TL;DR is because CONSTITUTION!

Because the Order in effect adjudicates and punishes alleged misconduct by Perkins Coie, it is an unconstitutional violation of the separation of powers. Because it does so without notice and an opportunity to be heard, and because it punishes the entire firm for the purported misconduct of a handful of lawyers who are not employees of the firm, it is an unconstitutional violation of procedural due process and of the substantive due process right to practice one's professional livelihood. Because the Order singles out Perkins Coie, it denies the firm the equal protection of the laws guaranteed by the due process clause of the Fifth Amendment. Because the Order punishes the firm for the clients with which it has been associated and the legal positions it has taken on matters of election law, the Order constitutes retaliatory viewpoint discrimination and, therefore, violates the First Amendment rights of free expression and association, and the right to petition the government for redress. Because the Order compels disclosure of confidential information revealing the firm's relationships with its clients, it violates the First Amendment. Because the Order retaliates against Perkins Coie for its diversity-related speech, it violates the First Amendment. Because the Order is vague in proscribing what is prohibited "diversity, equity and inclusion," it violates the Due Process Clause of the Fifth Amendment. Because the Order works to brand Perkins Coie as *persona non grata* and bar it from federal buildings, deny it the ability to communicate with federal employees, and terminate the government contracts of its clients, the Order violates the right to counsel afforded by the Fifth and Sixth Amendments.

The full complaint is available below. The Trump administration picked a fight with some of the best and brightest lawyers, and they're about to find out exactly what that means.

Perkins Coie v DOJ 20250311Download

To Avoid Trump's Target, Law Firms Scrutinize Practices Amid Investigation Threats

 [law.com/americanlawyer/2025/03/11/to-avoid-trumps-target-law-firms-scrutinize-practices-amid-investigation-threats](https://www.law.com/americanlawyer/2025/03/11/to-avoid-trumps-target-law-firms-scrutinize-practices-amid-investigation-threats)

Dan Roe and Abigail Adcox

What You Need to Know

- Recent executive actions punishing Covington and Perkins—and an impending Trump administration probe of 15 law firms' DEI programs—have law firms reviewing all potential sources of executive scrutiny.
- In addition to DEI and ESG, previously uncontroversial areas such as hiring and promotion policies are also under review.
- In lieu of publicly opposing the administration's assault on law firms, Big Law is more likely to take up the fight in court, sources said.

There is no playbook for dodging the types of presidential actions that hit Covington & Burling and Perkins Coie recently. Instead, law firms are writing their strategies from scratch, according to crisis management experts in contact with Big Law firms over the past few weeks.

That means scrutinizing every client retention, public statement, hiring policy and anything else that could provoke a Trump administration seeking to end DEI and exact revenge on the president's perceived adversaries. Law firms also are consulting their own defense counsel about their risks and potential defense strategies.

It's unclear how many law firms in all could be in the Trump administration's crosshairs at this point. While signing a Thursday executive order that stripped Perkins Coie attorneys of security clearances and access to federal government buildings, Trump indicated that at least 15 different firms could be subject to investigation. The White House has not responded to inquiries about which law firms are among the 15.

"We have a lot of law firms that we're going to be going after," Trump told Fox News on Sunday.

On Monday, National Intelligence Director Tulsi Gabbard said on the social media platform X that she had stripped security clearances from some national security officials and attorneys, including Alvin Bragg, the Manhattan district attorney who secured a felony conviction against Trump, and Lisa Monaco, a former O'Melveny & Myers partner and deputy attorney general who oversaw prosecutions against Trump supporters who stormed the U.S. Capitol on Jan. 6, 2021.

For its part, Perkins Coie has retained Williams & Connolly in response to Thursday's executive order, The American Lawyer confirmed on Monday.

Firms that think they could be included in a Trump administration probe of DEI policies are reviewing all of their potential vulnerabilities and either preparing to explain their rationale for keeping them or removing them altogether, crisis experts said. A significant portion of top Big Law firms had scrubbed their website of words such as "diversity" or taken DEI pages offline by Friday afternoon.

However, the personal nature of the grievances cited in the Perkins executive order—including the actions of former partner Marc Elias, who left the firm in 2021—make it difficult for firms to determine the scope of matters, clients and public stances that could draw the administration's ire.

"To try to think rationally about it, I'm not sure that works," said Cari Brunelle of legal advisory Baretz+Brunelle. "And I say that because, if you look at the cases that were cited in the executive order on Perkins, they were not current matters. They were handled by attorneys who are long gone from the firm. So I don't think you can think about these things in a rational way."

The list of potential Trump targets in Big Law could be long. That includes law firms targeted for their past representations, their current or past DEI policies or the law firms currently litigating against the administration.

At least 11 law firms, including Perkins Coie, are involved in litigation against the Trump administration—some pro bono, others not. Wilmer Cutler Pickering Hale and Dorr, Hogan Lovells, Jenner & Block, Ropes & Gray, Gibson, Dunn & Crutcher, Arnold & Porter Kaye Scholer, Milbank, Saul Ewing, Munger, Tolles & Olson and Cleary Gottlieb Steen & Hamilton are among the law firms that have signed on to represent plaintiffs in ongoing suits against the administration.

For instance, Saul Ewing is representing three education associations in a suit filed this month against President Donald Trump, the Education Department and Acting Education Secretary Denise Carter challenging the termination of roughly \$600 million in teacher training grants based on an executive order regarding DEI initiatives.

Meanwhile, Wilmer is representing eight former inspectors general who were fired by Trump in a lawsuit, which argues that their firings were illegal and should be reinstated.

For firms concerned about being targeted by the administration, crisis management consultant Bruce Hennes of Hennes Communications advises clients to start with a vulnerability audit. "You may decide to take certain words off of your website. You may

decide to look at your hiring policies and make changes,” Hennes said. “But no matter what, if you have these vulnerabilities, you’ve got to be prepared to explain what you did, why you did it and what your position is.”

Brunelle said she would advise firms to develop a cross-functional team to identify areas of risk in every area, including areas that previously weren’t as controversial. “You look at policies including those having to do with DEI, ESG, anything on hiring, partner promotion criteria—even things on the website that might have reference to that,” Brunelle said. “All of those things need to be looked at closely. Some firms have even gone so far as to strip them out.”

The DEI-related aspects of the Perkins Coie executive order is “one of the biggest areas of concern for most firms,” noted Jeffrey Cunningham, founding partner and general counsel at Cohen Vaughan, who works as outside counsel for small and midsized law firms.

“My advice right now is to sort of hold the line, stay committed to whatever you were committed to in December and see what your peer law firms are doing,” said Cunningham, adding it’s “important to watch the industry” as well as remain client-focused, keeping tabs on what clients are thinking.

However, Stephen Gillers, a professor emeritus at NYU Law School, indicated that there isn’t much that firms can do substantively.

“There’s only one thing they can do: pray,” said Gillers. “There’s nothing. I mean, they can’t build walls between themselves and Washington. They can just wait it out and see if Trump turns on them as well. I suppose some of them with relationships in the administration might reach out to ensure that they will not become targets of Trump’s hire, but most of them will just have to wait and see, to see if there is another shoe to drop that has their name on it.”

Gillers added that firms could start putting out feelers for defense counsel in advance of any actions by the administration.

Firms are also likely to be strategizing their internal and external communications in preparation for an executive order. While Brunelle said firms may be reinforcing commitments to their culture and their people internally, external communications also need to reflect firms’ responsibility to provide representation to all types of clients and adhere to the rule of law.

But that won’t necessarily come in the form of a press release, she added. “In some cases, fighting the fight legally is going to be better than fighting the fight publicly,” Brunelle said. “You are going to see a lot of firms keeping their heads down and hoping to stay under the radar.”

NOT FOR REPRINT

Trump administration sued over mass firings by workers at five agencies

 [reuters.com/legal/government/trump-administration-sued-over-mass-firings-by-workers-five-agencies-2025-03-11](https://www.reuters.com/legal/government/trump-administration-sued-over-mass-firings-by-workers-five-agencies-2025-03-11)

Daniel Wiessner

By Daniel Wiessner

March 11, 2025 12:22 PM PDT Updated 19 hours ago

A person displays a sign as labor union activists rally in support of federal workers during a protest, with the U.S. Capitol in the background in Washington, U.S., February 11, 2025.

REUTERS/Craig Hudson/File Photo Purchase Licensing Rights , opens new tab

March 11 (Reuters) - A group of U.S. government employees who lost their jobs as part of President Donald Trump's purge of the federal workforce filed a lawsuit on Tuesday claiming the mass firings of recently-hired workers is illegal and should be reversed.

The proposed class action , opens new tab in Washington, D.C. federal court appears to be the first of its kind against the Trump administration by probationary government employees, who typically have spent less than a year in their current roles and have fewer job protections than other federal workers.

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

Unions that have sued over the mass firings of thousands of probationary workers are facing procedural hurdles, and Tuesday's lawsuit says political turmoil at the board that hears federal workers' appeals of their terminations may render that process futile.

"What is needed is for this court to order the defendant agencies to return all affected employees to work for at least the pendency of this litigation," the plaintiffs said in the complaint.

White House spokeswoman Anna Kelly in an email said: "President Trump is rooting out the vast waste, fraud, and abuse across the Executive Branch. He will deliver on the American people's mandate to effectively steward taxpayer dollars, which includes removing probationary employees who are not mission-critical."

The lawsuit was filed by eight probationary employees who were fired over the last few weeks and are seeking to represent a class of more than 4,000 people at the five agencies where they worked.

They claim the mass firings violated workers' due process rights under the U.S. Constitution and were improper because agencies did not identify performance issues on a case-by-case basis or give workers an opportunity to respond.

The plaintiffs worked at the Department of Veterans Affairs, the Department of Health and Human Services, the Treasury Department, the Commerce Department, and the General Services Administration.

HHS, GSA, and the VA declined to comment. The Treasury and Commerce departments did not immediately respond to requests for comment.

Trump and billionaire Elon Musk, a top adviser, are pursuing an aggressive campaign to shrink the federal workforce, which included about 2.3 million workers when Trump took office in January.

The first round of mass firings focused on probationary workers, who have limited grounds to challenge their terminations. Unions, non-profits, and state attorneys general have brought legal challenges but so far have not secured widespread relief for government workers. Thousands of fired employees have turned to the U.S. Merit Systems Protection Board, which hears appeals of terminations and other discipline by federal agencies, and the agency has ordered the temporary reinstatement of nearly 6,000 probationary employees at the Department of Agriculture.

But the agency is facing a flood of new cases [\[link\]](#), opens new tab and the Democratic board member who issued the USDA order, Cathy Harris, is locked in a legal battle over Trump's attempt to remove her from office. If she loses, the board will at least temporarily lack a quorum of two members that can decide cases.

Tuesday's lawsuit seeks an order that reinstates probationary employees at the five named agencies "and otherwise make them whole."

The case is *Gober v. Collins*, U.S. District Court for the District of Columbia, No. 1:25-cv-00714.

For the plaintiffs: Pamela Keith and Scott Lempert of the Center for Employment Justice

For the defendants: Not available

Read more:

US federal workers hit back at Trump mass firings with class action complaints
Trump cannot oust chair of federal employees' appeal board, US judge rules
For fired US federal workers, legal protections offer little recourse
US board reinstates thousands of USDA employees fired by Trump administration
DOGE job cuts bring pain to Trump heartland
Democrat-led states join legal fight over Trump's mass firings of federal workers
Trump can continue mass firings despite disruption and chaos, US judge rules
Reporting by Daniel Wiessner in Albany, New York

Trump administration withdraws OPM director's declaration ahead of hearing on federal employee firings

DJ [dailyjournal.com/articles/384191-trump-administration-withdraws-opm-director-s-declaration-ahead-of-hearing-on-federal-employee-firings](https://www.dailyjournal.com/articles/384191-trump-administration-withdraws-opm-director-s-declaration-ahead-of-hearing-on-federal-employee-firings)

Judges and Judiciary,

Government

Mar. 12, 2025

A federal judge's order to cross-examine the acting director of the Office of Personnel Management over the firing of probationary employees has led the Trump administration to withdraw his declaration. With no witnesses at Thursday's hearing, the legal battle continues without testimony on both sides.



The Trump administration has dropped the declaration of the Office of Personnel Management's acting director, Charles Ezell, after a federal judge in San Francisco ordered him to be cross-examined by attorneys for public employee unions in a case involving the firing of federal probationary workers.

That means a hearing on the unions' motion for a preliminary injunction blocking the federal government from firing tens of thousands of probationary employees nationwide will take place without any witnesses.

"Because the Court's stated purpose of bringing Mr. Ezell to the hearing was to obtain testimony from him regarding the contentions made in his declaration, Defendants therefore submit that his presence is no longer necessary at any hearing given that this declaration is now withdrawn," U.S. Department of Justice trial attorney Yuri S. Fuchs wrote Tuesday afternoon.

The federal government's decision followed a Monday night ruling by Senior U.S. District Judge William Alsup, who ruled that Ezell appear in his courtroom to be cross-examined by attorneys with Altshuler Berzon LLP who represent the unions.

"The problem here is that Acting Director Ezell submitted a sworn declaration in support of defendants' position, but now refuses to appear to be cross examined, or to be deposed (despite, it should be added, government counsel's embrace of that very idea during the TRO hearing)," Alsup wrote in a Monday night ruling.

"If Ezell does not appear in violation of that order, then the Court will have to decide the sanction, including whether or not to strike or limit his sworn declaration," he added. American Federation of Government Employees, *AFL-CIO et al. v. United States Office of Personnel Management et al.*, 25-cv-01780 (N.D. Cal., filed Feb. 19, 2025).

The government's decision effectively removes Ezell's declaration from the evidentiary hearing, leaving lawyers for the government and the union - which also said it would not call any witnesses if the Trump administration did not - to argue for a preliminary injunction without any witnesses.

Alsup granted a temporary restraining order on Feb. 27 against the federal agency, concluding that it unlawfully ordered other agencies to fire probationary employees.

Fuchs argued that testimony from Ezell, or his declaration, is not required.

"Live testimony of Mr. Ezell is also not necessary, as a factual matter, because existing documentary evidence and briefing demonstrates that OPM is not directing agencies to terminate probationary employees," he wrote.

"On March 4, 2025, OPM issued revised guidance clarifying that 'OPM is not directing agencies to take any specific performance-based actions regarding probationary employees[.]' and further clarifying that '[a]gencies have ultimate decision-making authority over, and responsibility for, such personnel actions,'" Fuchs added.

But in an amended complaint filed earlier on Tuesday, Altshuler Berzon attorney Danielle E. Leonard argued that assertion is false.

"'OPM, the federal agency charged with implementing this nation's employment laws, in one fell swoop has perpetrated one of the most massive employment frauds in the history of this country, telling tens of thousands of workers that they are being fired for performance reasons, when they most certainly were not,'" she wrote.

The hearing on the unions' bid for a preliminary injunction will still take place Thursday, although without live witnesses, it will start at 1 p.m., according to Alsup's order.

"Plaintiffs do not plan to present live witness testimony at the March 13 evidentiary hearing, in light of the substantial and un rebutted declaration evidence Plaintiffs have already submitted to the Court and of Defendants' objection and refusal to make available witnesses employed by the federal government," Leonard wrote in a Tuesday afternoon filing.

She and other Altshuler Berzon attorneys could not be reached for comment Tuesday.

#384191

Craig Anderson

Daily Journal Staff Writer
craig_anderson@dailyjournal.com

SCOTUSblog founder Goldstein had connection to cryptocurrency wallet hosting \$100M in transfers, US alleges

 [abajournal.com/web/article/scotusblog-founder-goldstein-had-connection-to-cryptocurrency-wallet-hosting-100m-in-transfers-us-alleges](https://www.abajournal.com/web/article/scotusblog-founder-goldstein-had-connection-to-cryptocurrency-wallet-hosting-100m-in-transfers-us-alleges)

Criminal Justice

By Debra Cassens Weiss

March 11, 2025, 3:02 pm CDT

Federal prosecutors cited alleged “ongoing criminal conduct” by indicted SCOTUSblog co-founder Tom Goldstein in a court filing urging a federal judge to keep in place an order requiring monitoring of his electronic devices. (Photo by Alex Brandon/The Associated Press)

Federal prosecutors cited alleged “ongoing criminal conduct” by indicted SCOTUSblog co-founder Tom Goldstein in a court filing urging a federal judge to keep in place an order requiring monitoring of the former U.S. Supreme Court litigator’s electronic devices.

In a March 6 court filing, prosecutors said Goldstein has been using unhosted cryptocurrency wallets “for his financial shell game,” and prosecutors have evidence about two of them that were not previously disclosed to the court or pretrial services—including one that has hosted \$100 million in cryptocurrency transfers.

He also allegedly failed to file personal tax returns in 2022 and 2023 and offered payments to a law firm manager who was a potential witness.

Law360, Newsweek and PokerNews (via How Appealing) have coverage.

Goldstein was indicted on tax evasion charges in January for allegedly hiding millions of dollars in income and cryptocurrency transactions on tax returns. He was also accused of using his boutique firm to help cover his debts and of making false statements to mortgage lenders.

The indictment was for alleged tax evasion between 2016 and 2022. But Goldstein also failed to report gambling winnings of more than \$12 million in 2022 and more than \$10 million in 2023, the government said.

PokerNews highlighted a government spreadsheet showing payments made by a single player to Goldstein over a two-year period beginning in May 2022. The intent was to show Goldstein's 2023 gambling winnings, the article says. The payments reflect that the player had net losses of \$51.4 million.

The use of cryptocurrency reinforces that Goldstein is a significant flight risk, and his failure to disclose it shows that the government should not trust him, the court filing said.

"In effect, defendant now asks the court to just trust him," according to the filing. "But the indictment alleges defendant lied to the IRS, his accountants, his investors and multiple mortgage lenders—all of whom initially trusted him. ... The court should not make the same mistake."

The government alleged that Goldstein had connections to a previously undisclosed cryptocurrency wallet that has received and sent \$100 million in cryptocurrency since its creation in 2022. Even if Goldstein does not own the wallet, the government said, his use of it shows his connection to people "who have controlled tens of millions of dollars in cryptocurrency" and may be living abroad.

He also allegedly used another previously undisclosed wallet in which a professional gambler transferred more than \$242,000 to pay Goldstein for a poker loss. There is no indication that the money was meant for anyone else, the government said.

Prosecutors also alleged that Goldstein offered a departing firm manager a \$10,000 bonus, student loan payments and cryptocurrency. The Goldstein & Russell manager was a potential witness, and the payments appeared to be an attempt to influence the person, prosecutors said.

Goldstein was arrested in February after federal prosecutors alleged that Goldstein violated the terms of his release by failing to disclose two unhosted cryptocurrency wallets through which he transferred millions of dollars in the currency. The government's new filing cited his use of those wallets, as well as several others.

A federal magistrate judge ordered Goldstein's release Feb. 13 after determining that Goldstein had plausibly denied that he owned the two wallets, which are not hosted at any exchanges.

Goldstein has conceded that he previously had access to the newly disclosed cryptocurrency wallets but said he does not currently control them, prosecutors said.

"These statements raise more questions than answers," prosecutors said. Goldstein "has not explained how he lost control of those wallets, who now controls them, why they still contain large sums of cryptocurrency or what—aside from his own volition—prevents him

from regaining control of them. Nor does his filing offer any evidence to corroborate his claims.”

In a March 10 filing, Goldstein said his alleged failure to disclose cryptocurrency to the IRS consisted of failing to check a box on his tax return. In addition, “the government’s attempts to make Mr. Goldstein’s prior use of cryptocurrency appear nefarious are highly misleading,” Goldstein’s filing said.

He also said the additional cryptocurrency wallets cited in the prosecution’s legal filing were known to the government at Goldstein’s initial court appearance. And the wallets have been inactive since December 2022 and since 2024. There is no allegation that Goldstein used the wallets while on pretrial release, Goldstein said.

Write a letter to the editor, share a story tip or update, or report an error.

Related topics:

U.S. Supreme Court | Criminal Justice | Prosecutors | Tax Law | Trials & Litigation | Government | Technology | Personal Lives | Careers | Criminal Procedure | Career & Practice

You might also like:

- Trump order targeting Perkins Coie is 'an affront to the Constitution,' law firm says in lawsuit
- Seeing double standard, 5th Circuit judge resigns from judicial group over threats statement
- Law and the 'Trust Tax'
- Texas commits to NextGen bar exam starting in 2028, NCBE says
- Former Duane Morris partner arrested on outstanding warrant related to Michigan assault case

J.P.Morgan cuts price target on Tesla shares, brokerage expects lower deliveries

 [reuters.com/business/autos-transportation/jpmorgan-cuts-price-target-tesla-shares-brokerage-expects-lower-deliveries-2025-03-12](https://www.reuters.com/business/autos-transportation/jpmorgan-cuts-price-target-tesla-shares-brokerage-expects-lower-deliveries-2025-03-12)

Reuters

By Reuters

March 12, 2025 9:47 AM PDT Updated 12 min ago

Tesla vehicles are seen on display at the Canadian International AutoShow in Toronto, Ontario, Canada February 13, 2025. REUTERS/Carlos Osorio/File Photo Purchase Licensing Rights , opens new tab

March 12 (Reuters) - J.P.Morgan cut its price target on Tesla's (TSLA.O) , opens new tab stock as the brokerage expects a second straight year of lower deliveries, with analysts also pointing to a change in sentiment toward the EV maker from existing customers and potential new buyers.

There have been reactions toward the brand such as protests at Tesla stores across the U.S. and around the world, sales boycotts, and jettisoning already purchased vehicles in the second-hand market, the brokerage said.

Stay up to date with the latest news, trends and innovations that are driving the global automotive industry with the Reuters Auto File newsletter. Sign up here.

J.P.Morgan also cut its price target on the electric-vehicle maker's shares to \$120 from \$135. The median target for the stock is \$370, according to LSEG data.

The brokerage said it expects Tesla to deliver about 1.78 million vehicles this year, down about 1% from 2024.

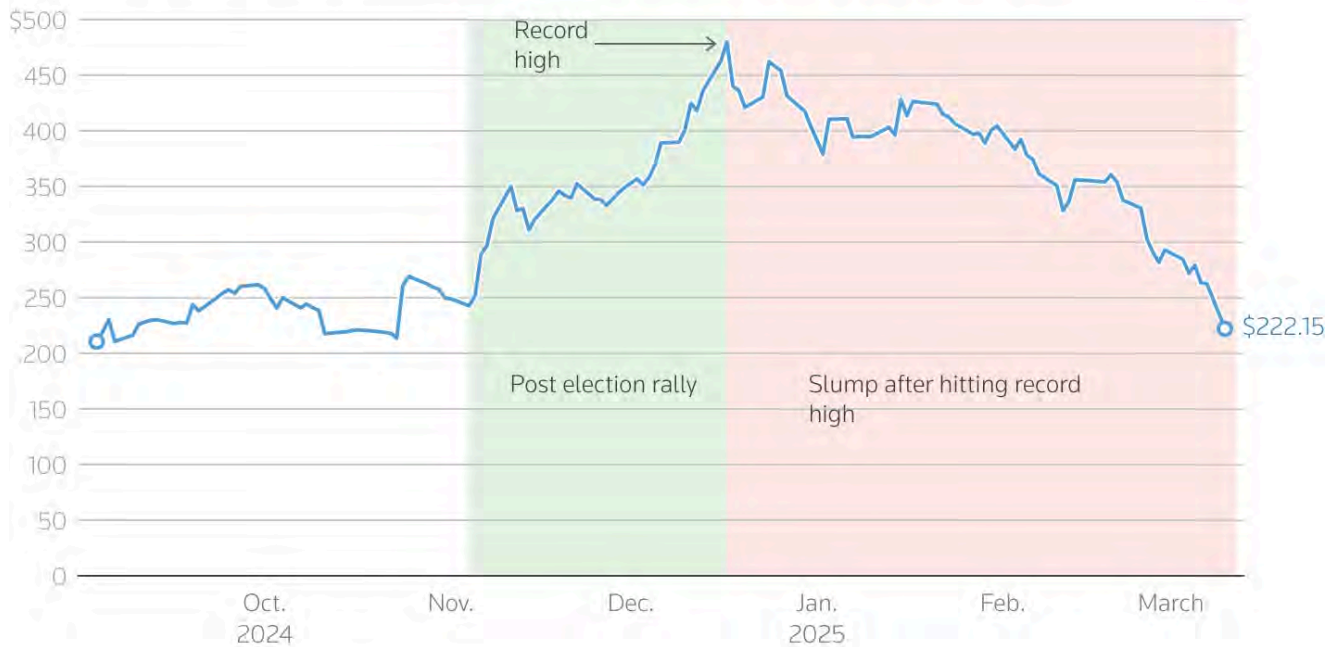
Recently, activists have staged so-called "Tesla Takedown" protests to express their displeasure at Elon Musk's involvement in significant reductions to the U.S. federal workforce and the cancellation of contracts funding global humanitarian efforts.

Musk, currently the world's wealthiest person, is leading the Trump administration's Department of Government Efficiency.

In a show of support for the EV maker's CEO Musk, U.S. President Donald Trump said on Tuesday that violence against Tesla dealerships will be labeled domestic terrorism. Tesla's shares have slumped after hitting an all-time high in December, erasing most of the gains the stock made after Trump won the U.S. election in November.

The stock has gained 10% since Monday's 15.4% slump, its worst one-day drop in four-and-a-half years.

Tesla shares tumble after hitting record high post U.S. election



By Akash Sriram/@hoodieonveshti • Source: LSEG

Tesla shares tumble after hitting record high post U.S. election

Reporting by Akash Sriram in Bengaluru; Editing by Shounak Dasgupta

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

Carson Block Says Tesla Plummet Doesn't Make It a Short Target

B [bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/ST0KSTDWRGG0](https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/ST0KSTDWRGG0)

March 12, 2025, 8:26 AM PDT



Siddharth Philip

Bloomberg Editorial



By Siddharth Philip

(Bloomberg) --

Carson Block says he still wouldn't bet against Elon Musk, even after Tesla Inc. shares experienced their worst one-day drop in more than four years.

"Just when you thought he was about to go over the edge of the cliff, he comes back," Block, the chief executive officer of Muddy Waters Capital, said in a Bloomberg TV interview Wednesday. "This guy for years and years has done nothing but pull rabbits out of the hat."

Last month, Block said he wouldn't bet against Musk despite Tesla shares being under pressure amid concerns over the world's richest person getting distracted by his role in President Donald Trump's administration.

Musk's electric vehicle company fell 15% on Monday alone and ended Tuesday down more than 50% from an all-time high touched in mid-December. It has given back all of the gains it experienced after the election, when traders were betting Tesla would benefit from Musk's close ties to the new president.

"Is he doing irreparable damage to the Tesla brand with his political involvement? Maybe," Block said. Still, his firm is "happy looking elsewhere for shorts."

Block, whose firm rose to fame by uncovering fraud at some Chinese firms, remains cautious on investing in the country despite stocks there rallying this year as President Xi Jinping signals support for the private sector.

"China is a trade, it is not an investment," Block said. The nation's geopolitical risk means investors want the ability to quickly shift away from the region at a moment's notice, he said. "China is not marriage material."

US SEC revokes staff's authority to launch formal probes, notice says

 [reuters.com/world/us/us-sec-revokes-staffs-authority-launch-formal-probes-notice-says-2025-03-11](https://www.reuters.com/world/us/us-sec-revokes-staffs-authority-launch-formal-probes-notice-says-2025-03-11)

Reuters

By Reuters

March 11, 2025 1:19 PM PDT Updated 18 hours ago

Signage is seen at the headquarters of the U.S. Securities and Exchange Commission (SEC) in Washington, D.C., U.S., May 12, 2021. REUTERS/Andrew Kelly/File Photo
Purchase Licensing Rights [↗](#), opens new tab

WASHINGTON, March 11 (Reuters) - The U.S. Securities and Exchange Commission has decided to formally revoke enforcement staff's authorization to formally launch investigations without the commission's approval, the agency said this week.

The new rule rescinds an authority that was first delegated to the head of enforcement in 2009 to issue formal orders, such as a subpoena. The move will "more closely align the Commission's use of its investigation resources with Commission priorities," it said in a notice published on the SEC's website on Monday.

Get weekly news and analysis on U.S. politics and how it matters to the world with the Reuters Politics U.S. newsletter. Sign up [here](#).

Lawyers at the SEC had previously been told they would need to seek permission from the political-appointed leadership to issue orders, Reuters previously reported. Reuters could not ascertain at the time if the Commission had voted formally to revoke the authority from enforcement staff.

The new rule will be effective 30 days from publication in the Federal Register, the SEC said in the notice.

"We are returning to how the Division operated for most of its existence, ensuring the Commission has the utmost insight into the cases we bring throughout the process," an SEC spokesperson said in an emailed statement.

Reporting by Chris Prentice Editing by Nick Zieminski

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

Bybit Hack Prompts EU Scrutiny of OKX Platform Used by Thieves

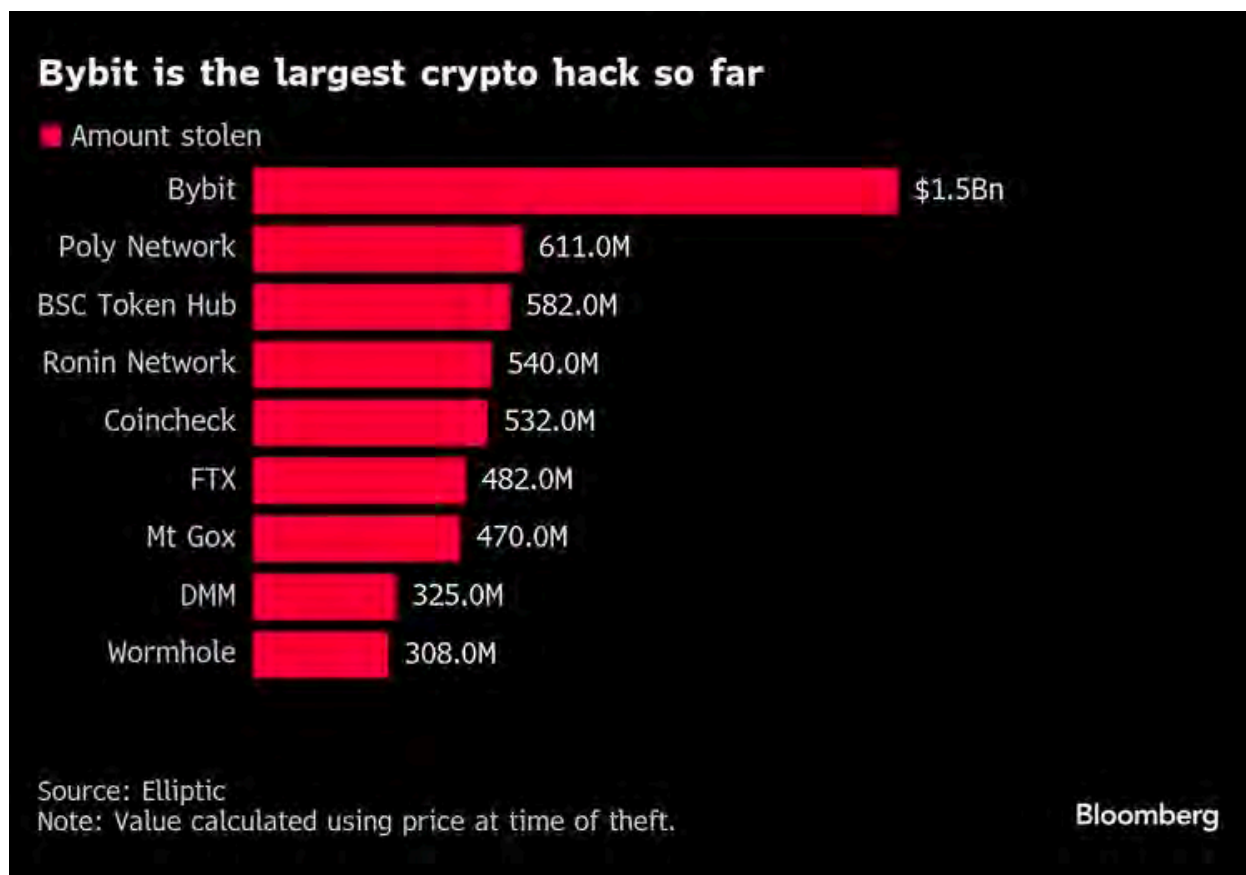
European crypto regulators are scrutinizing the use of a service offered by OKX, one of the largest digital-asset exchanges, by hackers to launder proceeds from a \$1.5 billion heist on trading platform Bybit, people with knowledge of the matter said.

National watchdogs from the European Union's 27 member states discussed the issue at a meeting hosted by the European Securities and Markets Authority's Digital Finance Standing Committee on March 6, the people said, asking not to be named because the deliberations are confidential. OKX is subject to the EU's new Markets in Cryptoassets, or MiCA, regulations.

Regulators are zeroing in on OKX's Web3 service, which the company markets as a decentralized-finance platform and self-custodial wallet that gives crypto traders access to various exchanges and blockchains, two of the people said. The hackers, which authorities have linked to North Korea, laundered about \$100 million of crypto they stole through the Web3 platform, according to Bybit.

At issue for regulators is whether the Web3 platform is encompassed by MiCA, and if so, what potential penalties to impose on OKX, the people said.

The Bybit exploit was the biggest and most sophisticated to hit the crypto industry so far, and highlighted key vulnerabilities in the ecosystem as North Korean hackers increasingly target exchanges. The hackers quickly moved to launder the tokens they stole — mainly Ether — through decentralized platforms and so-called cross-chain bridges.



Read More: North Korea's \$1.5 Billion Heist Puts the Crypto World on Notice

OKX, founded in 2017 and based in the Seychelles, offers trading in over 300 cryptocurrencies including Bitcoin and Ether over its centralized exchange. In July, the company said 53 million individual wallets had been created on its separate Web3 service, adding that the platform covered 100 different blockchains.

While fully decentralized platforms are exempt from MiCA rules that took full effect at the end of 2024, regulators from countries including Austria and Croatia said at the meeting that OKX's Web3 service should be encompassed by the bloc's rules, according to the people.

License "Passporting"

A presentation given at the gathering by one national regulator said the user interface for swapping tokens and connecting a Web3 wallet is directly integrated into OKX's website, and highlighted that the platform's terms of use clearly identifies an OKX Singapore entity as its main operator, one of the people said. The Web3 wallet service isn't related to OKX SG Pte, the entity that's regulated by Singapore's central bank, the company said.

The presentation concluded that the Web3 platform clearly falls within the scope of MiCA, the person added. It also called for regulators to discuss whether the incident represents a violation of sanctions on North Korea, according to the person.

“Claims of OKX’s involvement in laundering any funds are inaccurate and preposterous, we’ve been assisting Bybit on tracking wallet addresses and blocking those necessary in real time,” the exchange said in an emailed statement. “We follow local laws and work closely with regulators, and respond to inquiries as they come in.”

Austria’s Financial Market Authority declined to comment. The Croatian regulator didn’t immediately respond to questions.

OKX said Jan. 23 that it had secured a MiCA “pre-authorization” through its European hub in Malta. Just under a month later, the exchange announced that it had received permission to “passport” its services across the European Economic Area.

MiCA’s Article 64

Several EU regulators urged ESMA and the European Banking Authority, which was also represented at last week’s meeting, to take action against OKX, according to one person who was present. The watchdogs also pressed Malta’s financial authority to consider penalties including rescinding OKX’s MiCA permit and its approval to operate across the EEA, according to the person.

Representatives for Malta said at the gathering that they planned to hold meetings with OKX’s senior management to discuss the Bybit incident, while stopping short of a pledge to take formal action against the exchange, the person said.

Malta’s financial regulator declined to comment, as did the EBA. ESMA said it “stands ready to deploy all available regulatory tools, if necessary, to safeguard market integrity and investor protection,” without commenting on the meeting.

Under Article 64 of MiCA, a regulator can withdraw a license if the entity holding it fails to have in place effective systems to prevent money laundering, or if it violates rules in other serious ways. Article 64 also allows ESMA and the EBA to request a national regulator to carry out an assessment of whether an entity is still in compliance with the terms of its license.

ESMA Chair **Verena Ross** said in an interview last month that the watchdog is working with national crypto regulators to ensure “consistency and convergence” in supervision as countries transition to adopting MiCA.

The EU scrutiny adds to recent regulatory setbacks for OKX. The exchange last month pleaded guilty to processing more than \$1 trillion in transactions by US customers without a license, and will pay more than \$504 million in penalties.

Read more: OKX to Pay \$500 Million After Guilty Plea for Crypto Crime

To contact the reporters on this story:

Emily Nicolle in London at enicolle@bloomberg.net;

Laura Noonan in London at Inoonan6@bloomberg.net

SEC Probes Cyberattack of Detroit Suburb's \$30 Million Bond Sale

- Probe will determine potential violation of securities law
- White Lake Township makes disclosure in bond supplement

The US Securities and Exchange Commission is investigating a municipal-bond sale by a Detroit suburb that was hacked last year by cyber criminals, resulting in the theft of about \$30 million of proceeds.

The SEC is probing whether the bond issue, which was supposed to close in November, violated securities law, according to a March 11 bond-offering supplement. The community of 32,000 plans to sell \$29 million of bonds after the cyberattack forced it to cancel last year's issue to finance the construction of a civic center.

On the day of the initial sale's closing in November, criminals impersonated a township official after gaining access to the municipality's email, according to an offering document for the upcoming sale. The hackers then directed Robert W. Baird & Co., the investment bank that bought the bonds, to wire the purchase price to an account they set up.

Read more: [Add Cyberattacks to the List of Municipal Bond Credit Risks](#)

About \$23.6 million of the funds have been recovered and returned to Baird, according to the bond supplement. The investigation by federal authorities and the White Lake Township Police Department is ongoing.

"The Township is cooperating with all investigations and does not believe such investigations will impact the Township's ability to issue or repay the bonds," the bond-offering supplement said.

White Lake's supervisor, Rik Kowall, didn't immediately respond to a phone call seeking comment.

To contact the reporter on this story:

Martin Z. Braun in New York at mbraun6@bloomberg.net

To contact the editors responsible for this story:

Danielle Moran at dmoran21@bloomberg.net

VC Investors Find Complicated Ways to Monetize Locked-Up Crypto

- Venture funds have accumulated large sums of locked tokens
- Firms including Wintermute help investors hedge their holdings

Cryptocurrency investors are locking in returns from digital assets they're ostensibly barred from selling by entering into complex arrangements with specialist trading firms.

Venture-capital companies and other investors sitting on tokens that cannot yet be traded on the open market are working with market making firms to hedge their positions, according to seven people familiar with the matter, some of whom declined to be named because the arrangements are confidential.

The total value of all digital assets in circulation roughly doubled in 2024, according to CoinGecko data, yet the industry's venture investors have struggled to produce tangible returns. A recent dip in token prices – Bitcoin is currently trading more than 25% below a \$109,241 record set in January – suggests investors may have a vanishing window in which to realize gains.

Trading firms are stepping in to ease the pressure by “constructing two-sided books on these tokens that exist outside of the centralized exchanges,” said FalconX Global Co-Head of Markets Joshua Lim.

Wintermute, Flowdesk and Caladan are among the market makers taking the other side of such trades, according to spokespeople for those companies. GSR and Nomura Holdings Inc.'s Laser Digital are also active in the space, according to people familiar with the matter. Laser and GSR declined to comment.

“Since mid-2023, we've witnessed a rapidly developing secondary market for locked tokens,” said Flowdesk Chief Markets Officer **David Bachelier**. “While it's not yet a fully functional two-way market for various reasons, the demand suggests significant potential for innovation and growth.”

Token Troves

Early backers of crypto projects are often given tokens as well as — or instead of — shares. The tokens are typically subject to vesting programs, meaning they're unlocked according to a schedule that can last years. As a result, they can't be sold on the open market in the meantime.



The five largest unlocks of 2024 brought more than \$5.4 billion worth of tokens into circulation, according to a report from Tokenomist.

Unlocks can ramp up selling pressure as holders rush to book profits, which in turn can weigh on token prices. To hedge against that risk, token holders are turning to market makers and other funds for help.

“We have noticed more interest in token investors — not just VCs, but foundations, individual investors, etc. — for hedging in general,” said Wintermute’s Global Head of Business Development and Partnerships Jonathan Chan.

There are several ways to do it. One involves reassigning the assets to a buyer at a discount through the transfer of a contract known as a Safe Agreement for Future Tokens. A so-called tri-party custodian is often engaged in this scenario to look after the assets.

Another method involves a forward contract, which is a bilateral agreement between two parties to exchange tokens for a predetermined price once they unlock — in essence a kind of derivative. The seller typically puts up collateral in these arrangements to ensure the tokens are sent on the agreed date, which “helps to mitigate the risk of the seller not delivering the assets if the price of the token drastically appreciates,” Wintermute’s Chan said.

There are also websites, such as OFFX, that broker over-the-counter and secondary market trades in locked digital assets. OFFX didn’t respond to a request for comment on its activities.

In many cases, hedging of this kind – specifically the transfer of token rights – requires approval from the crypto project that issued the tokens in the first place. But there are also ways to hedge locked tokens without permission, according to two of the people familiar with the matter.

That's made locked token hedging a sensitive topic in crypto circles.

Still, Will Leung, head of partnerships at Caladan, sees such trades as a vital tool for funds sitting on large piles of locked tokens.

"I think managing the risk around your balance sheet is very important," he said. "We're not advocating for people to essentially not honor their investment agreements."

To contact the reporter on this story:

Ryan Weeks in Kuala Lumpur at rweeks23@bloomberg.net

To contact the editors responsible for this story:

stacy-marie ishmael at sishmael@bloomberg.net

Michael P. Regan

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

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

Epstein Often Knew More About JPMorgan Than Me, Staley Says (1)

- Staley was told about his JPMorgan exit by Epstein, he claims
- Former Barclays CEO is challenging his ban from UK finance

Jeffrey Epstein often knew more about what was going on at the top levels of JPMorgan Chase & Co. than Jes Staley, one of the Wall Street bank's most senior executives for more than a decade.

Staley claimed Epstein had a "remarkable ability" to gather information from the finance industry and was able to tell him things about his own career, according to his witness statement filed at a London court.

"Mr. Epstein was also well connected within the upper levels of JPMorgan itself," Staley said. "He seemed to be aware of things relating to the bank, that I was not aware of."

Later on Tuesday, the former Barclays Plc boss faced repeated questions about the nature of his friendship with Epstein. He was shown email after email where the pair described each other in warm effusive language.

Staley told the court his interactions with Epstein were more than work-related. "It was founded on a business relationship," he said. "He became a friend."



Jes Staley arrives at The Rolls Building in London, on March 11.

Photographer: Chris J. Ratcliffe/Bloomberg

Staley, who is attempting to overturn a lifetime ban imposed on him by the UK financial regulator, said Epstein had told him about his own departure from JPMorgan before even he knew about it.

"The bank was more important to him than the other way around," Staley said testifying in court for a second day on Tuesday.

Documents filed as part of now settled proceedings in the US have previously highlighted Epstein's high-level knowledge of JPMorgan. In an email in early September 2009, Epstein wrote to Staley telling him "you are on track," weeks before Staley was promoted to run JPMorgan's investment banking arm.

Staley has said he was told to get to know Epstein around 2000 by JPMorgan's then-CEO. "**Sandy Warner** recommended that I should become acquainted with Mr. Epstein because he was an exceptionally well connected man who could help me, in my capacity at JPM, to form business relationships with influential and other well connected individuals whom I might not otherwise have met or with whom it would have taken me longer to establish a relationship," he said in the witness statement.

He believes he was not the only JPMorgan employee to be in contact with Epstein. "I have no doubt, as a result of knowledge of the financial services industry, that a number of senior investment bankers at JPM and at other institutions will have engaged in extensive email correspondence with Mr. Epstein and with other clients, without the relationship between them having become a 'close' one," said Staley in his statement to the court.

Epstein was an important client at JPMorgan, particularly for its private banking unit, according to Staley's statement. However, Staley said he now deeply regretted his association with Epstein, who died in a New York jail cell in 2019.

Staley said he had not known of Epstein's "abhorrent" behavior. "If I was aware of his monstrous activities, I would not have maintained a relationship, and I was not aware," he said in court.

In 2013, six months after Staley left JPMorgan, senior executive **Mary Erdoes** terminated the firm's banking relationship with Epstein. Staley said he believed that the decision was taken because Epstein had been withdrawing large amounts of cash.

In his witness statement, Staley said nobody had told him about the issue while he was at JPMorgan. But under questioning, he acknowledged it was inaccurate. The FCA's lawyer, Leigh-Ann Mulcahy, disclosed a September 2011 email from Epstein to Erdoes saying: "jes told me there was [an issue] reg[arding] cash withdrawals."

Staley is tussling with the FCA over a letter sent by Barclays that said the pair weren't close, which the regulator says mischaracterized the nature of his relationship with Epstein. "The letter could have been written better," Staley said. "I wish it had been handled better; we probably wouldn't be sitting here."

(Updates with more Staley comments from fourth paragraph.)

To contact the reporters on this story:

Harry Wilson in London at hwilson57@bloomberg.net;

Jonathan Browning in London at jbrowning9@bloomberg.net

To contact the editors responsible for this story:

Jenny Surane at jsurane4@bloomberg.net

Marion Dakers, Jeremy Hodges

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

© 2025 Bloomberg Industry Group, Inc. All Rights Reserved

One-Time Amazon Takeover Target iRobot Warns Doubt on Future

B [bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/ST0NRBDWLU68](https://www.bloomberglaw.com/bloombergtterminalnews/bloomberg-terminal-news/ST0NRBDWLU68)

March 12, 2025, 8:25 AM PDT

By Lynn Doan and Natalie Harrison

(Bloomberg) --

The iRobot headquarters in Bedford, Massachusetts.

Photographer: Sophie Park/Bloomberg

iRobot Corp., the consumer robotics company that Amazon.com Inc. once planned to buy for more than \$1 billion, tumbled on Wednesday after raising a “substantial doubt” about its ability to continue operating.

The Bedford, Massachusetts-based company warned in its earnings results that there’s doubt about whether it can continue as a going concern. The firm’s board has begun a formal strategic review to evaluate options, including refinancing its debt and exploring a potential sale, according to the statement. Shares plunged as much as 42% to \$3.63 in New York, a record intraday decline for the stock, which made its public debut in November 2005.

Amazon abandoned its plans to buy the Roomba maker last year after clashing with European Union regulators who had threatened to block the deal, demonstrating the intense pressure the tech giant was facing from antitrust regulators on both sides of the Atlantic. The fallout for iRobot, which had already been struggling, was swift. Its shares tumbled the most in years, and the company’s market value stood at less than \$200 million as of Tuesday.

Carlyle Group Inc. provided a \$200 million loan through its private credit arm in 2023 to iRobot, which was burning cash at the time. The financing was intended to provide the company some liquidity while antitrust regulators reviewed the planned Amazon takeover.

Since the Amazon deal never materialized, Carlyle is still holding onto the debt. The lender was able to charge the company 9 percentage points over the Secured Overnight Financing Rate, well above norms on direct loans when it was inked.

Read More: Carlyle Seizes on New Antitrust World With iRobot’s 14% Loan

The company is paying a fee in order to amend the loan, according to a Wednesday filing. That will include \$3.6 million, or about 2% of the total loan outstanding, which will be paid with additional debt.

The company reported a net loss of \$77.1 million in the fourth quarter ended on Dec. 28, according to Wednesday's statement. At year-end, iRobot held \$134 million in cash or cash equivalents, up from the previous quarter but down from the year-ago level. The figure includes a \$40 million draw down of restricted cash that iRobot said it planned to use to purchase inventory.

iRobot reported a 44% slide in revenue in the fourth quarter from a year earlier, attributing the decline to promotional spending, the timing of orders from its largest customer for the holiday season and "ongoing competitive challenges that the company is addressing" with new product launches.

Still, it warned that there's "no assurance that the new product launches will be successful due to potential factors, including, but not limited to consumer demand, competition, macroeconomic conditions, and tariff policies."

(Updates with share move in the second paragraph.)

--With assistance from Irene García Pérez.

To contact the reporters on this story:

;

Natalie Harrison in New York at nharrison73@bloomberg.net

To contact the editors responsible for this story:

Isabella Farr

Puma

Puma shares tumble 23% as group blames trade disputes for sales slowdown

German sportswear group promises 'decisive actions' as share price falls by half this year



Puma is betting on the Speedcat — a retro-style racetrack-inspired shoe — to become a bestseller © Reuters

Florian Müller in Herzogenaurach

Published 6 HOURS AGO



Puma has warned that trade uncertainty and geopolitical tensions will hit sales growth this year, sending the German sportswear group's shares to their lowest level since 2016.

Shares in the company fell 23 per cent on Wednesday morning after it predicted a drop in operating profits this year and said sales adjusted for currency changes were expected to grow by a "low-to mid-single digit" rate.

[Puma](#) said "trade disputes" were hitting demand in its key markets, such as North America and China, and forecast earnings before interest and taxes of between €445mn and €525mn for 2025.

The range, which includes €75mn in one-off costs related to its efficiency programme, is well below the €690mn analysts had expected and the €622mn it made last year.

Puma shares have lost about 50 per cent of their value since the start of the year, suffering a more than 20 per cent fall over a single day in January when it [missed its profit target](#) for 2024.

Shares in rival Adidas also fell this month, after chief executive Bjørn Gulden — poached from Puma two years ago — said sales growth [would slow this year](#), and forecast lower than expected operating profit. The company's stock is down 6 per cent in the year to date.

On Wednesday, Puma's chief executive Arne Freundt said he was “not satisfied” with the company's “stagnant profitability” and promised “decisive actions” through a cost-cutting programme first announced in January.

“We are fully aware of the root causes of our challenges and are addressing them with full focus and rigour,” he said.

Puma shares have slumped

Share price, €



Source: LSEG via markets.ft.com

The company said it was also experiencing weaker demand in the first few months of the year “due to a soft performance in the US and China”. Freundt said their US customers had a “constrained budget due to increased insecurity” after recent US policy changes, adding that the company had factored in the new tariffs in its current outlook.

Puma said currency adjusted sales would come in at a “low-single-digit” behind the first quarter of 2024, while operating profit would be “significantly below” the €160mn it reported for the same period last year.

Chief financial officer Markus Neubrand said the sportswear brand had increased deliveries to the US before the tariffs came into force, and had reduced US imports from China to 10 per cent, down from 30 per cent historically, shifting production to other countries in south-east Asia.

While Puma has largely missed out on the retro trainer boom that has driven sales at rival Adidas, it is betting on the Speedcat — a retro-style racetrack-inspired shoe — to become a bestseller.

Freundt said sales of the Speedcat looked “promising” and would be scaled up this summer, but analysts at Citi warned that the company’s muted first-quarter guidance pointed to “poor momentum” for the model.

Puma said its cost-cutting programme would involve cutting about 500 jobs, closing unprofitable stores and simplifying its product range. The initiative is expected to add €25mn to 2025 operating profit, net of expenses.

The company is targeting an operating margin of 8.5 per cent by 2027, up from 7.1 per cent in 2024.

Deutsche Bank analysts noted that, compared with an estimated margin of 6 per cent this year, the target “feels ambitious at this stage”.

Puma cut its dividend to €0.61 per share, down from €0.82 the previous year.

[Copyright](#) The Financial Times Limited 2025. All rights reserved.

Follow the topics in this article



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

J&J Tells 3rd Circ. No Price Impact In Talc Concealment Suit

By **George Woolston**

Law360 (March 11, 2025, 8:59 PM EDT) -- Johnson & Johnson urged the Third Circuit on Tuesday to undo class certification of investor claims that the company inflated its stock price by failing to disclose cancer risks associated with its talcum powder products, arguing that the investors could not have relied upon its alleged misrepresentations because there was no impact on the stock market's price.

J&J told a three-judge panel that no fact in any of the investors' alleged corrective disclosures is either new or corrective, asserting that it's discounting of those corrective disclosures is enough for it to rebut the presumption of classwide reliance set forth in the 1988 U.S. Supreme Court decision **Basic Inc. v. Levinson** . The 1988 ruling held that investors can be presumed to rely on an alleged misrepresentation only if it affected the stock's market price.

Once you demonstrate that the facts behind the alleged corrective disclosures are not new or corrective, meaning it revealed that a prior statement was false, "the rationale of their presumption that the corrective disclosures demonstrate classwide reliance on the propped up, inflated price evaporates," said J&J attorney Robert N. Hochman of Sidley Austin LLP.

"We are rebutting the presumption of reliance that depends on the price impact analysis of the asserted corrective disclosures," Hochman said.

U.S. District Judge Zahid N. Quraishi **certified** a class in 2023 including all individuals who purchased or acquired J&J securities from Feb. 22, 2013, to Dec. 13, 2018. The judge also named a lead plaintiff in the case, the San Diego County Employees Retirement Association, as class representative and Robbins Geller Rudman & Dowd LLP as class counsel.

The investor class action was first lodged in New Jersey federal court in 2018. It alleged that J&J hid its knowledge of asbestos in its baby powder products to keep up stock prices, and those prices cratered after news outlets, including Reuters, published articles exposing the company's knowledge of the presence of asbestos. The suit also referenced a 2018 Law360 article quoting one of the attorneys.

Counsel for plaintiffs, Joseph D. Daley of Robbins Geller Rudman & Dowd LLP, argued Tuesday that the Reuters article is, in fact, a corrective disclosure because, among other information, it included a link to a document in which J&J executives said they were going to leave a study out of a website because it could tell the market that there's a causal connection between its talcum powder and ovarian cancer.

Daley further argued that the court doesn't even have to consider whether the alleged corrective disclosure included new information, pointing to the Supreme Court's 2021 **Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System** decision.

"That argument to us sounded very much like a lost causation argument, you know, dressed up as price impact," Daley said. "There's nothing in the Goldman Sachs case, for example, which is the latest price impact statement from the Supreme Court, that talks about the corrective information having to be brand new."

In his December 2023 decision, Judge Quraishi found the investor group met all the basic

requirements for certification, such as numerosity and typicality. He added that while J&J's various arguments against certification point to the possibility that the alleged disclosures did not impact the company's stock price, it is still not enough to completely "rebut the presumption of price impact by a preponderance of the evidence."

U.S. Circuit Judges Patty Swartz, L. Felipe Restrepo and Cindy K. Chung sat on the panel for the Third Circuit.

The investor plaintiffs are represented by James E. Cecchi of Carella Byrne Cecchi Olstein Brody & Agnello PC and Robert R. Henssler Jr., Nathan R. Lindell, Hillary B. Stakem and Joseph D. Daley of Robbins Geller Rudman & Dowd LLP.

Johnson & Johnson is represented by Jack N. Frost Jr. of Faegre Drinker Biddle & Reath LLP and Kristen R. Seeger, Robert N. Hochman, John M. Skakun III and Neil H. Conrad of Sidley Austin LLP.

The case is Frank Hall et al. v. Johnson & Johnson et al., case number 24-8001, in the U.S. Court of Appeals for the Third Circuit.

--Additional reporting by Kellie Mejdrich and Katryna Perera. Editing by Rich Mills.

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



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

Digimarc Faces Investor Suit Over Subscription Plunge

By **Emilie Ruscoe**

Law360 (March 11, 2025, 10:28 PM EDT) -- Digital watermarking technology company Digimarc Corp. and two of its executives face a proposed investor class action alleging that the company failed to warn investors that its recurring revenue would take a significant hit after one of its major customers had its contract expire in June.

In a **complaint** filed Monday in Manhattan federal court, plaintiff Karen Mayer claimed that Digimarc, its CEO Riley McCormack and its Chief Financial Officer Charles Beck should face liability after Digimarc shares slid 43% in February after the company announced its 2024 financial results.

Mayer accused Digimarc, McCormack and Beck of violating fraud provisions of the federal securities laws, asserting that prior to the February revenue reporting, investors had no idea that the company's annual recurring revenue for 2024 would come in at about \$20 million when it had been over \$22 million for its 2023 fiscal year.

In Digimarc's February announcement, it said its annual recurring revenue — a key metric for investors — was down "due to the expiration of a commercial contract in June 2024."

The company said in the same February report that its subscription revenue for the final quarter of its latest fiscal year was down by \$600,000, from \$5.6 million to just \$5 million.

According to Mayer, the company hid from investors that the commercial partner wouldn't renew its Digimarc contract with terms and conditions similar to the parties' earlier agreement, and as a result, Digimarc would renegotiate the large commercial contract.

The company's February announcement doesn't identify the Digimarc customer that had its contract expire in June, and the suit doesn't identify the customer, either.

After the company disclosed that its annual recurring revenue was down, market records show trading prices for its shares fell over 43%, from over \$27 to about \$15.40.

Mayer claimed that prior to the February decline, Digimarc shares had traded at artificially inflated prices because investors were in the dark about the changes to the company's recurring revenues.

The proposed class includes those who purchased Digimarc shares between May 2, 2024, when the company told investors that recent growth reflected "higher subscription revenue from new and existing commercial contracts," and the February announcement of its 2024 financial results.

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

Mayer is represented by Rebecca Dawson, Robert V. Prongay and Charles H. Linehan of Glancy Prongay & Murray LLP and Frank R. Cruz of The Law Offices Of Frank R. Cruz.

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

The case is Mayer v. Digimarc Corp. et al., case number 1:25-cv-01963, in the U.S. District Court for the Southern District of New York.



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

Origin Brass Face Investor Suit Over Factory Delay Disclosure

By **Sydney Price**

Law360 (March 11, 2025, 10:08 PM EDT) -- Executives and directors of sustainable chemical manufacturer Origin Materials have been hit with a shareholder's derivative suit alleging that they concealed a three-year construction delay affecting a production facility the company was building that increased company costs and altered relationships with its customers, including Pepsi.

According to the **complaint** filed by shareholder Travis Tanasse in California federal court on Monday, Origin Materials had publicly represented for several months that it was on track in building a facility it called "Origin 2." However, Origin Materials did not disclose that it knew by no later than early 2023 that its project would not launch on the timeline previously predicted, which forced it to amend a so-called offtake contract with Pepsi, the complaint alleged.

When the company did disclose the delays, its share price sharply plunged, the complaint said.

In addition to nominal defendant Origin Materials, the suit's defendants include its CEO John Bissell and several current and former executives and board members.

The suit alleged that in December 2022, Origin Materials employees were informed in a meeting that due to the economics of scaling paraxylene — a chemical that the new facility was intended to store — Origin Materials was forced either to produce less of the chemical or to pivot the plant's production to another product.

The suit's relevant period begins Feb. 23, 2023. On that day, Origin Materials told investors that "due to strong customer demand," Origin Materials was "substantially committed" to completing Origin 2, according to the complaint. However, the suit alleged that Origin Materials already knew at the time that problems with development and production had delayed the engineering and design plans for the project.

On May 9, 2023, Origin Materials and Pepsi finalized amendments to an agreement they had originally inked in 2018 under which Pepsi was granted a five-year term to purchase a specified quantity of product annually from Origin Materials, the complaint said. The plaintiff alleged that the modified terms of the agreement are evidence of Origin Materials' knowledge that it would not be able to complete Origin 2 on time.

Origin Materials did not publicly address the delays it was facing until a few months later, the suit alleged. On Aug. 9, 2023, Origin Materials said the company had spent a significant amount of money and time revising the project and taking it in a new direction, which would set back the project's timeline by about three years.

"As a result, Origin's stock price fell by approximately 66.5% on Aug. 10, 2023, and then another 68% from there by Nov. 1, 2023," the suit said. "By Jan. 4, 2024, Origin was forced to disclose to its investors that it had failed to meet its Nasdaq listing obligations, closing at below \$1 per share for over 30 consecutive business days."

The individual defendants are accused of breaches of fiduciary duty, unjust enrichment and wasting corporate assets.

The suit also noted that the defendants are facing a **securities class action** over their alleged

misrepresentations related to the Origin 2 project in the same court.

Counsel for Tanasse and a representative of Origin Materials did not immediately respond to requests for comment bTuesday.

Tanasse is represented by Betsy C. Manifold, Rachele R. Byrd and Alex J. Tramontano of Wolf Haldenstein Adler Freeman & Herz LLP and Justin A. Kuehn and Molly Brown of Kuehn Law PLLC.

Counsel information for Origin Materials and the individual defendants was not immediately available Tuesday.

The case is Tanasse v. Bissell et al., case number 2:25-at-0033, in the U.S. District Court for the Eastern District of California.

--Editing by Rich Mills.

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



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

Weapons Check Co. Sued In Del. After Hyped Reports, Probes

By **Jeff Montgomery**

Law360 (March 11, 2025, 7:50 PM EDT) -- A shareholder of weapons screening system developer Evolv Technologies fired off a derivative suit on the company's behalf in Delaware's Court of Chancery late Monday, seeking recovery of damages arising from allegedly hyped marketing of flawed, artificial intelligence-enabled systems that failed to meet threat detection claims.

Stockholder Steve Bersch's proposed class suit alleges breaches of fiduciary duty, unjust enrichment or insider trading against 11 current or former directors and three current or former officers of the Massachusetts-based company and seeks millions in disgorgement.

The complaint focuses on actions of a company and principals now also facing a second amended, three-count federal securities action in Massachusetts, alleging violations of the Securities Act and Exchange Act.

"These matters have severely damaged shareholder value and were all the direct responsibility of Evolv's officers and directors," the suit said.

Evolv was described as a producer of security screening technology systems that use artificial intelligence for education, healthcare, sports and live entertainment settings, with features superior to regular metal detectors.

The suit alleged that Evolv's investors were damaged when the company revealed that its financial statements had been inaccurate for more than two years, and that it expected to report additional weaknesses in its internal controls. Included in the suit were claims that Evolv also withheld material information about the company's business and financial condition.

The picture began to worsen in October 2023 when Evolv reported that it was under a Federal Trade Commission investigation into its marketing practices, followed by reports of a nonpublic U.S. Securities and Exchange Commission fact-finding inquiry.

In November 2024, the company reached a settlement with the FTC regarding false claims about the technology, after a security and surveillance industry research group questioned the validity of a positive report about the business.

Evolv "had seemingly reviewed and edited" the positive report before publication, the suit said. Removed during the process were findings "that demonstrated that the technology struggled to find certain types of knives, as well as bombs."

Other problems included a report by the BBC that in some cases hundreds of knives were missed, including one used in a school stabbing in Utica, New York.

the FTC settlement would free some buyers of the systems from their contracts, including school systems, and oblige Evolv to stop making unsupported claims.

"The misconduct of the individual defendants involves culpable violations of their obligations, the absence of good faith on their part, and a reckless disregard for the fiduciary duties owed to Evolv and its shareholders, which they were aware or should have been aware posed a risk of serious harm to Evolv," the Delaware complaint said.

Evolv reported two years of sequential revenue growth but on Oct. 25, 2024 announced a restatement of its finances from the second quarter of 2022. Revenue had been overstated by \$4 million to \$6 million, the company said, by undisclosed sales contract and subscription terms affecting receipts.

Each of the directors and officers named, however, received "generous" compensation and stock awards otherwise profited through alleged wrongful conduct that included collecting proceeds from insider trading.

Four individuals received more than \$8.9 million for stock while possessing material, adverse, nonpublic information, according to the suit.

Evolv did not respond to an emailed request for comment.

Steve Bersch and the proposed class are represented by P. Bradford deLeeuw of deLeeuw Law LLC and Robert C. Schubert and Willem F. Jonckheer of Schubert Jonckheer Kolbe LLP.

Counsel information for those named was not immediately available.

The case is Steve Bersch v. Peter George, et al, case number 2025-0266, in the Court of Chancery of the State of Delaware.

The federal case in Massachusetts is The case is Buchan v. Evolv Technologies Holdings Inc. et al., case number 1:24-cv-12768, in the U.S. District Court for the District of Massachusetts.

--Additional reporting by Sydney Price and Julie Manganis. Editing by Alex Hubbard.

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



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

Zillow Investors Urge 9th Circ. To Uphold Class Certification

By **Isaac Monterose**

Law360 (March 11, 2025, 6:19 PM EDT) -- A class of Zillow Group Inc. investors told the Ninth Circuit to reject the property listing company's bid to overturn the class certification of their suit accusing the company of making misleading statements about its home-flipping program and causing stock prices to drop.

The Zillow investors argued on Monday that the company is pushing the appellate court "to adopt a newly fabricated test" that will allow the company to argue that its corrective disclosure to investors didn't drive down its stock prices if that disclosure is determined to be almost identical to its prior statements, which the investors say were misleading.

The contested class certification was **granted** by U.S. District Judge Thomas S. Zilly of the Western District of Washington in August, and Zillow **filed** its Ninth Circuit opening brief in January.

In its Ninth Circuit answering brief, the class slammed Zillow's reliance on the U.S. Supreme Court's 2021 decision in *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System* and a footnote in the Second Circuit's 2023 decision in *Arkansas Teacher Retirement System v. Goldman Sachs Group Inc.* to make this argument.

According to the class, if Zillow's side of the argument is accepted that would significantly change the court test that's used to decide if there's a link between a corrective disclosure and a misleading statement.

"Not one court has adopted Zillow's myopic definition," the class said. "Instead, every court to consider the issue has affirmed the old regime that, for price impact, a corrective disclosure need only reveal new facts that belie an earlier misrepresentation. This court should do the same and affirm."

The class further argued that the Goldman decision only "clarified what evidence courts can consider" when the defendants in securities class actions argue that their allegedly misleading statements didn't affect company stock prices.

Also according to the class, the lower court went through thousands of documents to properly determine that Zillow failed to show that its misleading statements and subsequent disclosures did not devalue the company's stock.

"While never saying it outright, Zillow contends that the district court erred by not adopting its unsupported and exceedingly narrow interpretation of Goldman," the class argued. The class also pointed out that no other court has shared Zillow's viewpoint in the years since the U.S. Supreme Court handed down its Goldman decision.

"The reason is simple," the class claimed. "Corporate wrongdoers rarely admit that they committed fraud."

The class also defended the court from Zillow's "hollow" claim that the court didn't go over all the evidence.

"The district court — which, in its 36 years' experience, has handled dozens of securities class actions

— plainly stated it considered all probative evidence and at no point indicated it had excluded any defense evidence," the class argued. "That the district court did not mention every item of evidence — or draw Zillow's preferred 'import' to the evidence Zillow presented — is not a ground for error."

According to the class, there's a lot of evidence showing that Zillow misled investors.

In one example, the class alleged that the company falsely told them in August 2021 that it was able to double its home acquisitions because it improved the algorithm that supported its online home-buying program, Zillow Offers.

The class claimed that Zillow actually used pricing overlays for the algorithm-created prices that the company offered for homes in order to increase what the company offered to homeowners.

"Zillow pushed these overlays, despite warnings that they risked causing Zillow to significantly overpay for homes," the class claimed. "These overlays increased Zillow's home offer prices by as much as 7% or 8% above the company's models' valuations."

Eventually, in November 2021, Zillow admitted that its algorithm failed to accurately predict home prices and announced that Zillow Offers was shutting down, according to the class.

Additionally, the company stated that it was going to go forward with a \$569 million write-down for the almost 18,000 homes that it purchased over two quarters because the company bought those homes at a price that was too high to make a profit from selling them, the class alleged.

Class counsel and Zillow's counsel didn't immediately respond to requests for comment Tuesday.

The class is represented by Gregory Castaldo, Evan Hoey and Stacey M. Kaplan of Kessler Topaz Meltzer & Check LLP, and by Lucas Gilmore, Catherine Y.N. Gannon, Reed R. Kathrein, Karl Barth, Sean Matt and Steve Berman of Hagens Berman Sobol Shapiro LLP.

Zillow is represented by Peter B. Morrison, Virginia F. Milstead and Winston Hsiao of Skadden Arps Slate Meagher & Flom LLP, and by Sean C. Knowles of Perkins Coie LLP.

The case is Jaeger v. Zillow Group Inc. et al., case number 24-6605, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Karin Roberts.



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

Innodata Slams 'AI Washing' Shareholder Suit As Flimsy

By **Emilie Ruscoe**

Law360 (March 11, 2025, 9:56 PM EDT) -- Investors in data engineering company Innodata Inc. "essentially cut and pasted" claims from a short-seller's report on the company into their proposed class action accusing the company of "AI washing," despite the company's recovery from a related trading price dip, the company has argued.

In a Friday **filing** in New Jersey federal court, Innodata, its CEO Jack Abuhoff and its Chief Financial Officer Marissa Espineli asked U.S. District Judge Jamel K. Semper to dismiss the latest version of investor Francis Grondin's claims, noting, among other things, that trading prices for the company's shares are significantly up since it saw trading prices fall with the short-sellers report in February 2024.

"With the benefit of hindsight, the only shareholders who have been damaged are those who relied on the [short-seller's report cited in the suit] given Innodata's sustained stock price increase since" the short-sellers report, the company and its brass said Friday.

In the most recent version of the claims, from January, Grondin accused the company of misrepresenting the role artificial intelligence played in its offerings to capitalize on surging investor interest in AI.

Before the start of Grondin's proposed class period in May 2019, the investor claimed, Innodata had "primarily operated as a services company using offshore labor for manual data annotation."

According to Grondin, over a 20-year period, Innodata had "rebranded itself on numerous occasions without changing its underlying business," at one point marketing itself to academic and cultural institutions and at another time promoting its e-book services.

The investor claimed that in 2018, as the company saw waning revenue for its digital data services segment, Innodata "suddenly began marketing itself as an AI company and represented that it had implemented AI and machine learning into its business."

During the class period, Grondin claimed, "Innodata engaged in AI washing and advertised its new supposedly AI-centered operations to investors, presenting its market opportunities as AI data preparation, AI model deployment and integration, and AI-enabled industry platforms."

The investor claimed the truth was revealed when the February 2024 short-seller's report was published. The suit references short-seller claims that the company's purported AI offerings were "smoke and mirrors," and the investor alleged that publication of the short-seller assertions pushed trading prices for Innodata shares down from over \$12 to under \$9, a decline of over 30%.

On Friday, Innodata and its brass characterized the short-seller report as a "hit piece," noting that since it saw shares dip over a year ago, its stock price is up. On Wednesday, market records showed Innodata shares trading at more than \$42, up significantly from the \$8.52 price associated with the end of its class period.

"But that did not stop plaintiff from filing the amended complaint, which continues to rely primarily" on the short-seller report, Innodata said in its dismissal bid.

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

Grondin is represented by Jeffrey C. Block, Jacob A. Walker and Sarah E. Delaney of Block & Leviton LLP and James E. Cecchi, Donald A. Ecklund and Kevin G. Cooper of Carella Byrne Cecchi Brody & Agnello PC.

Innodata, Abuhoff and Espinelli are represented by Harvey Bartle IV, Michael D. Blanchard and Christopher M. Wasil of Morgan Lewis & Bockius LLP.

The case is D'Agostino v. Innodata Inc. et al., case number 2:24-cv-00971, in the U.S. District Court for the District of New Jersey.

--Editing by Rich Mills.

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

Musk Opens Del. Appeal To Recover \$56B In Tesla Pay

By **Lauren Berg**

Law360 (March 11, 2025, 10:45 PM EDT) -- Elon Musk on Tuesday launched his Delaware Supreme Court appeal aimed at a Court of Chancery decision that had short-circuited the electric car company's 10-year, \$55.6 billion compensation plan for the celebrity CEO.



Elon Musk, pictured in 2023, and other **Tesla** directors told the Delaware Supreme Court on Tuesday that a lower court committed "legal error" when it tossed a 10-year, \$55.6 billion compensation plan for the CEO. (Leon Neal/Pool Photo via AP, File)

Musk and the other Tesla directors argued in their opening brief that the Chancery Court applied the "onerous" fairness standard to the compensation plan, rather than the proper business judgment standard, because the court concluded that Musk controlled the board during the transaction.

"That was legal error," the brief states. "Musk owned less than a quarter of Tesla's stock, had no power to dictate terms to the board, and did nothing to dominate or coerce the directors during the transaction. Musk therefore does not qualify as a controlling stockholder."

The directors argue that the Chancery Court's control analysis contradicts the appellate court's precedent, which holds that the concept of control is rooted in majority voting power or something equivalent, according to the brief.

"Fundamentally, the court conflated Musk's influence — which arose from his successful performance and value to the company — with control justifying heightened judicial scrutiny of informed business

decisions," the directors said.

The challenge to Musk's pay kicked off in 2018 with a derivative lawsuit from stockholder Richard J. Tornetta, who alleged Tesla's directors breached their fiduciary duty to shareholders by approving Musk's compensation package. He said the \$55 billion pay plan "was wholly unnecessary to properly incentivize Musk" given that he already had a reason to devote time and energy to the company based on his substantial equity stake.

The plan went to a weeklong trial in November 2022 after it was challenged by stockholders opposing the 10-year compensation scheme. It included 12 tranches or performance milestones that Musk had to meet before qualifying for a portion of the total, once estimated at as much as \$56 billion.

In the end, Chancellor Kathaleen St. J. McCormick struck down the compensation plan last January, finding disclosure failures, murky terms, conflicted director architects and the effect of Musk's influence warranted voiding the package.

Tesla's board reacted, after moving the company's corporate charter to Texas, by putting the pay to a **second vote** after the fact. But the chancellor in December **refused to reinstate** Musk's proposed pay, rejecting the "creative" ratification argument.

"At bottom, defendants seek to introduce a new fact that they created for the purpose of flipping the outcome of the post-trial opinion. Defendants do not cite to a single case where a court has provided such relief," she wrote.

Chancellor McCormick also rejected the plaintiff firms' bid for \$5.6 billion in freely tradeable Tesla shares — commenting in her decision, "In a case about excessive compensation, that was a bold ask" — but did approve a \$345 million attorney fee award.

In their opening brief Tuesday, Musk and the other Tesla directors argued that the Chancery Court not only adopted the wrong standard but then misapplied it. The directors contend that the court was wrong to require the defendants to prove that Musk wouldn't have worked for less money, the brief states.

"Rather than assess whether the plan was fair to Tesla and its stockholders, the court speculated that Musk might have agreed to perform the same services for less — or nothing — if the board had negotiated harder," the directors said.

"Meanwhile, the court disregarded key indicia of fairness, including the all-incentive structure of the plan, its significant limitations on Musk, its many stockholder safeguards, the monumental growth that it inspired, and stockholders' overwhelming support for it," they added. "That was reversible error."

In addition, the Chancery Court was wrong to reject the stockholders' 2024 ratification of the payment plan, according to the brief.

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

Musk and the other Tesla directors are represented by Alex Spiro, Christopher D. Kercher and Michael A. Barlow of Quinn Emanuel Urquhart & Sullivan LLP, Daniel Slifkin and Vanessa A. Lavelly of Cravath Swaine & Moore LLP, and David E. Ross, Garrett B. Moritz and Thomas C. Mandracchia of Ross Aronstam & Moritz LLP.

Tornetta has been represented in the underlying matter by Jeroen van Kwawegen, Gregory V. Varallo and Margaret Sanborn-Lowing of Bernstein Litowitz Berger & Grossmann LLP, Jeremy S. Friedman, Spencer M. Oster and David F.E. Tejtrel of Friedman Oster & Tejtrel PLLC and Peter B. Andrews, Craig J. Springer, David M. Sborz and Jackson E. Warren of Andrews & Springer LLC.

The case is In re: Tesla Inc. Derivative Litigation, case numbers 534-2024, 10-2025, 11-2025 and 12-2025, in the Supreme Court of the State of Delaware.

--Additional reporting by Jeff Montgomery. Editing by Andrew Cohen.

A Brief Look At Delaware's Divisive Corporate Law Bill

By **Jeff Montgomery**

Law360 (March 11, 2025, 4:59 PM EDT) -- Delaware state Senate Bill 21, up for a Judiciary Committee vote on Wednesday, overturns some provisions of landmark state Supreme Court rulings, from *Kahn v. M&F Worldwide Corp.* in 2014 to *In re Match Group* a decade later, which call for plaintiff-friendly entire fairness review for controller transactions.



The Delaware legislation would provide "safe harbor" provisions for actions or transactions involving one or more directors, officers or controlling stockholders and members of control groups with "interests or relationships that might render them interested or not independent." (iStock.com/marcusamelia)

If approved and signed into law by Gov. Matt Meyer, the bill would provide "safe harbor" provisions for actions or transactions involving one or more directors, officers or controlling stockholders and members of control groups with "interests or relationships that might render them interested or not independent."

Meyer commissioned a group to draw up the changes earlier this year, amid concerns that corporate agitation over costly losses in stockholder class cases would lead companies to reincorporate elsewhere, undermining an important state revenue source.

The measure has wide support from the nation's corporate law firms, including Wachtell Lipton Rosen & Katz, Skadden Arps Slate Meagher & Flom LLP and Delaware-headquartered Richards Layton & Finger PA, which provided a partner who compiled provisions of the legislation drawn up by a working group chosen by Meyer. The relatively fast-paced effort began after recent corporate moves out of Delaware in the wake of Court of Chancery decisions seen as tilted toward stockholders and away from precedent.

Supporters of the changes have warned that so-called DExits will continue without more business-friendly guardrails for breach of fiduciary duty and related claims, jeopardizing a body of law that now governs more than a million Delaware-chartered entities, representing two-thirds of the nation's Fortune 500 and contributing about 20% of the state's General Fund revenues.

Plaintiff-side attorneys have objected both to the proposed changes and to the fast-paced, largely closed process used to develop them. Bernstein Litowitz Berger & Grossmann LLP, a prominent class and plaintiff-side firm, branded the measure "a proposal to abandon the Delaware model of corporate law" and said: "Scholars and practitioners agree that the amendments would overrule decades of Delaware Supreme Court and Court of Chancery precedent, including dozens of seminal decisions."

"Far from 'balancing amendments,' S.B. 21 would disrupt the balance that Delaware courts have spent decades calibrating by radically shifting power to controlling stockholders — and away from the judiciary — to the detriment of investors," Bernstein Litowitz said.

Skadden Arps and others have pointed to recent Court of Chancery decisions described as addressing fundamental issues driving the redomestication debate, including director independence standards, controlling stockholder liability, and the scope of corporate books and records that must be made available to stockholders submitting a demand.

Provisions of the bill include measures to:

- Create a new path to business judgment deference now controlled by the Kahn decision if controller deals — excluding going-private transactions — are approved by a special committee of disinterested directors or a majority of votes by disinterested stockholders. Going-private deals are excluded. At present, Kahn, or "MFW," requires approval from both a special committee and a majority of informed minority stockholders.
- Permit business judgment deference for going-private transactions involving controlling stockholders if negotiated and approved or recommended by a committee of a majority of disinterested directors and approved or ratified by a majority of the votes cast by the disinterested stockholders.
- Allow approval by special committees with a majority of disinterested members, rather than a requirement for unanimous approval by disinterested special committee members, as set down in the Match Group decision.
- Make optional a requirement that special committee members choose their own counsel and advisers.
- Provide that controlling stockholders and control groups cannot be held liable for monetary damages for breaches of the duty of care under specified circumstances, including that a deal is "fair as to the corporation," provided requirements disclosure and voting hurdles are met.
- Satisfy duty of care obligations if special committees approve actions in good faith. Directors could not be held liable for monetary damages in their capacity as controlling stockholders or members of control groups.
- Limit the definition of controlling stockholder to include those with a majority of voting power in director elections or the equivalent of a third of votes in director elections, but a majority for directors who have a majority and power to direct a company's managerial actions.
- Automatically exculpate controlling stockholders or members of a control group from duty of care liability.
- Allow boards to apply stock exchange rules in determining director independence rather than currently more specific Delaware rules.
- Prohibit a presumption of a lack of independence on the part of a director if nominated or elected by an interested party or parties.

--Editing by Robert Rudinger.



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

BigLaw Firms Join To Support Del. Corporate Law Changes

By **Jeff Montgomery**

Law360 (March 11, 2025, 5:26 PM EDT) -- Twenty-one law firms with Delaware corporate practices have jointly endorsed pending state legislation, S.B. 21, that aims to narrow stockholder avenues for challenging corporate acts and clarify the definition of company controllers.

The letter to Gov. Matt Meyer and the General Assembly says the bill, recently described in terms that have ranged from necessary and corrective to radical and seismic, was a "bipartisan bill that provides greater clarity in Delaware corporate law."

The firms endorsing in the legislation are Cleary Gottlieb Steen & Hamilton LLP, Cravath Swaine & Moore LLP, Davis Polk & Wardwell LLP, Debevoise & Plimpton LLP, Freshfields LLP, Fried Frank Harris Shriver & Jacobson LLP, Gibson Dunn & Crutcher LLP, Goodwin Procter LLP, King & Spalding LLP, Kirkland & Ellis LLP, Latham & Watkins LLP, McDermott Will & Emery LLP, Milbank LLP, Paul Weiss Rifkind Wharton & Garrison LLP, Ropes & Gray LLP, Sidley Austin LLP, Simpson Thacher & Bartlett LLP, Skadden Arps Slate Meagher & Flom LLP, Sullivan & Cromwell LLP, Willkie Farr & Gallagher LLP and Weil Gotshal & Manges LLP.

During the state's "long history at the epicenter of American corporate law, Delaware has repeatedly adjusted its approach in order to modernize and respond to market developments," the letter said. "S.B. 21 is consistent with that continuing tradition."

Drawn up in recent months and up for a Senate committee vote on Wednesday, the bill includes new safe harbor protections for one or more directors, officers, controlling stockholders or control groups, shielding them from liability if they have interests or relationships that might render them "not independent" regarding deals or actions.

Cleansing measures for potential conflicts include disclosures of material facts on the relationships in question and ratification of corporate actions by a majority of disinterested stockholders or directors.

The bill also amends and limits stockholder inspection rights involving corporate records and provides that controlling stockholders and control groups cannot be held liable for monetary damages for breaches of the duty of care.

Details of the measure, the firms said, "will enhance clarity and will facilitate proactive evaluation of director appointments, conflicts cleansing and transactional planning."

The letter said the bill would help to "streamline corporate decision-making and transactional execution" while also attending to procedural protections, including use of majority independent special committees and votes of unaffiliated stockholders. Those features, the letter said, "have been central features of Delaware law for decades."

The measure would be retroactive, excluding pending actions and proceedings. It was spurred, in part, by several recent moves of high-profile former Delaware corporations, including Tesla and SpaceX, which have moved to Texas. Those moves added to perennial concern for the state's role as the corporate charter home for more than 1 million Delaware-incorporated business entities, including two-thirds of the Fortune 500.

Those corporate charters produce corporate franchise fees that account for more than 28% of state

general fund revenues, second only to the personal income tax.

Delaware's prominence as a hub for corporate charters and corporation law and reach of the legislation churned up debate in legal and commerce centers around the country in recent weeks.

The bill was highlighted at the annual Tulane University Corporate Law Institute last week, where opponent Ned Weinberger, a partner at plaintiffs firm Labaton Keller Sucharow LLP, told participants: "We are rewriting Delaware law. We're disempowering our courts, disempowering judges."

Former Delaware Supreme Court Chief Justice Leo E. Strine Jr., now of counsel at Wachtell Lipton Rosen & Katz, painted a different picture, saying on a different Tulane panel that "it's not honest to say there isn't widespread concern. Delaware's traditional response is to listen to its stakeholders."

Strine said separately later that "there has been legitimate concern from companies in every industry, in every region of the country about things becoming more unpredictable" in the First State.

Wachtell did not sign the firms' letter. Nor did Wilson Sonsini Goodrich & Rosati, another powerhouse corporate law firm whose partners include former Chancellor William B. Chandler III.

Wachtell founder Martin Lipton, however, posted on the Harvard Law School Forum on Corporate Governance in February comments including that the legislation in Delaware "will ensure that Delaware law gives full respect to the good-faith decisions of independent directors and recognizes the primacy of disinterested stockholders when they vote for a transaction."

Earlier, across the country, UCLA School of Law Professor Stephen M. Bainbridge wrote in November that "Delaware courts need a course correction. They have pushed the law governing controlling shareholders far beyond legitimate policing into unnecessary and unwise overregulation. This has prompted a backlash in which controllers threaten to reincorporate outside of Delaware, following Elon Musk's example of moving Tesla to Texas."

Legislative sponsors of the bill, led by Democratic Senate Majority Leader Bryan Townsend, a Morris James LLP attorney, said more recently that "uncertain standards or barriers to responsible options that cause widespread frustration among Delaware companies are not helpful to anyone."

--Editing by Brian Baresch.

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



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

Alaska's RICO Claims Advance Against PBM In Opioid Suit

By **Mark Payne**

Law360 (March 11, 2025, 6:06 PM EDT) -- An Alaska federal judge has allowed most of the state's Racketeer Influenced and Corrupt Organization Act claims to move forward against pharmacy benefits manager Express Scripts for its alleged role in the opioid epidemic.

U.S. District Judge Sharon L. Gleason wrote in a 50-page order on Monday that Express Scripts must face claims that the company potentially engaged in fraudulent concealment and misrepresented its role in the epidemic but dismissed claims for the state's request for equitable relief.

A spokesperson for Alaska Attorney General Treg Taylor said in a statement that the state is pleased with the decision to allow it to pursue its RICO claims against the PBM.

"The court's decision permits the state to continue to seek relief against participants in the opioid industry for their role in creating the opioid epidemic that has caused substantial harm to Alaskans," the spokesperson said.

The decision comes less than a year after U.S. District Judge Joshua M. Kindred handed the state **another win** in May 2024, allowing public nuisance and other claims to proceed against Express Scripts and its subsidiaries. In that order, Judge Kindred allowed those state claims to move forward after the PBM had removed the lawsuit to federal court and then sought to dismiss the case.

While the motion to dismiss the public nuisance claims was in limbo, Alaska amended its complaint to allege Express Scripts violated the RICO Act. In the second amended complaint, the state alleged the PBM purposefully misrepresented its role in the opioid epidemic and manipulated the public and government over its assurance to prevent drug abuse.

"These allegations, if proven, could establish that Express Scripts engaged in wrongful concealment of the facts underlying the state's claim for relief," Judge Gleason said in her Monday order.

Express Scripts moved to dismiss the RICO claims, arguing that only the U.S. Attorney General can seek equitable relief, the state's amended action was time barred and it doesn't have standing to bring a RICO claim.

However, the judge said the state has standing and that with the claim moving forward, the court would determine the state's potential recoverable damages, but that damages would be limited to those under the RICO Act.

Furthermore, the order allows the state to amend its complaint regarding the time barred issue under the separate accrual rule for its claims. Judge Gleason also denied Express Scripts' request for a partial pause of discovery while a separate state claim plays out in the state's Supreme Court.

The decision is the latest blow to PBMs, which have become the focus of opioid litigation claims in recent years, as opposed to others in the drug supply chain, but others, such as pharmacies, have also **faced claims**.

The spokesperson for Attorney General Taylor told Law360 in a statement that the state has obtained roughly \$100 million from defendants for its litigation efforts against those who allegedly played a role in the opioid scourge.

Express Scripts didn't immediately respond to a request for comment.

Express Scripts Inc. and its subsidiaries are represented by Michael J. Lyle, Jonathan G. Cooper, Christopher G. Michel and Nolan Anderson of Quinn Emanuel Urquhart & Sullivan LLP.

The state of Alaska is represented by Attorney General Treg Taylor and Margaret Paton Walsh of the state Department of Law; Linda Singer, Elizabeth Smith and Christopher F. Moriarty of Motley Rice LLC; and David Karl Gross and Mara E. Michaletz of Birch Horton Bittner & Cherot.

The case is the state of Alaska v. Express Scripts Inc. et al., case number 3:23-cv-00233, in the U.S. District Court for the District of Alaska.

Additional reporting by Theresa Schliep and Dan McKay. Editing by Drashti Mehta.

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



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

Zydus Cuts Deal With States, Tribes In Opioid Nuisance Suit

By **Jonathan Capriel**

Law360 (March 11, 2025, 8:30 PM EDT) -- Zydus Pharmaceuticals Inc. has reached a deal in principle with states and Native American tribes that should quash claims related to the company's alleged role in exasperating the opioid crisis.

U.S. District Judge Dan Aaron Polster, who oversees the sprawling multidistrict litigation targeting opioid manufacturers, distributors, and pharmacies, signed off on the establishment of a settlement fund that Zydus will pay into, according to a five-page order issued Tuesday.

The exact amount Zydus, and its subsidiary Nesher Pharmaceuticals, will pay into the fund remains confidential, but they are supposed to fill the fund by April 23, 2025.

The settlement fund is part of a broader effort to resolve claims against Zydus, which has been accused of contributing to the opioid crisis alongside other pharmaceutical companies. Companies named in the MDL have been accused of downplaying the risks of opioids and failing to monitor suspicious orders, fueling a nationwide epidemic.

Terms of the settlement with Zydus are still being hammered out. But the order does say that the money put in the fund will go back to Zydus unless a "certain percentage," yet to be fleshed out, of the states and tribes sign on to the settlement. Additionally, the deal will require that all signatories must forsake "all pending and threatened future claims," the order said.

Judge Polster set a deadline for the settlement to be finalized by Sept. 1.

Additionally, the order assigned as "settlement referee" BrownGreer PLC.

The plaintiffs' executive committee is represented by Jayne Conroy of Simmons Hanly Conroy LLP, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller and Peter H. Weinberger of Spangenberg Shibley & Liber LLP.

Zydus is represented by Lauren S. Colton of Hogan Lovells US.

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

--Editing by Emily Kokoll.

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



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

Publix's Suit Over Ga. County's Private Attys 'Beyond Reason'

By **Chart Riggall**

Law360 (March 11, 2025, 4:11 PM EDT) -- Publix can't sue a metro Atlanta county to force it to drop its private attorneys who filed an opioid suit against the supermarket chain, the Georgia Court of Appeals has said, ruling that the company "fails to show what right the county has violated by its choice of counsel."

A three-judge panel of the appellate court on Monday backed trial court's dismissal of Publix's suit against Rockdale County, which alleged that the county unconstitutionally hired Napoli Shkolnik PLLC on a contingency fee basis to litigate its nuisance suit over the store's sales of prescription drugs.

The move to invalidate the county's retention of the lawyers was well beyond the scope of what's allowed under Georgia's declaratory judgment act, the panel said.

"The complaint shows that the declaratory judgments Publix seeks are limited to voiding the county's arrangements with the specific law firm in that specific federal case, to which Publix was a party," Judge Todd Markle wrote for the court.

"In this same respect, we note that the relief Publix seeks would require a state trial court to, in essence, disqualify attorneys involved in a federal lawsuit, straining beyond reason all notions of comity between these courts," he added.

While the court said a Rockdale County judge had correctly tossed the suit, the panel clarified that the judge's doing so under Georgia's anti-SLAPP statute was unnecessary because the case was plainly "nonjusticiable."

The suit between Publix and the county, according to the **opinion**, originated with Rockdale County's participation in a federal suit over the store's opioid sales. Publix would later allege that Napoli Shkolnik had solicited the county to join the suit as part of a pattern of recruiting governments into their litigation.

"These lawyers are among a group of private plaintiffs' lawyers who convince states, cities, and counties to hire them to sue opioid manufactures, distributors, and in some cases dispensing pharmacies and stand to gain a substantial amount of money because they take a percentage of the money paid to settle the claims," Publix claimed in its 2023 complaint.

Eventually, Publix would be dropped from the suit, and the supermarket responded by suing the county, alleging that its hiring of the firm was illegal.

But in March 2024, Rockdale County Superior Court Judge Robert Mumford would find that there was "no legitimate public policy reason" for the county to not be protected under the anti-SLAPP law.

"Publix has no legally recognized right against the county's retention of counsel to pursue opioid tort litigation on a contingent fee basis," Judge Mumford wrote as he granted the county's dismissal bid.

In this week's opinion, the Court of Appeals agreed that Publix had no right to interfere with the county's legal contract with Napoli Shkolnik, adding that because the company had been dismissed from the federal case, the dispute was moot anyway.

The court also rejected Publix's bid for a declaratory judgment that would state its "operations in Rockdale County do not constitute a public nuisance."

"Looking again to the language of the complaint, the sole risk Publix identifies is that the county may again name it as a defendant in the federal action," Judge Markle wrote. "This claim is merely an end-run around any future opioid litigation against Publix, and is thus an impermissible basis for a declaratory action."

Judges Todd Markle, Benjamin Land and Jeffrey Davis sat on the panel for the Georgia Court of Appeals.

Napoli Shkolnik's Hunter Shkolnik told Law360, "Publix knew full well their lawsuit was frivolous and should never have embarked on this fool's errand."

Counsel for the parties could not immediately be reached for comment Tuesday.

Publix is represented by William Patrick Eiselstein, Michael P. Kohler and Robert Foust Parsley of Miller & Martin PLLC.

Rockdale County is represented by Jason Christopher Waymire of Williams & Waymire.

The case is Publix Super Market Inc. v. Rockdale County, case number A24A1391, in the Court of Appeals of Georgia.

--Editing by Rich Mills.



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

Fla. Court Urged To Remove Cigna Claims Processor In MDL

By **David Minsky**

Law360, Miami (March 11, 2025, 9:43 PM EDT) -- Cigna Healthcare on Tuesday urged a Florida federal court to remove a settlement claims processor in a long-running multidistrict litigation case involving alleged underpaid insurance reimbursements to medical providers, telling a judge that the company has misspent more than \$25 million in funds meant for members of a class action within the MDL.

Representing Cigna before U.S. District Judge Federico Moreno during a hearing in Miami, Marty Steinberg of Hogan Lovells argued that Managed Care Advisory Group LLC should pay the money back with interest and be removed from overseeing claims because it breached its role as a fiduciary when it dipped into the settlement fund to pay for costs not authorized by the court.

"MCAG's expenses should be charged to MCAG, not the class, and yet for the purposes of fighting this fight against their misuse of class funds, they now claim that MCAG's own expenses should be charged against the class," Steinberg said.

The litigation began in 1999 over claims that Cigna and other managed care insurance companies improperly rejected medical provider claims. In 2000, multiple lawsuits were consolidated as a multidistrict litigation in the Southern District of Florida.

Cigna reached a settlement with the hundreds of thousands of physicians in the class in September 2003. Under the agreement, class members could pursue compensation either from a fixed fund or they could resubmit claims with proof-of-claim and supporting documentation, which the settlement agreement called "category two" claims.

In 2005, Cigna and MCAG entered arbitration over a category two claims dispute. The arbitrator allowed MCAG's claims to be reprocessed in 2007, although the question remained whether the category two claims were viable, court records show. In November 2023, Judge Moreno vacated the \$16 million final arbitral award after finding that the settlement agreement barred MCAG's resubmitted claims. MCAG filed an appeal of the ruling to the Eleventh Circuit, which is pending and tentatively scheduled for oral arguments on June 2.

As the lower court proceedings progressed, however, Cigna said it learned that more than \$25 million of the settlement funds were misspent and made a bid to stay arbitration, although the court granted MCAG's motion to enforce arbitration, which was followed by Cigna's appeal in 2017. In the Eleventh Circuit's opinion issued in 2019, the appellate court compelled an accounting of funds that were paid.

Cigna brought a motion in 2020 alleging litigation abuse against MCAG, saying the claims processor depleted the settlement fund with attorney fees through wrongly obtained physician agreements without court approval and after counsel was already awarded \$55 million.

Additionally, Cigna alleged that MCAG used \$4.8 million of the settlement funds to pay for an unrelated litigation settlement. Other than the alleged misappropriated settlement funds, Cigna said MCAG should be ordered to pay interest totaling more than \$6.8 million.

Steinberg urged Judge Moreno to hand the matter over to the U.S. Department of Justice.

"Do I have authority to refer something to DOJ? Where does that come from?" Judge Moreno said, to

which Steinberg replied, from the "general powers of the court."

Jeff Gutchess of AXS Law Group, representing MCAG, told the court that the reason why this case has cost so much is due to Cigna not fulfilling class members' claims in the first place.

"One of the questions the court has to answer is did MCAG act in good faith in these past 20 years in pursuing Cigna and using these funds to do so?" Gutchess said. "We think the answer is unquestionably that they acted in good faith."

Gutchess admitted that the \$4.8 million was taken out of the fund, but was later put back in, and told the judge he could conclude that MCAG was operating in good faith because the money was returned.

Judge Moreno didn't rule from the bench but expressed some thoughts, including that he was concerned about the commingling of funds and the amount of money that Cigna says should be paid back. The judge told the parties to expect a ruling in the summer.

"No matter how I rule, there's bound to be an appeal," Judge Moreno said.

Cigna is represented by Marty Steinberg and Alvin F. Lindsay III of Hogan Lovells.

MCAG is represented by Jeff Gutchess of AXS Law Group and Andrew H. Selesnick of Buchalter Law Firm.

The case is In re: Managed Care Litigation, case number 1:00-md-01334, in the U.S. District Court for the Southern District of Florida.

--Editing by Melissa Treolo.

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



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

NCAA Name, Image, Likeness Settlement Is A \$2.8B Mistake

By **William Lavery and Dodi Allocca** (March 11, 2025, 4:47 PM EDT)

In *House v. National Collegiate Athletic Association*, in the U.S. District Court for the Northern District of California, objectors **filed** more than 20 objections and submitted more than 60 letters opposing the NCAA's \$2.8 billion antitrust settlement on the court's Jan. 31 objection deadline.

Over the following weeks, around 250 former collegiate athletes who opted out of the settlement also launched a new round of lawsuits or joined existing suits.[1]

These moves aren't trivial formalities. They're a full-throated rejection of the idea that this settlement is a win for fairness.

While the plaintiffs' lawyers and their clients might call the settlement a breakthrough, in reality, it's nothing more than a slap in the face — a half-hearted, legally dubious Band-Aid that props up a system favoring a select handful of male athletes, mostly from Power 4 conference schools, while female athletes and countless others get left out.

This proposed settlement, which **received** preliminary approval on Oct. 7, 2024, and is set for its final approval hearing on April 7, isn't bold reform or a radical rethinking of fair compensation in college sports.

Instead, it's a cheap fix that settles three lawsuits, while at the same time locking in outdated gender inequities and setting the stage for even more legal battles down the road.

College athletes deserve better. If we're going to reform compensation in college sports through binding settlement agreements — a terrible idea — the new rules must deliver real fairness, rather than merely entrench an outdated system that rewards a select few while leaving the rest to pick up the scraps.

A Deal for the Few, Not the Many

At first glance, a \$2.8 billion settlement is a big number, and some of its revenue-sharing provisions look like a victory for college athletes.

But peel back the layers, and you uncover a rigged payout scheme where a select few — mostly male football and basketball players from major conferences — cash in, while thousands of other athletes, particularly women, are left with virtually nothing.

One objector pointed out that while some male athletes might pocket over \$100,000, many female athletes are slated to get as little as \$125.[2] This isn't just a minor oversight — it's a stark reminder of how deeply entrenched gender disparities undermine the integrity of college sports.

Some of the plaintiffs' attorneys have tried to deflect criticism by insisting this is solely an antitrust case — not a Title IX issue — arguing that schools must comply with Title IX anyway. But this rationale is flawed.

If schools are legally bound to comply with Title IX, how can they implement a revenue-sharing model that virtually guarantees disproportionate name, image and likeness, or NIL, payments to men's teams?



William Lavery



Dodi Allocca

And does anyone really believe that boosters are entirely independent of the schools themselves?

The plaintiffs also rely on technicalities and incorrect assumptions for their position — for example, arguing in their omnibus response to objections that historical disparities in revenue between men's and women's sports somehow justify permanently embedding those inequalities into the settlement.[3]

This cynical view undermines Title IX's fundamental purpose: ensuring gender equity, not codifying past discrimination.

Though designed to address antitrust concerns, this settlement effectively sets the framework for athlete compensation in a way that cements gender inequities. It imposes binding financial obligations on NCAA schools that will collide with Title IX.

This isn't simply an antitrust fix — it's a giveaway to the few at the expense of everyone else.

Ignoring Alston's Warning

The NCAA's agreement also not only sidesteps, but effectively ignores, the landmark 2021 U.S. Supreme Court **decision** in NCAA v. Alston.

In that case, the court made its position unequivocally clear — with Justice Brett Kavanaugh emphasizing that the compensation restrictions imposed on college athletes would be "flatly illegal in any other business in America."

By preserving outdated limits and instituting new ones, the settlement echoes practices the court struck down. This isn't progress — it's a rehash of old practices in a new, legally dubious package.

The U.S. Department of Justice seems to agree. In a Jan. 17 filing, the DOJ warned that the settlement's artificial caps on athlete compensation do nothing to eliminate antitrust issues; they merely disguise them.[4]

As the Supreme Court said, in virtually every other industry in America, such caps would be flatly illegal. Yet here, they serve to delay a reckoning that's long overdue.

A Financial Model That Sows Instability

Beyond its inherent unfairness, the settlement compounds existing problems in college sports. With the disruptive forces of NIL money, conference realignments and a transfer portal that's turned team rosters into revolving doors, this deal adds another layer of instability.

Clemson University Athletic Director Graham Neff is one of the few who has spoken publicly about trying to make it work, noting that Clemson would be funding its share and adding scholarships.

But most schools, especially those outside the Power 4, won't have that luxury. For every Power 4 school, countless smaller schools will be forced to slash programs or compromise on Title IX commitments just to stay afloat.

College sports, already teetering on the edge of financial chaos, with recent reports that many athletic departments are already operating on thin margins, now face a model that prioritizes high-revenue programs at the expense of a more balanced and equitable system.[5]

Some coaching legends also see the move as misguided. Former Alabama football head coach Nick Saban — not known for his subtlety — summed it up nicely: "All the things that I believed in, for all these years ... no longer exist in college athletics ... why are we doing this?"

And as Clemson's head football coach Dabo Swinney put it, college sports are turning into "wackyland." [6] This settlement isn't bold reform or a genuine rethinking of athlete compensation — it's a short-term fix that buries deep-seated inequities under a veneer of legal technicality.

A Call for Real Reform

This settlement is a short-term patch that will only perpetuate inequality and invite further litigation. It

institutionalizes a model that benefits the few while sidelining female athletes and smaller institutions, all under the guise of antitrust relief.

Instead of celebrating this \$2.8 billion payout as justice served, we should recognize it for what it is: a missed opportunity for meaningful reform in college sports.

It's time for policymakers, courts and the NCAA to get serious. The status quo — where male athletes in marquee sports cash in big, while others get left behind — can no longer be tolerated.

Perhaps it's time to rethink an antitrust exemption for the NCAA. Rather than going from lawsuit to lawsuit — as more seem to be filed almost on a weekly basis at this point — it's time for Congress to step in and create a clear, cohesive framework.

This framework needs to take into account fairness, compliance with antitrust laws, and the principles of amateurism. Such a framework could balance fair compensation for athletes with the principles of education and opportunity that college sports are supposed to represent.

At minimum, any deal needs to serve all athletes without compromising Title IX. Anything less is not just shortsighted — it's a blatant violation of the integrity of collegiate athletics.

William Lavery is a partner and Dodi Allocca is an associate at Clifford Chance LLP.

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] See *Fontenot et al. v. NCAA*, 1:23-cv-03076 (D. Col.); *Hill et al. v. NCAA*, 4:25-cv-01011 (N.D. Cal.); *Allen et al. v. NCAA*, 2:25-cv-00014 (E.D. Ky.).

[2] *Objection to Amended Settlement Agreement and Opposition to Final Settlement Approval Based on Failure to Apply Title IX and Request to Speak at Approval Hearing*, ECF No. 618, 4:20-cv-3919 (Jan. 31, 2025).
https://static1.squarespace.com/static/5ad3f3d836099b72e443cc35/t/67a0ed4ca579026b85cdda09/1738599771132/show_temp+%2835%29.pdf.

[3] See *Plaintiffs' Motion for Final Settlement Approval and Omnibus Response to Objections*, ECF No. 717, 4:20-cv-3919 (Mar. 3, 2025).

[4] *Statement of Interest of United States of America*, ECF No. 595, 4:20-cv-3919 (Jan. 17, 2025), <https://fingfx.thomsonreuters.com/gfx/legaldocs/akveeldazvr/DOJ%20statement%20NCAA%20NIL.pdf>.

[5] See, e.g., *Several Big Ten Universities Bleed Red Ink In Their Athletics Budgets*, *Forbes* (Jan. 28, 2025) <https://www.forbes.com/sites/michaelnietzel/2025/01/28/several-big-ten-universities-bleed-red-ink-in-their-athletics-budgets/> ("A recent *Forbes* article reported that many schools are struggling with deficits due to rising costs like coaching salaries, facility maintenance, and compliance expenditures. And the NCAA's financial model already resulted in concentrated revenue among a few elite programs. With the new NIL rules and NCAA settlement, if approved, revenue and resources would likely flow even more toward high-profile programs at Power 4 schools, further disadvantaging smaller schools").

[6] *Clemson AD Neff says school will fully fund NCAA settlement and add 150 scholarships in two years*, *Associated Press* (Nov. 26, 2024), <https://apnews.com/article/clemson-neff-ncaa-settlement-740c62b8d694d437ceba1e77618ea32b>.



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

'Paucity' Of Proof Thwarts NC State Law Claims In Gardasil MDL

By **Emily Field**

Law360 (March 11, 2025, 10:13 PM EDT) -- A North Carolina federal judge has found that Merck did not violate state law by not including warnings about its Human Papillomavirus vaccine Gardasil, saying there was a "paucity" of evidence that the vaccines cause certain injuries to recipients.

U.S. District Judge Kenneth Bell said that Merck did not have enough evidence that there was a causal association between the vaccine and postural orthostatic tachycardia syndrome or primary ovarian insufficiency. The plaintiffs argue that such an alleged link should have been put on warning labels by 2013, at which time more than a hundred million doses of Gardasil had been administered.

But there had only been one verified case of POTS and four cases of POI, the judge said.

"Simply put, no scientist could reasonably conclude there is a causal association between POTS and POI and Gardasil based on this paucity of evidence, even putting aside the fact that the FDA was made aware of all these cases and studies (which raises a question whether they can even qualify as 'newly acquired information')," the judge said. "Therefore, the court concludes that Merck did not have the authority under federal law to unilaterally add plaintiffs' requested warnings to the vaccine's label."

The judge also noted that requiring evidence about POI is important because it involves infertility.

"Raising the possibility of losing the ability to have children among a population of young women and their parents (who hope to be grandparents) might well significantly discourage use of a vaccine that has prevented innumerable deaths from cancer," he said.

Merck has been hit with lawsuits related to Gardasil, which is administered to prevent HPV and the cancers the virus causes. Many plaintiffs have complained of health problems, including autoimmune disorders, neurologic issues and other serious complications.

In August, the judge **threw out** claims from four patients in the MDL, saying three of them didn't file a petition with the federal vaccine injury program on time, while the fourth never filed his petition at all.

According to the order, under the National Childhood Vaccine Injury Act, a person seeking damages for an alleged vaccine injury must file a petition in so-called "Vaccine Court" before they can file a civil action, and that petition must be filed within three years of when the injury manifests.

First, Judge Bell dismissed plaintiffs Junious Nielsen's claims, as he had not filed a petition in the first place, nor did he file a response or appear at a hearing to oppose the motion to dismiss.

Plaintiffs Tessa Needham, Angela Walker and Shane D. Roman first experienced symptoms in 2015, 2016 and 2009, respectively, but did not file their petitions until 2023, according to the order. The Vaccine Court dismissed their claims as untimely, and none of them appealed the dismissals to the Court of Federal Claims or the Federal Circuit before they filed their civil actions, the judge wrote.

The court noted that HPV vaccines are "remarkably effective," and that Gardasil is "a vaccine that has prevented innumerable deaths from cancer." In reaching its conclusion, Judge Bell explained that "federal law requires more than speculative inferences prior to adding dire warnings to lifesaving

vaccines that discourage their use."

He went on to say that, "simply put, no scientist could reasonably conclude there is a causal association between POTS and POI and Gardasil based on this paucity of evidence."

The plaintiffs are represented by Paul J. Pennock of Morgan & Morgan, K. Rachel Lanier of the Lanier Law Firm PLLC, and Bijan Esfandiari Wisner Baum and Allison Mullins of Mullins Duncan Harrell Russell PLLC.

Merck is represented by Allyson M. Julien of Goldman Ismail Tomaselli Brennan & Baum LLP, and David C. Wright III of Robinson Bradshaw & Hinson PA.

The case is In re: Gardasil Products Liability Litigation, case number 3:22-md-03036, in the U.S. District Court for the Western District of North Carolina.

--Editing by Adam LoBelia.

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



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

Vegan Co. Huel Hit With Class Action Over Quality Of Protein

By **Jonathan Capriel**

Law360 (March 11, 2025, 7:14 PM EDT) -- Vegan meal and supplement company Huel Ltd. misled consumers into thinking its protein powders were made with high-quality protein when in reality it's made with inferior ingredients that can't be digested as easily, according to a proposed class action filed in California federal court by a health-minded San Jose resident.

Protein is important for building muscle and reaching fitness goals, which is why lead plaintiff Aykut Sarayli and "millions of Americans" track their protein intake daily, according to the lawsuit filed Monday. Sarayli turned to Huel's chocolate-flavored Black Edition Vegan Protein Powder to make sure he hit his goals.

But after about 16 months of using the powder, Sarayli learned that the product's promised 40 grams of protein per serving were negated by the fact that they were derived from inferior sources, peas and rice, the suit said.

In the protein rankings, these foods fall lower than many others because about 30% of the protein in them can't be absorbed by the human body through digestion, the suit said.

Foods like eggs, milk and whey have high-quality proteins that are almost totally absorbed when eaten, the suit said. For vegans, there are vegetable substitutes that Huel could have used instead, such as soy, which has a protein bioavailability score rivaling those animal products, the lawsuit said.

"Unless they are told otherwise, consumers reasonably expect that [Huel's] products will actually provide the full amount of bioavailable protein per serving claimed on the front of the package and stated in the protein quantity section of the nutrition facts panel, i.e., that the products contain high quality proteins," the suit said. "But Defendant's products do not. Instead, they consist of low-quality proteins that are not bioavailable."

The lawsuit seeks damages for unjust enrichment, breach of express warranty and for violations of California's Consumer Legal Remedies Act.

The lawsuit also claims that Huel misled consumers in a way that is explicitly forbidden by the U.S. Food and Drug Administration. Federal regulation requires food makers to label the protein levels in a manner that matches with how they stack up on the protein digestibility-corrected amino acid score, or PDCAAS.

For example a high-quality protein, like whey, has a PDCAAS score of 1 — the highest possible score — while peas have a score of .7, according to the lawsuit.

So, under the FDA rules, a whey-based protein powder with 10 grams of protein per serving can legally have a label that advertises the full 10 grams. But, the lower-quality pea-based powder of similar protein content needs to be "corrected" to say 7 grams, the lawsuit said.

Counsel information for Huel wasn't immediately available.

Sarayli is represented by Charles C. Weller of Charles C. Weller APC.

The case is Sarayli v. Huel Ltd., case number 5:25-cv-02406, in the U.S. District Court for the

Feds Turn To FCA As Enforcement Weapon In Opioid Crisis

By **Dan McKay**

Law360 (March 11, 2025, 4:54 PM EDT) -- Federal prosecutors are expanding their use of the False Claims Act to target pharmacies accused of contributing to the opioid crisis, a legal strategy that exposes the defendants to hefty penalties, according to a new law firm healthcare fraud report.

A series of recent FCA cases demonstrates the government's commitment to using the anti-fraud law to go after pharmacies accused of filling prescriptions in violation of the Controlled Substances Act, said lawyers at Bass Berry & Sims PLC.

Lawsuits filed under the False Claims Act allow prosecutors to seek triple damages and other stiff penalties.

"DOJ has made fighting the opioid epidemic a key enforcement priority in recent years, and with good reason," Matthew M. Curley, a Bass Berry attorney and co-chair of its healthcare fraud and abuse task force, told Law360. "We have increasingly seen DOJ working up the distribution and supply chain to target pharmacies, hospitals and other healthcare providers."

The targeting of pharmacies is one of a host of trends highlighted in the 97-page report released last week. It's Bass Berry's 13th annual healthcare fraud and abuse review.

The firm also noted the uncertainty facing healthcare fraud enforcement with a new presidential administration in office, a constitutional challenge to FCA's qui tam provision awaiting action at the 11th Circuit and other court decisions shaping the legal landscape.

In the report, Bass Berry attorneys say state and federal regulators have responded to the opioid crisis with a steady uptick in enforcement action against pharmacies and other healthcare entities. Litigation under the False Claims Act is increasingly part of those efforts.

In December, the government reached an \$8 million settlement with grocery chain Food City to resolve allegations that it violated the FCA by improperly dispensing opioids. Also that month, the government intervened in an FCA qui tam case against CVS pharmacies centering on opioid prescriptions.

In July, Rite Aid agreed to a \$7.5 million payment to help resolve FCA allegations involving opioids. The Department of Justice also obtained a \$402 million claim in the drugstore chain's pending bankruptcy.

In all three cases, the government alleges the pharmacies violated the FCA when they sought reimbursement from federal healthcare programs for prescriptions filled in violation of the Controlled Substances Act, according to the report.

The DOJ contends pharmacists must investigate and resolve all red flags before they dispense prescriptions for controlled substances as part of their joint responsibility with the doctors who write prescriptions.

"Such cases signal the government's endorsement of this sort of FCA theory of liability," said Lisa S. Rivera, a former federal prosecutor and co-chair of the controlled substances enforcement and diversion practice at Bass Berry. "DOJ and whistleblowers undoubtedly will perceive CSA-based FCA

cases as potential high-dollar opportunities for recovery."

Legal Uncertainty

A second theme running through the report is the uncertainty created by the arrival of new leadership at the DOJ and other federal agencies, in addition to defense-friendly court decisions.

Curley said he expects a "a return to the same emphasis on deregulation that was a hallmark of the first Trump administration."

But FCA enforcement has enjoyed bipartisan support and is likely to continue without much change. The Bass Berry report notes that civil fraud recoveries have remained relatively constant across recent presidential administrations.

Less certain is the potential impact of defendants' push to rein in the False Claims Act and its frequent companion, the Anti-Kickback Statute.

A Florida federal judge ruled in September that allowing whistleblowers to possess civil enforcement authority violates the appointments clause of the U.S. Constitution. The federal government has appealed to the 11th Circuit, where the case is now **pending**.

A recent 1st Circuit ruling also added to the defense bar's momentum toward a tough standard for using the FCA to prosecute illegal kickbacks. It was the third decision in a row by a federal appellate panel saying that prosecutors and whistleblowers must show that a fraudulent federal reimbursement claim wouldn't have been submitted if not for an illegal kickback.

The Third Circuit is the only appellate court to have adopted a less demanding standard, requiring only some link between a kickback violation and the reimbursement claim.

Rather than a change in strategy by the Trump administration, legal challenges to the FCA and Anti-Kickback Statute "are far more likely to disrupt enforcement efforts," Curley told Law360.

"There can be little doubt that some of these challenges will eventually find their way to the Supreme Court," he said.

The report also notes last year's explosion in qui tam lawsuits filed by whistleblowers, a record-breaking number **fueled at least partly** by allegations of fraud in programs that provided COVID-19 pandemic relief.

The Department of Justice has also increased its litigation under the Civil Cyber Fraud Initiative, which uses the FCA to attack cybersecurity-related fraud by government contractors.

But healthcare fraud is likely to remain a priority for FCA enforcement, Curley said.

"Within the healthcare industry, we have continued to see DOJ and whistleblowers devote their efforts, in significant part, to False Claims Act lawsuits alleging underlying violations of the Anti-Kickback Statute," including concerns about physician compensation and improper referral income, Curley said.

--Additional reporting by Daniel Wilson. Editing by Marygrace Anderson.