Bloomberg Law

REITs’ Merger Proxy Deceived Broadmark Investors, Lawsuit Says

May 29, 2025, 9:44 AM PDT

- **COURT:** W.D. Wash.
- **TRACK DOCKET:** No. 2:25-cv-01013 (Bloomberg Law subscription)

Broadmark Realty Capital Inc. investors voted in favor of a 2023 merger into Ready Capital Corp. based on misleading proxy materials, according to a suit over the combined company’s post-merger performance.

The materials that the real estate investment trusts presented to Broadmark investors failed to adequately disclose the risks associated with Ready’s real estate lending portfolio, Brian Grant says. Grant and two funds associated with him filed the proposed class action against Broadmark, Ready, their directors and top executives, and external asset manager Waterfall Asset Management LLC on Wednesday in the US District Court for the Western District of Washington.

Some REIT mergers have led to litigation in recent years. Cedar Realty Trust Inc. preferred stock owners failed to state viable claims against directors who allegedly froze them out when setting up a merger with Wheeler Real Estate Investment Trust, which was allegedly in financial distress. But a NexPoint Advisors LP unit agreed in February to pay $12 million to settle class securities claims on behalf of an acquired self-storage REIT’s shareholders.

Grant says Broadmark and Ready failed to disclose that many Ready borrowers “were experiencing significant financial distress due to high interest rates” and that a major development project for a hotel “had experienced catastrophic setbacks,” among other problems.

There are hundreds of members of the proposed class, the complaint estimates.

Grant and his funds seek compensatory and rescissory damages on their claims of false and misleading proxy statements.

Ready didn’t immediately respond to an emailed request for comment on behalf of itself, its unit that was formerly Broadmark, and the individual defendants. Waterfall didn’t immediately respond to a phone message seeking comment.

Keller Rohrback LLP and Robbins Geller Rudman & Dowd LLP represent Grant and his funds.

The case is Grant v. Broadmark Realty Cap. Inc. , W.D. Wash., No. 2:25-cv-01013, complaint 5/28/25 .

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Bloomberg Law

UnitedHealth Investor Drops Medicare Suit, Deferring to CalPERS

May 29, 2025, 7:00 AM PDT

A UnitedHealth Group Inc. investor dropped his proposed class action filed after the murder of its insurance arm's CEO and backlash, deferring to a previously filed securities lawsuit that incorporated similar claims about the company's Medicare business.

Investor Roberto Faller voluntarily dismissed his complaint in the US District Court for the Southern District of New York Wednesday given California Public Employees' Retirement System's pending proposed class action in the District of Minnesota. CalPERS, appointed lead plaintiff in Minnesota almost a year ago, told the New York judge it had had moved to boost its lawsuit with similar allegations since the December killing of UnitedHealthcare CEO Brian Thompson two days before Faller filed his May 7 complaint.

- UnitedHealth share prices plummeted more than 22% April 17 after the insurer slashed its 2025 profit outlook, indicating "heightened care activity" for Medicare Advantage beneficiaries. It was the stock's steepest one-day fall since 1998, according to data compiled by Bloomberg
- This cut signaled its Medicare business shift as individuals and policymakers scrutinized UnitedHealth's practices, CalPERS' newest complaint filed May 14 said
- CalPERS seeks to represent a class of investors from Sept. 22, 2021, through April 16, 2025

The Rosen Law Firm PA represented Faller. Robbins Geller Rudman & Dowd LLP is lead counsel for CalPERS, which also alleges UnitedHealth engaged in anti-competitive practices, among other claims. Neither firm immediately responded to an email seeking comment. Nor did UnitedHealth and its insurance subsidiary.

The case is Faller v. UnitedHealth Group Inc. , S.D.N.Y., No. 1:25-cv-03799, voluntarily dismissed 5/28/25 .

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Securities Law News

Checkpoint Investor Sues for Info on Sale From Fortress to Sun

May 28, 2025, 10:23 AM PDT

- **COURT:** Del. Ch.
- **TRACK DOCKET:** No. 2025-0587

Checkpoint Therapeutics Inc.'s planned $355 million sale to Sun Pharmaceuticals Inc. will likely siphon value from public investors and steer it to Fortress Biotech Inc., according to a lawsuit filed Wednesday.

A shareholder sued Checkpoint for deal-related documents, saying public information suggests the transaction was designed to favor Fortress, which owns a majority of the clinical-stage oncology company. The acquisition—announced in March and expected to close in June—reflects a push by Mumbai-based Sun, India's largest drugmaker, to grow its US footprint as it seeks to expand beyond its traditional focus on generics.

The sale will hand Checkpoint's investors $4.10 a share in cash, along with contingent value rights worth up to $0.70 a share based on post-deal milestones. That's "a sharp discount to the Wall Street price target," which averaged $12 a share just days before the deal announcement, indicating "substantial value was diverted to Fortress," the 45-page court complaint says.

Abuses of corporate control comprise a recurring theme for Delaware's Chancery Court, the leading US forum for business disputes, which sees a steady stream of litigation targeting alleged looting of public companies by founders, majority shareholders, and other influential insiders.

Checkpoint didn't immediately respond to a request for comment Wednesday. Fortress, which isn't directly named as a defendant, said through a spokesperson that it doesn't comment on ongoing litigation. Sun isn't named as a defendant.

The lawsuit seeks internal files from Checkpoint under a statute known as Section 220 that gives investors broad access to corporate records if they raise self-dealing concerns. Like many records cases—which often reflect an attempt to drum up fiduciary breach claims—the shareholder suit stops short of alleging outright wrongdoing, instead citing "credible" but preliminary suspicions.

A series of Delaware court decisions cracking down on controlling stockholder conflicts of interest—including a landmark $56 billion ruling against Elon Musk—recently sparked a major legislative overhaul aimed at reversing a perceived legal swing toward minority investors. The corporate law amendments included provisions curtailing document access under Section 220.

The Checkpoint investor, Gary Fell, is represented by Ashby & Geddes PA, Levi & Korsinsky LLP, and Kaskela Law LLC. The company hasn't yet made a court appearance.

The case is Fell v. Checkpoint Therapeutics Inc. , Del. Ch., No. 2025-0587, complaint filed 5/28/25 .

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Securities Law News

Morgan Stanley, Goldman Get Receptive Judges in Archegos Appeal

May 28, 2025, 11:28 AM PDT

- **Banks said deceived by Archegos and didn't have insider status**
- **Investors said Archegos had massive beneficial ownership**

Morgan Stanley and Goldman Sachs Group Inc. appear close to free of allegations they sold shares on insider information during Archegos Capital Management LLC's $36 billion collapse in March 2021.

US Court of Appeals for the Second Circuit judges noted during oral arguments on Wednesday that the system by which Bill Hwang's private investment firm quietly amassed large positions in several companies was uncomfortable and perhaps troubling to the average investor. But considering the Securities and Exchange Commission's allowance of total return swap arrangements, judges questioned how that would weigh on their decision on liability for the two banks that acted as Archegos' prime brokers.

Attorney David W. Hall of San Francisco, on behalf of investors, said Morgan Stanley and Goldman unlike other banks front ran the implosion of a market manipulation scheme they enabled by offloading "billions of their own proprietary shares and tipping their own third-party, hedge fund preferred clients to do the same." Just because banks were considered victims in a criminal action against Archegos doesn't mean that they didn't participate in fraud, he said.

But the banks were deceived by Archegos and didn't know until the scheme's end about its massive positions, said Charles S. Duggan of Davis Polk & Wardwell LLP on behalf of the defendants. The banks had a contractual right to the provided information about Archegos' exposures and ability to pay debts, he said.

No court has said total return swap arrangements sufficiently confer insider status to Archegos under securities laws, he said—Archegos didn't own the shares or have capacity to vote on them, rather had exposure to price movements in the stock the banks owned. Archegos only knew about its own risks; it didn't have internal information to the companies the investors had stake in, he said.

Hall asserted two liability theories under the Securities Exchange Act of 1934: a tipper-tippee theory turning on a breach of a duty Archegos owed to issuers and shareholders, and a misappropriation theory about a duty the banks had to Archegos. Archegos was a controlling shareholder for insider status given its beneficial ownership, he said, and the lower court misdefined material nonpublic information as just internal corporate information.

Fiduciary Breach

Judges pushed back on whether all controlling shareholders have the same fiduciary duties, even without information normally associated with insider trading such as gathered from being a company executive. They also resisted whether the banks' hedged shares to limit exposure should be included in considering Archegos' controlling ownership. Hall said the investors counted those as Archegos' for control purposes as a traditional insider.

But even only counting its proprietary collateral, Archegos met the 5% threshold for reporting rules about beneficial ownership, he said.

The collapse's timing suggests a breach of fiduciary duties, which the US District Court for the Southern District of New York ignored in dismissing investors' claims, Hall said. A bank has to provide a client of a notice of default, which happened March 26, he said. But stock sales and meetings with material nonpublic information occurred starting two days before, he said.

Archegos built up massive beneficial ownership in seven companies including ViacomCBS Inc. and Discovery Inc. that saw huge selloffs through its implosion, investors' brief filed in the appeals court said. Investors of affected companies in seven coordinated securities-fraud class actions asked the appellate panel to reverse the 2024 dismissal.

Banks had hedged Archegos' swapped positions by buying shares of the underlying stock—when share prices moved adversely in March 2021, their client sought sales of certain positions, but couldn't meet margin calls and defaulted, the Wall Street banks' brief said. After Archegos asked for a managed wind-down plan, Morgan Stanley and Goldman didn't agree, liquidating collateral and exiting the swap hedges, they said. Goldman and Morgan Stanley said the district court rightfully struck the suits given the brokers were closing out a contractual relationship with a defaulting counterparty, their brief said.

Judges Eunice C. Lee, Sarah A. L. Merriam, and Maria Araújo Kahn sat on the panel.

Multiple firms in addition to Hall's represent plaintiff-appellants. Davis Polk represents Morgan Stanley. Cleary Gottlieb Steen & Hamilton LLP represents Goldman.

The case is In re: Archegos 20A Litig. , 2d Cir., No. 24-1162, oral arguments 5/28/25 .

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Class Action

CD&R, Cornerstone Reach $45 Million Accord in Buyout Dispute (1)

May 29, 2025, 7:36 AM PDT; Updated: May 29, 2025, 8:16 AM PDT

- **Lawsuits alleged CD&R controlled Cornerstone, forced buyout**
- **Settlement also releases pending federal securities claims**

Claims that Cornerstone Building Brands Inc.'s board manipulated the company's forecasts amid pressure from Clayton, Dubilier & Rice LLC to approve a $5.8 billion take-private buyout will be resolved with a $45 million cash settlement, a Delaware judge ruled Thursday.

The accord also resolves pending federal securities claims, Vice Chancellor J. Travis Laster said in a Delaware Chancery Court hearing.

"The game being played was, 'We're not making an offer, but we're willing to acquire you at Price X if you would accept it," he said, adding there's a "high likelihood" the claims would succeed and the recovery was reasonable.

The settlement reflects a recovery of 71 cents per share for class members, said Ned Weinberger of Labaton Keller Sucharow LLP, representing Whitebark Value Partners LP and an individual investor, who led the class action.

Cornerstone designs and manufactures exterior building products such as doors, siding, roofing, and windows. The litigation initially filed in January 2023 alleged the company's leadership and its private equity backers pushed Cornerstone into a sale unfairly priced at $24.65 per share. At the time, CD&R held a 49% stake in Cornerstone.

Shareholders alleged the negotiations leading up to the July 2022 transaction breached a standstill provision designed to limit CD&R's control of the company. "It's unclear if any of the company's projections were reliable," Weinberger said.

In his bench ruling approving the settlement, Laster assailed the legal advice that led to the creation of "an alternative record" in board minutes and a proxy statement "in order to avoid the requirements of the standstill."

"This is just a good example of big law firms losing their moral compass," he said.

"This is the type of behavior that unfortunately, to trial judges, undermines our confidence, where the proxy will say one thing and the internal documens say something entirely contrary," he said. "That's a problem."

Laster also approved a $9.65 million fee award for the plaintiffs' attorneys from Labaton Keller Sucharow and Block & Leviton LLP.

Cornerstone's board and CD&R are represented by Kirkland & Ellis LLP, Ross Aronstam & Moritz LLP, Simpson Thacher & Bartlett LLP, Richards Layton & Finger PA, and Paul Weiss Rifkind Wharton & Garrison LLP.

The case is In re Cornerstone Bldg. Brands, Inc. S'holder Litig., Del. Ch., No. 2023-0092, settlement hearing 5/29/25 .

(Updates with new comments from the hearing by the judge and an attorney.)

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Securities Law

Chip Part Maker AXT Beats Investor Suit Over China IPO for Now

May 29, 2025, 9:03 AM PDT

AXT Inc. defeated investor allegations its Beijing subsidiary concealed using a competitor's trade secrets, preventing its listing on the Chinese stock market, a federal judge ruled.

Investors' amended complaint failed to point to an adequate source for that accusation—originally published by a short seller—to carry securities fraud claims, said Judge Maxine M. Chesney in tossing the lawsuit. The US District Court for the Northern District of California judge is letting Charles Grubb and Craig Nowakowski file another amended complaint on or by June 27. NASDAQ-listed AXT said while announcing financial results on May 1 that Beijing Tongmei Xtal Technology Co. Ltd.'s initial public offering is still being reviewed by Chinese regulators.

- Investors alleged AXT failed to disclose risks while issuing rosy projections for Tongmei's Shanghai Stock Exchange STAR Market IPO
- Tongmei was under criminal investigation and failed to answer Chinese regulators' inquiries about allegedly stolen trade secrets for 602 days, they said
- AXT's share prices plummeted almost 35% April 4, 2024, the day short-seller J Capital Research accused it of this and other issues. It was the stock's steepest one-day fall since 1999, according to Bloomberg data

The Rosen Law Firm PA is lead counsel for the proposed class, which would cover those who acquired AXT stock from March 24, 2021, through April 3, 2024. Attorneys didn't immediately respond to an email seeking comment. Freshfields US LLP, which declined to comment in an email, represents AXT and two top executives.

The case is Nowakowski v. AXT, Inc. , N.D. Cal., No. 3:24-cv-02778, 5/28/25 .

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Foot Fault? Del. Courts Weigh When Harm From Corporate Bylaws is Beyond Theoretical

law.com/litigationdaily/2025/05/29/foot-fault-del-courts-weigh-when-harm-from-corporate-bylaws-is-beyond-theoretical

Ellen Bardash May 29, 2025

Credit: smuki/Adobe Stock

Analysis
Right now, this is the question that's been coming up in Delaware litigation over and over: when can a court weigh in on the theoretical harm caused by a corporate bylaw?

Litigation
Imagine you're playing tennis. You're about to serve, but the line judge stops you. You stepped over the baseline before you hit the ball. There's a small but persistent group of people who travel from one tennis match to another, focused solely on trying to catch people making that same misstep and getting officials to make a call penalizing them for it.

Maybe you and some others are critical of that small group and believe they're making a big deal out of a harmless error. But it could be argued that a harmless error still breaks the rules, and maybe that small group is doing something good by trying to catch them.

Now imagine you're not a tennis player making a serve, but a transactional lawyer drafting a corporate bylaw. That small group is the plaintiffs' bar, and the official is a judge.

Is the tennis analogy a perfect way to describe what's been brewing in corporate law the past couple of years? Probably not—I've never played tennis in my life and had to stop and Google "Do tennis referees blow whistles?" while writing this, so I honestly couldn't tell you. (Turns out they yell and use hand signals, by the way.) But it's close enough that the defense bar calls these cases "foot fault" litigation.

I'm going to use the phrase "foot fault litigation" here because it's the most succinct term for a case that alleges some element of a corporate document technically violates the law. But the term itself is a little contentious, as plaintiffs' lawyers say it trivializes claims that identify legitimate legal issues.

"A more accurate, if less catchy term for 'foot fault litigation' would be 'sloppy-transactional-lawyer litigation,'" **Joel Fleming** of **Equity Litigation Group** recently told me in an email. "The corporate bar is particularly hostile to this type of litigation because it's embarrassing to admit to your clients that plaintiffs' lawyers caught a mistake."

The foot fault label has been applied over the years to cases challenging a number of different corporate acts and bylaws. Those challenges often come in waves, with a number of cases challenging similar acts at different corporations all filed in relatively quick succession.

I spoke to **John Mark Zeberkiewicz** and **Robert Greco**, both directors at **Richards Layton & Finger**, who said a turning point for this type of case came in 2014, when Sections 204 and 205 were added to the Delaware General Corporation Law, creating a way for defective corporate acts to be addressed by a court without going through a more extensive litigation process.

"These foot faults that, previously, you'd identify and they would be blowing up the corporation's capital structure, are things that you can easily fix now, so they no longer have this great significance," Greco said. "But despite that, the court has continued to award fees based upon the old law that placed a lot of import on these foot faults."

I started hearing talk of the Delaware courts' ability to address the validity of bylaws at the end of 2023, when a Chancery opinion reviewing the validity of advance notice bylaws and predicting similar challenges to come was released in *Kellner v. AIM Immunotech*. The Delaware Supreme Court heard an appeal and issued a decision last summer that essentially had the same outcome, though with different reasoning.

A point of clarification: just because a case is disputing bylaws doesn’t mean it’s a foot fault case. Most attorneys I’ve spoken to don’t consider *Kellner* to be foot fault litigation because it was centered on a shareholder actually seeking to nominate board members—a specific, existing dispute.

Right now, this is the question that's been coming up in Delaware litigation over and over: when can a court weigh in on the theoretical harm caused by a corporate bylaw? That's been addressed in three separate matters I covered in the span of a little over a month.

Based on the conversations I've had on this topic and what's been brought up in court, it seems all sides can agree it would be helpful to have some more case law on the books that draws clear lines on when these cases can be brought. They're going to differ pretty dramatically on where those lines should be, of course, and those are the arguments we're seeing now.

Here's why I mentioned *Kellner* before: on April 14, the Court of Chancery applied *Kellner* and dismissed a case in an opinion confirming shareholders can only get equitable review of an as-applied bylaw if there's an actual dispute in play.

Lori Marks-Esterman, who leads the shareholder activism litigation practice at **Olshan Frome Wolosky**, said cases post-*Kellner* have been filed by shareholders in a representative capacity, claiming a corporation's advance notice bylaws have a chilling effect on shareholder nominations. But she said in practice, cases challenging advance notice bylaws don't actually get litigated often.

"The investor has a choice: hope that the company will waive it, and if they don't, do they want to spend the money and put their own reputation at risk to litigate? In my view, that's not a good result," Marks-Esterman said. "If there's no ability for representative shareholders to challenge that provision and you're not going to see an activist engage to challenge it, then that deterring preclusive bylaw remains."

Three weeks later, on May 7, the question of when a facial challenge is or isn't ripe came up in argument before the Delaware Supreme Court—attorneys for the appellant, Moelis & Co., say the underlying Chancery decision was wrong to analyze a facial challenge to an agreement that didn't include allegations of actual harm, while counsel for the shareholder appellee said blocking that analysis would upend Delaware's ripeness doctrine.

And on May 14, defense counsel for a dozen defendant corporations that have all adopted a similar style of bylaw requiring forward-looking, undated resignation letters from prospective board members told the Court of Chancery that litigation bringing a facial challenge to those bylaws can't move forward unless there's an actual existing or imminent dispute in play.

In that case, the tension on this issue was spelled out in briefing, with the defense claiming the litigation is an example of the plaintiffs' bar filing foot fault cases en masse in hopes of getting a mootness fee awarded, while attorneys for the plaintiffs called that mudslinging in an attempt to distract from their legal argument.

"A lot of the plaintiffs' attorneys are just trolling public filings to find what they perceive to be violations of the DGCL," Zeberkiewicz said. "Sometimes they're right, other times debatable, other times dead wrong."

Transcript

Transcript: The challenge to Delaware’s corporate dominance

Marc Filippino talks to Sujeet Indap and James Politi

Marc Filippino, Sujeet Indap and James Politi

Published YESTERDAY

This is an audio transcript of the FT News Briefing podcast episode: ‘The challenge to Delaware’s corporate dominance’

Marc Filippino

Good morning from the Financial Times. Today is Thursday, May 29th, and this is your *FT News Briefing*.

Nvidia is still riding high on the AI wave, and the Trump administration is playing rough with Venezuela. Plus, Delaware was the spot for companies to incorporate. Now, Nevada and Texas are challenging that. I’m Marc Filippino, and here’s the news you need to start your day.

[MUSIC PLAYING]

A US court invalidated President Donald Trump's so-called "liberation day" tariff scheme yesterday. The move could throw Trump's global trade policy into disarray. The US court of International Trade found that the president did not have the power to introduce the levies using emergency economic powers legislation. Trump cited that legislation when imposing the sweeping tariffs on countries around the world last month. A White House spokesperson defended using the emergency powers. The Trump administration says it will appeal the ruling.

[MUSIC PLAYING]

The Trump administration said this week that it will not renew Chevron's oil licence in Venezuela, which means the company can no longer produce oil in the country. The announcement by the US state department complicates an increasingly tense relationship between Washington and Caracas. Here to talk about it is the FT's Washington bureau chief, James Politi. Hey, James.

James Politi

Hey, Marc.

Marc Filippino

So bring us up to speed. Why is Chevron's presence in Venezuela kind of a sticky situation?

James Politi

So when he came into office at the beginning of this year, President Trump had said he didn't want to do anything to enable the regime of President Nicolás Maduro, and he had warned that Chevron's oil licence might be in jeopardy, and this week he followed through with the decision to pull the plug on the licence. And, of course, that raises tensions between Washington and Caracas at a time when America's kind of relationship with Latin America is definitely in flux.

Marc Filippino

Why is this such a blow to Venezuela?

James Politi

Well, it's a blow Venezuela because the regime run by Maduro obviously earns quite a bit of revenue from the oil industry, having a big American oil major, producing and exporting from the country helps sustain it. And so depriving it of that is quite problematic for the regime.

Marc Filippino

Why did the Trump administration eventually pull the plug on Chevron's licence?

James Politi

Well, it just decided that it didn't want to help the Maduro regime anymore, and it was time to kind of crack down. And that comes amid a sort of split between the different personalities and officials, top officials in the Trump Administration. Secretary Marco Rubio has long been a Venezuela hawk and was out front championing the decision to remove the licence, whereas others in the administration, such as Rick Grinnell, the special envoy, has been negotiating the release of detained Americans in the country and had been in talks with Venezuelan officials about this and had actually suggested that the licence might be renewed as recently as last week. So there's been a bit of a tug of war within the administration over these conflicting messages, but for now, the sort of more hawkish approach championed by Secretary Rubio seems to have won out.

Marc Filippino

How does this move fit in with Trump's stance towards the oil industry? He's talked a lot about oil since coming back into office.

James Politi

Well the oil has certainly cheered on some of the Trump administration's moves, especially when it comes to regulation and drilling and those kinds of policies. On the other hand, the oil industry has not been very satisfied with President Trump's trade policies. They've worried about the tariffs and how they could affect the energy industry and their ability to transact across the globe. And this is a case where Chevron had been lobbying pretty hard to have this licence renewed and they weren't able to win that argument with the Trump administration. They were able to get the Trump Administration to issue a more limited licence which will allow it to maintain its assets in Venezuela just for ordinary care but that won't allow Chevron to produce oil and export it.

Marc Filippino

The Trump administration will do something as a bargaining chip. Is there any way that Chevron's licence could be reinstated if they get something they want from the Maduro administration?

James Politi

That's hard to tell. It's true that President Trump will use almost anything as a bargaining chip. And so this could be a decision that's overturned, changed at any point. There is another factor to consider, however, which is that there are a number of Republican members of Congress from Florida who are also adamant that that licence had to be stopped. And if the Trump administration were to reverse course on this, before final passage of the big, beautiful tax bill, as it's called, then it could put passage in the House in jeopardy, given that Republicans have such a slim majority in the House. That's the FT's James Politi. Thanks, James.

James Politi

Thanks for having me.

[MUSIC PLAYING]

Marc Filippino

The artificial intelligence boom seems to be alive and well for Nvidia, despite economic uncertainty and increasing US export controls. The chipmaker reported yesterday a nearly 70 per cent surge in quarterly revenues year on year. That beat analyst expectations. But its revenue projections for this quarter came in slightly below Wall Street estimates. The company is navigating the impact of US President Donald Trump's trade war with China. It's also dealing with new export restrictions. Those have prevented it from selling AI chips designed specifically for China. Nvidia shares jumped in after-hours trading following the earnings report.

[MUSIC PLAYING]

The US states of Texas and Nevada are in the middle of a showdown of sorts. No, it's not a sports rivalry or a political face-off. It's a battle to become the next Delaware. Texas and the Nevada are competing to have the most attractive corporation law and become a hotspot for companies to incorporate. Here to explain is the FT's Wall Street editor, Sujeet Indap. Hey, Sujeet.

Sujeet Indap

Hey, great to be here, Marc.

Marc Filippino

So just give me some background on what state-level corporation law is. And why it's such a big deal to American companies.

Sujeet Indap

Yeah, so state-level corporation law essentially governs how companies make decisions and then how it is shareholders who are upset with those decisions if they want to file a lawsuit, how those lawsuits are brought, what's the law that applies to that. Delaware is the market leader in this area, has been for several decades, almost a hundred years and because Delaware dominates this world, they have literally like a million different corporate entities that are incorporated there. Those entities pay taxes. And those taxes are so much in volume that Delaware does not have a state sales tax. But now that dominance is being challenged and the risk is these fees, and frankly, this prestige are gonna go away too.

Marc Filippino

But why is Delaware looking somewhat less attractive to these corporations?

Sujeet Indap

So this goes back to a high-profile court fight. Elon Musk, obviously the world's richest man, famously had this $56bn pay package that was awarded to him by the Tesla board of directors in 2018. A shareholder sued saying that package was excessive. And the court last year, the lower court in Delaware, said the board of directors in Tesla in awarding that was too cosy with Musk and therefore was not independent. And therefore just invalidated the package. And so Tesla very quickly moved its incorporation to Texas and a bunch of other companies that are like Tesla decided to rethink whether Delaware made sense for companies like them.

Marc Filippino

OK, so you mentioned Texas. What kind of changes have Texas and Nevada been making to their corporate law to become more attractive?

Sujeet Indap

So the thing, we'll go back to Delaware for one second. It is a state that is very flexible and gives a lot of freedom to boards of directors to make the decisions that they want to without being second-guessed. If shareholders don't like that, typically they can just replace the directors. But there is an exception to that. And that relates to companies like Tesla that have a dominant shareholder or founder. Their decisions get a much higher level of review. And that's where Elon Musk and Tesla got tripped up. And so Nevada and Texas have created systems where founders like Elon Musk are just not going to be second-guessed by shareholders in the same way. And they are using that to tell founders and boards of directors, come to our state because you're not gonna have a situation where your $56bn pay package is going to be invalidated by an unelected judge.

Marc Filippino

So Sujeet, is Delaware just taking this line down or is it doing something to try and stay competitive?

Sujeet Indap

Yeah, they are definitely not taking this lying down. The last two years, the legislature have made a series of changes to Delaware law to make it harder for shareholders to win lawsuits in an effort to prevent this exodus, which they're calling 'Dexit'. And that's been controversial, again, because Delaware has been a jurisdiction that's been very neutral and even-handed between shareholders and companies. And that balance is definitely tipped. So in that kind of framework, there is this competition to see who can have the strictest rules on shareholder actions. And the question now is A) will companies actually decide to leave Delaware, which again, has like 60 per cent or two-thirds of S&P 500 companies, or will companies say, we don't wanna actually anger the big mutual funds. Those shareholders will be upset if we move and what they'll do is they'll sell our shares and that's not good for anyone. So that's a question to see how it's answered in the next two or three years.

Marc Filippino

Sujeet Indap is the FT's Wall Street editor. Thanks, Sujeet.

Sujeet Indap

Thanks, Marc.

[MUSIC PLAYING]

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Bloomberg Law

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Securities Law News

Coinbase Users Sue Over Terra Relationship, WLUNA Token Crash

May 28, 2025, 10:26 AM PDT

- **COURT:** N.D. Cal.
- **TRACK DOCKET:** No. 3:25-cv-04473 **(Bloomberg Law subscription)**

Coinbase Global Inc. had a conflict of interest stemming from its relationship with Terraform Labs that motivated the cryptocurrency exchange to act in its own interest instead of its customers', a lawsuit says.

Coinbase marketed Terra's "Wrapped LUNA" token misleadingly, mishandled a WLUNA conversion to a different token designation following a Terra blockchain system collapse in May 2022, and provided inaccurate account records and tax documents, more than a dozen exchange users who held Terra's LUNA and WLUNA tokens say in the suit. They filed their complaint, which isn't on behalf of a class, Tuesday against Coinbase and its Coinbase Inc. subsidiary in the US District Court for the Northern District of California.

"Coinbase was not only privy to substantial private information through joint projects and direct communications but also held a substantial financial position in Terra's assets, creating an inherent conflict of interest analogous to major traditional financial scandals," the exchange customers say.

"Coinbase's conduct mirrors past well-known episodes involving institutions such as Enron and Lehman Brothers, where internal conflicts of interest and opacity harmed retail investors by obstructing the disclosure of material information and manipulating markets at critical junctures," they say.

Investor questions and complaints received inadequate or misleading responses when they were addressed at all, the plaintiffs say.

"Coinbase's false representations regarding WLUNA's status, Coinbase's failure to accurately and timely execute the immutable smart contract peg to new LUNA, and Coinbase's systematic obstruction of Plaintiffs' access to their assets prevented Plaintiffs from realizing significant economic gains or mitigating their substantial losses," they say.

Among the claims are two under the rubric of securities fraud. Judge Jed Rakoff of the Southern District of New York ruled in December 2023 that Terra's UST, LUNA, wLUNA, and MIR crypto assets were securities—a ruling in tension with that of another judge in the same district that a Ripple Labs token was not a security when sold to the public on secondary markets.

In addition to the securities fraud claims, the 17 customers bring claims for breach of contract, breach of implied covenant of good faith and fair dealing, conversion, unjust enrichment, and common law fraud. They seek compensatory and punitive damages, restitution, and disgorgement.

Coinbase didn't immediately respond to an emailed request for comment.

Mario Tafur, who practices in Glendale, Calif., represents the plaintiffs.

The case is Heabeart v. Coinbase, Inc. , N.D. Cal., No. 3:25-cv-04473, complaint 5/27/25 .

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Securities Law News

Coinbase’s Customer Service Provider Sued Over Data Breach (1)

May 28, 2025, 9:18 AM PDT; Updated: May 28, 2025, 10:38 AM PDT

- **COURT:** S.D.N.Y.
- **TRACK DOCKET:** No. 1:25-cv-04409 **(Bloomberg Law subscription)**

Customer-support services provider TaskUs Inc. negligently failed to protect the personal information of nearly 100,000 people after a March data breach hit the Coinbase Inc. cryptocurrency exchange, a proposed federal class action alleges.

The lawsuit places TaskUs, a Coinbase contractor, at the center of the breach, which reportedly affected around 1% of Coinbase’s 9.7 million active customers.

Lead plaintiff Nelson Estrada alleges that the breach occurred after cybercriminals bribed “rogue overseas support agents” for Coinbase to disclose customer data. Those employees worked at TaskUs’s customer call centers based in India, according to a complaint filed Tuesday in the US District Court for the Southern District of New York.

Coinbase executives first became aware of the breach in January, Estrada’s complaint alleges, citing a Bloomberg news report. At nearly the same time, TaskUs decided to fire 300 employees at its India call centers over allegations of fraud, the complaint says.

“The reported timeline of Coinbase’s awareness of the data breach coincides directly with TaskUs’ involvement in the data breach,” the complaint says.

TaskUs said in a statement, “Early this year we identified two individuals who illegally accessed information from one of our clients. We believe these two individuals were recruited by a much broader, coordinated criminal campaign against this client that also impacted a number of other providers servicing this client. We immediately reported this activity to the client, terminated the individuals involved, and are coordinating with law enforcement.”

Coinbase isn’t named as a defendant in Estrada’s lawsuit but is facing at least 13 other proposed federal class actions over the breach. It expects to pay out between $180 million and $400 million in remediation costs and customer reimbursements related to the incident, according to a May 14 SEC filing.

Coinbase didn't respond immediately to a request for comment.

TaskUs breached its duties under common law, contract law, industry standards, and the Federal Trade Commission Act to implement reasonable and adequate data-security measures and provide timely notice of the breach, the complaint says.

Information exposed in the incident included names, addresses, phone numbers, email addresses, Social Security numbers, bank account numbers and identifiers, government-ID images, and account data, it says.

Estrada seeks to represent a nationwide class and a California subclass of people affected by the breach.

The complaint brings claims of negligence, negligence per se, breach of implied contract, unjust enrichment, declaratory judgment, and violations of the California Unfair Competition Law and the California Consumer Privacy Act.

Estrada is seeking actual, statutory, and punitive damages; restitution and disgorgement; declaratory, equitable and injunctive relief; attorneys' fees and costs; and pre- and post-judgment interest.

Greenbaum Law Group LLP represents Estrada and the proposed class.

The case is Estrada v. TaskUs Inc. , S.D.N.Y., No. 1:25-cv-04409, complaint filed 5/27/25 .

(Updates paragraph 8 to say that Coinbase didn't respond to a request for comment.)

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Consumer Cases Crumble Over Microplastics: ‘Microplastics Are in Just About Everything’

law.com/2025/05/29/consumer-cases-crumble-over-microplastics-microplastics-are-in-just-about-everything

Amanda Bronstad May 29, 2025

- Nearly two dozen consumer class actions have alleged popular products like Evian bottled water and Philips Avent baby bottles contain microplastics, but almost none have survived past dismissal.
- Some found federal preemption barred claims that products were mislabeled, or that the science wasn’t there.
- The first suits focused on bottled water, but newer cases allege microplastics in baby bottles, Ziploc bags and Rubbermaid storage containers.

Nearly two dozen consumer class actions have alleged popular products like Evian bottled water and Philips Avent baby bottles contain microplastics, but almost none have survived past dismissal.

More than half a dozen federal judges in California and Illinois, where most of the cases have been filed, have dismissed microplastics lawsuits outright. Some found that the U.S. Food, Drug, and Cosmetic Act preempted claims that the products were mislabeled, or that the U.S. Food and Drug Administration had primary jurisdiction over the matter. Others concluded plaintiffs failed to provide enough scientific information about how much harm microplastics caused to consumers, and the amount of microplastics in the products at issue.

“The science hasn’t caught up with the concerns of the consumers,” Sarah Morath, of Wake Forest Law, told Law.com. “There’s agreement in the scientific literature about microplastics being in our bodies, and we ingest microplastics, and where it might be coming from, but the harm, the link between microplastics in our bodies and harm in our bodies, is emergent."

Morath added: "That is what is missing in some of these tort claims, which is that causal link between the microplastics and harm, and also proving the harm.”

There is also the challenge of proving that microplastics, which are ubiquitous, came from a specific product, Morath said. U.S. District Judge Steven Seeger of the Northern District of Illinois pinpointed that complexity when dismissing a consumer class action over the “100% Natural Spring Water” label on Ice Mountain bottled water.

“At the end of the day,” Seeger wrote in an Aug. 9 decision, “microplastics are in just about everything. Even the most health-conscious person among us can’t escape the possibility of consuming microplastics. When simply breathing air puts you at risk of inhaling microplastics, it’s unreasonable to assume that your spring water won’t have any microplastics.”

Ryan Clarkson, of Clarkson Law Firm, in Malibu, California, who has filed many of the cases, including new suits brought last month over Ziploc freezer bags and Rubbermaid storage containers, did not respond to a request for comment. Another prolific filer, Todd Friedman, of the Law Offices of Todd M. Friedman in Los Angeles, did not respond.

The suits, targeting large companies such as Nestlé, S.C. Johnson & Son and Philips North America, have brought in numerous Big Law firms, including Covington & Burling, DLA Piper, White & Case, ArentFox Schiff, and Dentons.

‘The Complaint Doesn’t Hold Water’

Scientists agree that microplastics are 5 millimeters or less in size. Some studies allege that ingesting microplastics causes problems in the digestive system and other health problems. But the science has not reached a consensus. On July 24 of last year, the FDA released a statement that “current scientific evidence does not demonstrate that levels of microplastics or nanoplastics detected in foods pose a risk to human health,” but that it would continue monitoring the research.

Lisa M. Gilford of Sidley Austin.

"The studies that are out there talk about the environmental impact, and the fact that microplastics are ubiquitous and found in places one would not expect plastics to be found, but you really don't have even animal studies or laboratory studies that talk about significant human health impacts," Lisa Gilford, of Sidley Austin in Los Angeles, said. "And even though these are consumer class actions, and not personal injury cases, judges, when evaluating whether a representation from a company is false or not, or deceptive or not, they look to the science on whether something is safe or unsafe."

The first wave of microplastics suits targeted the manufacturers of bottled water: Nestlé Pure Life, Evian, Poland Spring, Ice Mountain, Arrowhead and Fiji. Many of those suits alleged the statements on the bottle labels, which used words such as "pure" and "natural," misled consumers into believing the water would not contain microplastics. They cited a 2018 study that found microplastics in 93% of water bottles made by 11 brands.

In 2019, U.S. District Judge Virginia Phillips of the Central District of California dismissed a case after agreeing with Nestlé Waters North America Inc. on federal preemption and primary jurisdiction.

"Congress has placed the issues raised in plaintiff's complaint—the labeling of bottled water as pure or purified—squarely within the jurisdiction of the FDA and depend on the FDA's expertise," she wrote.

Then, in 2024, judges dismissed cases involving Arrowhead, Ice Mountain and Evian, many of them citing her ruling. The first, on May 6 of last year, was in a case over the "100% Mountain Spring Water" label on Arrowhead bottled water, made by BlueTriton Brands Inc., which also got sued over its Ice Mountain bottled water.

Seeger, dismissing the Ice Mountain case, wrote, "The complaint doesn't hold water."

In addition to federal preemption, Seeger also found no reasonable consumer would interpret Ice Mountain's label to mean it didn't contain microplastics.

“Plaintiffs’ theory is that the spring water is not 100% natural because it contains microplastics,” the judge wrote. “But the microplastics are … well … microscopic. They are tiny. No reasonable consumer would read the phrase ‘100% Natural Spring Water’ and think that BlueTriton was making a guarantee at the molecular level.”

On Nov. 5, U.S. District Judge Thomas Durkin of the Northern District of Illinois dismissed a case about the “Natural Spring Water” label on Evian bottles, although on slightly different grounds for federal preemption.And, on March 3, U.S. District Judge Matthew Kennelly, in a microplastics case over Fiji’s “Natural Artisan Water” label, concluded that federal preemption did not bar allegations based on the FDA’s definition of “artesian water,” but granted dismissal due to the lack of scientific data.

“Allowing a suit of this type to proceed on this basis would basically open the door to enabling any purchaser of any consumable product to file a lawsuit simply saying ‘I bought product X, and it contains microplastics,' (or 'forever' chemicals, or heavy metals, or whatever) and thereby get past a motion to dismiss and into discovery and class certification proceedings,” Kennelly ruled.

Baby Bottles, Ziplocs and Rubbermaid Containers

A second wave of cases focused on baby bottles, which parents often heat before feeding infants. The plastic products leach microplastics when exposed to increased temperatures, the lawsuits allege, and the health risks are much greater for infants digesting them.

Rita F. Lin testifies before the Senate Judiciary Committee during her confirmation hearing to be U.S. District Judge for the Northern District of California, on Wednesday, November 30, 2022. Photo: Diego M. Radzinschi/ALM

In a rare win for the plaintiffs, U.S. District Judge Rita Lin of the Northern District of California defended the “BPA free” label of Philips Avent baby bottles but ruled plaintiffs could move forward on claims that the defendant should have warned about the risk of microplastics. Plaintiffs had cited studies since 2020 about the risks of infants ingesting microplastics in baby bottles and plastic containers.

“Plaintiffs have sufficiently alleged a plausible connection between the amount of microplastics potentially leached by the products and the associated harms to infants—a particularly sensitive population,” Lin wrote in a Feb. 20 dismissal order. “The information is sufficient to allege that the plastic feeding bottles leach microplastics at high levels.”

On April 28, Lin denied Philips North America’s request to certify her decision for an appeal to the U.S. Court of Appeals for the Ninth Circuit. One day later, U.S. District Judge Yvonne Gonzalez Rogers of the Northern District of California dismissed a similar case over Dr. Brown’s baby bottles.

New suits, filed last month by Clarkson Law Firm, allege that heating up leftovers in Rubbermaid storage containers or freezing food in Ziploc bags, which both state they are “microwave safe” and for the “freezer,” causes microplastics to thrive in those products.

It is unclear how successful the new cases will be. But Gilford said it is premature to say microplastics will not continue to be the subject of litigation.

“Even though these claims haven’t gotten a lot of play to date, I would not suggest they’re zero risk or this is a wave that’s going to die down,” Gilford said. “It may take a lot more time and scrutiny, more scientific development, other companion litigation, to get it to gain steam, but I certainly think it’s not a case where there’s zero or limited risk against industries that use plastic in their products.”

Latest

Trending

Class Action

Fourth Circuit Declines to Reconsider Removing 3M PFAS Case

May 28, 2025, 1:49 PM PDT

- **Mixed pollution sources supported removal, panel ruled**
- **States argued March decision conflicted with precedent**

The full Fourth Circuit on Wednesday declined to rehear Maryland and South Carolina's bid to keep their "forever chemicals" pollution case against 3M Co. in state courts after a panel initially sided with the company.

The judges' previous majority opinion allowed 3M to remove the case, which claimed the company contaminated waterways and the environment with per- and polyfluoroalkyl substances (PFAS).

Plaintiffs said the decision conflicted with circuit court precedent, which holds that federal officer jurisdiction hinges on the actual conduct charged in a lawsuit. Federal officer jurisdiction allows a case to be moved to federal court and can shield defendants from liability for activities taken under the federal government's direction.

When Maryland and South Carolina originally sued 3M in 2023, both stated that their lawsuits were only seeking relief for PFAS pollution from private product manufacturing. The states disclaimed relief for PFAS contamination related to 3M's activities manufacturing military firefighting foam.

Two of three Fourth Circuit judges, however, found 3M's work manufacturing military firefighting foam was "inextricably related" to the states' complaints, overturning a lower court's ruling. Each kind of pollution likely commingled in waterways and will be difficult to sort out, which put the case under federal jurisdiction due to its military connection, according to the opinion.

"No matter how it is framed, the basic question—what contamination was caused by 3M's federal work—is the same," the company said in a response to the states' rehearing request. "3M is entitled to have that question resolved in federal court."

Judge Henry F. Floyd dissented in the March opinion, expressing concern that the majority decision could erroneously take cases out of the state courts they belong in.

Maryland and South Carolina are represented by their respective states' attorneys general, as well as Smith Robinson Holler Dubose & Morgan; Sher Edling LLP; Law Offices of John K. Dema; Savage, Royall & Sheheen LLP; Speights & Solomons; and Kelley Drye & Warren LLP.

Gibson, Dunn & Crutcher LLP and Clement & Murphy PLLC represent the company.

The case is Maryland v. 3M Co. , 4th Cir., No. 24-01218, rehearing denied 5/28/25 .

Class Action

Consumer Ends Class Action Over Capri Sun 'All Natural' Claim

May 27, 2025, 12:46 PM PDT

Kraft Heinz Food Co. will not have to face a proposed class action over its claim that Capri Sun contains "all natural" ingredients.

Alyssa Flexer dismissed with prejudice all claims as to herself and without prejudice as to the proposed class, her May 23 notice of voluntary dismissal said. Flexer filed suitin January in the US District Court for the Eastern District of New York on behalf of a proposed nationwide class of consumers and a proposed New York subclass.

- The proposed class action asserted claims for deceptive acts or practices and false advertising in violation of New York's General Business Law
- Capri Sun contains citric acid, a synthetic preservative and a common additive in food and beverage products that is not considered natural by the FDA, the complaint said. But with Capri Sun's labeling and advertising, a reasonable consumer "would understand Defendant's labeling to mean that the products contain only natural ingredients, and not any synthetic substances," Flexer alleged
- The proposed class action also alleged that Kraft Heinz breached an express warranty regarding "all natural" ingredients because the presence of a synthetic substance does not "conform to Defendant's representations and warranties" for Capri Sun

Neither Flexer nor Kraft Heinz immediately responded to requests for comment.

Arisohn LLC represents Flexer and the proposed class. Jenner & Block LLP represents Kraft Heinz.

The case is Flexer v. Kraft Heinz Food Co. , E.D.N.Y., No. 1:25-cv-00414, notice of voluntary dismissal 5/23/25
.

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Plaintiffs to file targeted complaints over 2025 Palisades fire

DJ **dailyjournal.com**/articles/385886-plaintiffs-to-file-targeted-complaints-over-2025-palisades-fire

May 29, 2025

The move follows opposition from LADWP's legal team, who argued that a single master complaint would confuse the factual and legal theories. Judge Stuart M. Rice, who is overseeing the case, announced his upcoming retirement at a status conference Wednesday.

Superior Court Judge Stuart M. Rice

Plaintiffs' attorneys pursuing damages from the Palisades Fire plan to file multiple "mini master complaints" targeting specific water districts and utilities allegedly responsible for worsening the 2021 wildfire that destroyed homes across Malibu, Pacific Palisades, and unincorporated Los Angeles County.

The move follows pushback from the Los Angeles Department of Water and Power, whose attorneys argued that lumping all defendants into a single complaint would blur distinct legal theories.

"It puts the city in somewhat of a different position, because now it's going to be a theory, presumably like ... the water service for DWP didn't operate the way it should have, and therefore the fire wasn't stopped earlier, but then when the fire got to a new area, there was some other problem with a different water district. That's somewhat a different case," Daniel B. Levin, a partner at Munger, Tolles & Olson LLP, told a hearing Wednesday.

Superior Court Judge Stuart M. Rice agreed.

The plaintiffs' attorneys intended to name all the defendants in a master complaint. Those defendants include L.A. County Waterworks District 29, which provides water service to the Big Rock and Sunset Mesa communities; and the Las Virgenes Municipal Water District, which provides water to the Las Flores Canyon neighborhoods. They also allege that Southern California Edison was partially responsible for the destruction of homes along Pacific Coast Highway in Malibu.

But the LADWP's attorneys said the proposal - part of a joint status conference report that the parties filed ahead of Wednesday's status conference - was confusing.

The initial lawsuits over the January wildfires that devastated Pacific Palisades blamed the Department of Water and Power for inadequate hydrant and reservoir supply, which allegedly worsened the damage. Attorneys initially said the fire's cause was unclear.

Kevin R. Boyle of Boyle Law and Alexander Robertson IV of Robertson & Associates LLP filed new claims in March alleging that energized power lines owned by the Los Angeles Department of Water and Power ignited the blaze - contradicting earlier statements from the utility.

Rice informed the parties on Wednesday that he was retiring, and that his last day on the bench would be June 24.

"And so, we're just going to set up a schedule together, because there's nothing of substance that I'm going to be ruling on - who wins or loses - before I leave the bench," Rice said.

The parties congratulated Rice.

"Thank you much. Congratulations on getting older, I guess," Rice replied.

"It's better than the alternative," Boyle quipped.

"Your honor, a post-judicial career can be rewarding as well," said former U.S. magistrate judge Vijay "Jay" C. Gandhi.

Gandhi is now a mediator, and is working with Robertson & Associates LLP and Foley Bezek Behle & Curtis LLP

as a plaintiff and lawyer over the loss of his home in the Pacific Palisades. Dan Grigsby, et al. v. City of Los Angeles acting by and through the Los Angeles Department of Water and Power, 25STCV00832 (L.A. Super. Ct., filed Jan. 13, 2025).

The liaison plaintiffs' counsel include Alexander Robertson IV of Robertson & Associates, LLP; Roger N. Behle Jr. and Robert A. Curtis of Foley Bezek Behle & Curtis LLP; Kevin R. Boyle and Matthew J. Stumpf of Boyle Law PC; and Peter J. McNulty of McNulty Law Firm and E. Kirk Wood of the Wood Law Firm.

The steering committee includes Walter J. Lack and Daniel G. Whalen of Engstrom Lipscomb & Lack; James P. Frantz of Frantz Law Group APLC; and Ellen K. Wolf of Wolf Wallenstein PC.

#385886

The AI temptation that lawyers must resist

DJ **dailyjournal.com**/articles/385873-the-ai-temptation-that-lawyers-must-resist

May 29, 2025

Generative AI promises to revolutionize legal practice, but attorneys risk losing their essential human skills and judgment if they become too dependent on this powerful technology.

Jeremy M. Evans

Jeremy M. Evans is a past president of the California Lawyers Association and chair of the Association's Task Force on Artificial Intelligence. He is also the CEO of California Sports Lawyer.

See more...

Artificial intelligence (AI) is a powerful tool, and generative AI is even more so. Both are growing in knowledge and daily use, including in workplace settings.

Policies are being drafted by attorneys, compliance officers, and other company personnel that deal directly with the proper use of generative AI. Bar associations have also issued reports on the proper use of generative AI. Practitioners are making their own decisions based on State Bar of California policy statements and the Rules of Professional Conduct as to generative AI use in the office for clients and running a business.

The California Lawyers Association's AI report laid out the need for attorneys to not disclose or use confidential, private, or protected intellectual property, to have a human review of all results, and to disclose, where appropriate, that the tool was used.

The question is not whether generative AI can help an attorney. The answer is clearly yes. Generative AI can help attorneys be more efficient and smarter for their clients. The dividing line in the future of the legal profession will be between attorneys who use generative AI versus those who do not.

Instead, the most important question is what generative AI does psychologically to an attorney who uses the powerful tool. Generative AI tends to cause a reliance problem on the technology. If that reliance leads to the attorney not practicing law, but merely using a tool to find answers, draft, and do most or all of the legal work, it will raise questions over the attorney's competence and lack of oversight over the tool, much like it would an associate under their supervision.

There is something about generative AI that tricks the user into thinking that all the information is at their fingertips, is correct, and that makes life and practice much simpler.

The problem with reliance is that the attorney, and people in general, forget that they are smart, competent, and capable of handling significant and important tasks. Tasks that allow people to grow, learn, and make mistakes, which is a beautiful thing and a gift in life. Attorneys, next to the oath of the priest/clergy and doctors, are sacred. This is why the use of generative AI is so complex--because its implications are vast and complex.

Imagine, for example, a doctor using generative AI to treat a patient. On the one hand, a robot arm helping to perform the perfect surgery sounds ideal, possibly more cost-effective, and resulting in fewer mistakes and lawsuits (assuming the technology is sound). However, imagine a doctor relying solely on generative AI results from ChatGPT or another application or platform to diagnose a patient, without consulting their own knowledge, experience or other colleagues. There is also the privacy issue for doctors that attorneys and clergy face. Imagine further if your pastor said, "Let me consult ChatGPT to access your theology question or moral dilemma." Not the most assuring thought.

Generative AI without regulation, oversight and discipline by the user, with discipline being the most important practice and virtue, is a recipe for reliance on technology versus it being used as a tool to secure and analyze improved outcomes for clients. Users also need guidance. Guidance that can come in the form of an AI bill of rights.

The AI bill of rights would establish that humans would always have the final say and guardianship over artificial intelligence and generative AI inputs and outputs through source code and review. The AI bill of rights would maintain human reporting, checks, and balances on inputs and outputs of information and data being used by generative AI systems. Policy would dictate that AI and generative AI also be reviewed by humans and independent third-party boards and experts for biases, protected IP and privacy issues. The AI bill of rights would not restrict free speech, but maintain the powerful AI tool that is essentially working as an artificial human brain.

Generative AI today is akin to Google Search. Just like Google Search is akin to the first iteration of the internet, and before that, the first computers. Any technology can have an impact, but its depth of impact is determined by its interaction with humans. The concern with generative AI is that it only needs access to the internet to learn from humans. It does not need direct contact with a human or humans to learn or grow, which is a thought that is both scary and fascinating.

As an example, people today are increasingly using generative AI platforms to search the internet for answers and advice on anything under the sun, versus finding the answer through a Google or internet search, library or encyclopedia. It was once a process to learn information. It is now a click or voice command, and a moment. Next will be a thought command to the result. *Minority Report* with actor Tom Cruise seems more likely by the day.

As we trade process for speed and efficiency, we risk losing the transmission of knowledge and experience--gains that come quickly, but not without long-term cost.

Humans need to be cognizant of the changes to human activity and interaction. In striving for immediate knowledge and satisfaction, there must be a reflection on impact and vision. Humans cannot forget that reliance on each other, our faith, and doing very human things are essential to happiness in life and our practices.

#385873

'Spoofed' Plaintiff, Firm Still on Hook for $475K Settlement Payment, Court Says

law.com/therecorder/2025/05/27/spoofed-plaintiff-firm-still-on-hook-for-475k-settlement-payment-court-says

Cheryl Miller May 28, 2025

A defendant who unwittingly wired a six-figure settlement to a "spoofing" imposter must still pay the real plaintiff, a San Diego court of appeal held Tuesday.

The Fourth District Court of Appeal, Division One found that "several red flags" should have alerted defendant Corbyn Restaurant Development Corp. and its attorneys at Tyson & Mendes that emailed requests with fund-deposit instructions, supposedly sent by plaintiff's counsel, were fraudulent.

"This case demonstrates that parties to modern, high-tech financial transactions must remain vigilant in ensuring they are dealing with their authentic peer," Associate Justice David Rubin wrote for a unanimous three-justice panel. "Failing to do so may be at their own financial peril."

The opinion affirms a ruling by San Diego County Superior Court Judge Robert Dahlquist that Corbyn Restaurant, doing business as Cowshed Bar & Grill, must still pay plaintiff Brian Thomas $475,000, effectively doubling the cost of a personal injury lawsuit settlement.

The case stems from a suit Thomas filed against the San Marcos business and two of its employees after an unspecified altercation. An administrator at Thomas's law firm, The Law Offices of Chambers & Noronha, sent a copy of the settlement agreement to Corbyn Restaurant's counsel at Tyson & Mendes on August 28, 2023.

The email—which included Chambers & Noronha's correct phone number, physical and website addresses and the email address of firm administrator Janet Mattson—asked that the settlement check be made out to Thomas and the firm's client trust account.

On Sept. 6, 2023, however, Thomas's attorney received an email, purportedly sent by Mattson, asking that the settlement funds be sent electronically to Chambers & Noronha's IOLTA account.

"Mattson's" email address contained two small spelling differences from the one sent in August, however. The Chambers & Noronha phone and fax numbers listed in the email were similar but different, too.

Several additional, seemingly innocuous emails between "Mattson" and Tyson & Mendes attorney Daniel Fallon followed, including one email from someone identified as Chambers & Noronha's finance director, "Mark Anderson." Tyson & Mendes staffers also spoke with

"Anderson" by calling him at a number he provided in his email.
The defense firm eventually wired the $475,000 as directed in the September email.

Someone posing as Fallon, using an email account with a spelling slightly altered from his real one, then emailed Chambers & Noronha's Mattson to say the check was going out in the mail soon—a possible tactic to keep the ruse from being discovered more quickly. In October, after no check arrived, counsel for both parties finally realized they had been duped by a spoofer, someone who uses slightly altered emails, phone numbers, names or addresses to trick victims into believing they're dealing with a trusted source.

The source of the spoofing has not been publicly identified.

Thomas then asked the San Diego trial court for an order enforcing the settlement agreement. He cited the "Imposter Rule" in Section 3-404 of the federal Uniform Commercial Code, which places the burden of costs on the party who was in a better position to discover the fraud. Thomas and his attorneys cited the spoofed details that Tyson & Mendes relied on to send the money.

Tyson & Mendes attorneys argued that its employees had acted reasonably by talking with "Anderson," notifying their cyber insurance carrier, filing a report and engaging in an internal investigation that determined their computer system had not been hacked by the fraudster.

The trial court found that Tyson & Mendes were in the best position to detect the fraud and that Thomas's firm had "no comparative fault."

In reviewing the case, the Fourth District panel wrote that "in this issue of first impression in California … we hold that the risk of loss from an imposter's fraudulent diversion of a wire transfer shall be bone by the party in the best position to prevent the fraud." In *Thomas v. Corbyn Restaurant Development Corp*., that party was the defendant, the court held.

"Contrary to Defendants' assertion, there were red flags that should have alerted their counsel to the fraudulent scheme," Rubin wrote, noting the spoofed email addresses, the incorrect phone numbers and the shifting instructions on how to send the settlement funds.

The panel also found that the evidence did not prove that the data breach occurred from within the Chambers & Noronha firm.

"We are pleased that the Fourth District Court of Appeal has affirmed the San Diego Superior Court's well-reasoned order and judgment in our client's favor," Matthew Szwajkowski partner O'Hagan Meyer, who represented Thomas, said in an prepared statement.

Fallon did not immediately return a message seeking comment.

Householder lawyers 'exploring every option' for ex-speaker's release

cincinnati.com/story/news/politics/2025/05/29/householder-lawyers-exploring-every-option-for-ex-speakers-release/83918186007

Jessie Balmert and Laura A. Bischoff

POLITICS

- Householder was convicted in a $60 million bribery scandal involving FirstEnergy and a nuclear power plant bailout.
- While Householder previously sought a pardon from Trump, his attorney declined to comment on current efforts.
- Even if pardoned, Householder faces state charges for allegedly misusing campaign funds.

After President Donald Trump pardoned former Cincinnati City Councilman P.G. Sittenfeld of federal corruption charges, an attorney for former Ohio House Speaker Larry Householder says his team is "exploring every option to secure Larry's release."

Householder's attorney, Steve Bradley, said he could not comment on whether Householder was seeking a pardon. Householder does plan to appeal a recent decision upholding his corruption conviction, Bradley said.

Householder, 65, was convicted of participating in a $60 million pay-to-play scandal at the Ohio Statehouse, trading donations from Akron-based utility FirstEnergy for a $1 billion bailout for two nuclear power plants. A federal judge sentenced Householder to 20 years in prison in June 2023 after a lengthy trial.

Householder and former Ohio Republican Party Chairman Matt Borges, who was sentenced to five years for his role in the scheme, appealed their convictions.

In May 2025, a trio of appeals court judges upheld those convictions, saying that evidence abounds that Householder knew FirstEnergy donated in exchange for a bailout bill. However, one appellate judge wrote that the U.S. Supreme Court should take another look at the line between legal campaign contributions and illegal bribes.

“Householder’s guilt is clear under current law," wrote Sixth Circuit Court of Appeals Judge Amul Thapar, a Trump appointee. "But if the Supreme Court revisits its bribery cases and undermines the foundation of Householder’s conviction, Borges’s conviction is also ripe for reconsideration."

Borges' attorney Dennis Belli said he and his client are deciding whether to appeal the most recent decision. He could not speak to whether Borges had sought a pardon.

News of Sittenfeld's pardon broke on May 28. Sittenfeld, a Democrat, was sentenced to 16 months in federal prison after accepting illegal campaign donations from undercover FBI agents posing as developers. Those same agents were involved in the case against Householder and four others.

Householder planned to ask Trump for a pardon but held off while the appeals court revised his case. Another attorney for Householder, Scott Pullins, declined to comment on whether Householder would renew his efforts to seek a pardon.

It's not clear how well Trump knows the former Ohio House speaker. Householder was an early Trump supporter and spoke at Trump's Republican National Convention in Cleveland in 2016. Householder flew on FirstEnergy's jet to Trump's inauguration. And FirstEnergy encouraged Householder to speak with Trump about the importance of nuclear energy.

If Trump were to pardon Householder, the Ohio politico would still face charges in state court brought by Ohio Attorney General Dave Yost, also a Republican. Those charges, filed in Cuyahoga County, accuse Householder of stealing about $1.2 million from his campaign account to pay for his criminal defense in the federal case.

Federal prosecutors have also charged two former FirstEnergy executives, Chuck Jones and Michael Dowling. The men have pleaded not guilty, and no trial date has been set.

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Securities Law News

How Fannie and Freddie Went From Bailout to IPO Watch: QuickTake

May 28, 2025, 12:36 PM PDT

Nearly two decades after the US federal government took over mortgage giants Fannie Mae and Freddie Mac, the future of the companies is once again up for grabs. In a series of posts in May on Truth Social, President Donald Trump declared that he intended to return the companies to private ownership. Yet Trump also pledged that the government would continue to function as a backstop to both entities, a move that could keep the government deeply entwined in housing finance even as it relinquishes formal control.

The companies, which nearly collapsed during the 2008 financial crisis, play a crucial role in making mortgages available for US homebuyers. Fannie and Freddie also have been the focus of a group of hedge fund managers and retail investors who picked up the leftover shares of the companies — often at bargain-basement prices — after the government stepped in, and now hope to see a windfall.

Trump's posts sparked an immediate reaction on Wall Street, sending the shares of both companies sharply higher. The Trump administration's plans are also being closely monitored by the housing industry. Releasing the companies from government conservatorship risks adding thousands of dollars in costs to the average American home loan.

Reprivatizing the companies would involve untangling a complex structure implemented during an emergency. And it would also mean answering a question that has long vexed both Washington and Wall Street: Can Fannie and Freddie really operate as normal businesses?

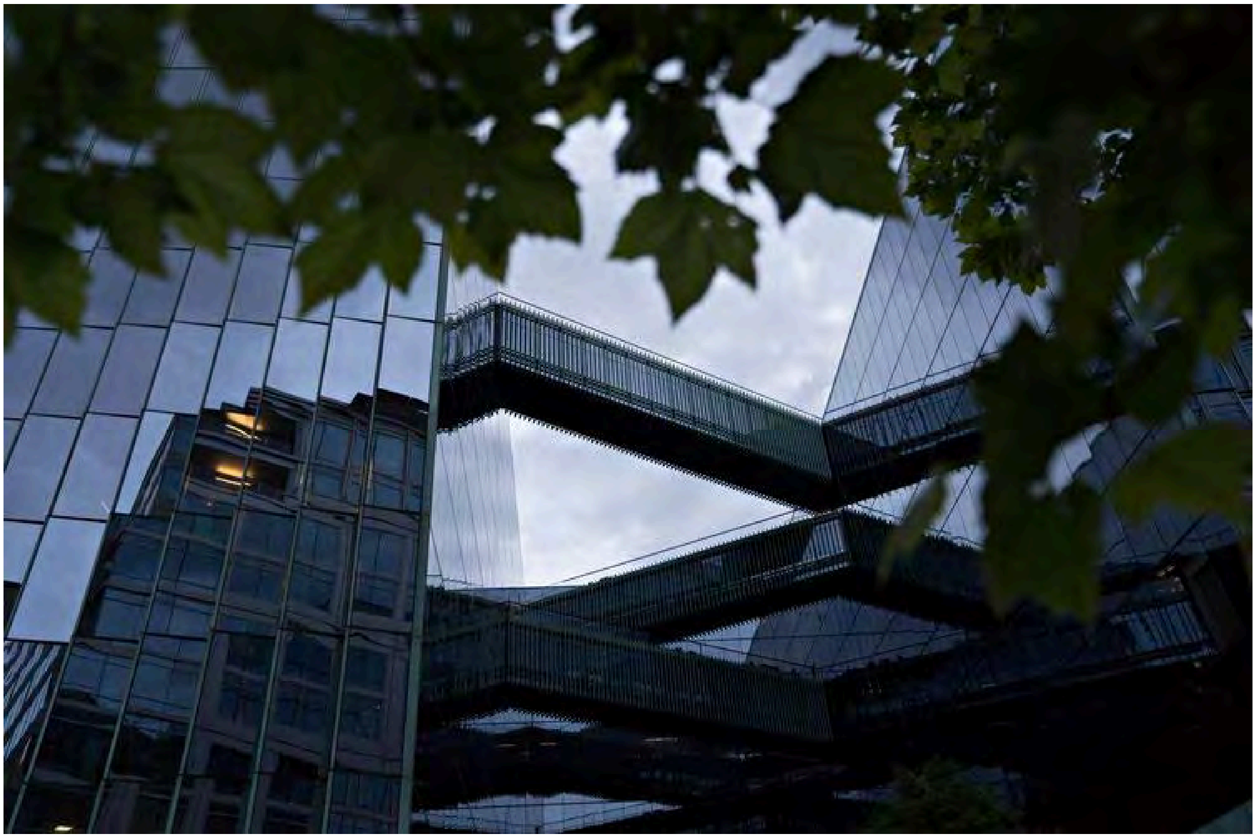
Homes in Aldie, Virginia.
Photographer: Nathan Howard/Bloomberg

What are Fannie Mae and Freddie Mac?

The companies have always been closely linked to the government. Congress established the Federal National Mortgage Association, nicknamed Fannie Mae, in 1938 to reignite the US housing market after its collapse during the Great Depression. Three decades later, the government launched a nearly identical counterpart, the Federal Home Loan Mortgage Corp., known as Freddie Mac.

Both companies buy home loans from banks and other lenders and bundle them into securities for sale to investors. Fannie and Freddie then guarantee the securities, protecting investors in the event homeowners default on their loans. Those purchases free up money that lenders can use to make more loans, making it easier for homebuyers, especially low- and moderate-income households, to obtain mortgages. Fannie and Freddie back some 70% of the US mortgage market, according to the National Association of Realtors (NAR).

For decades, Fannie and Freddie operated as private, fully shareholder-owned corporations. Even so, a perception of implicit government backing meant that investors saw the entities’ mortgage-backed securities as among the safest assets. Essentially, the buyers of those securities were willing to accept lower rates because they assumed Washington would never let such important institutions fail. That proved true when the 2008 housing crisis hit.



The building that houses the Fannie Mae headquarters in Washington, DC.
Photographer: Andrew Harrer/Bloomberg

How did the government end up in control?

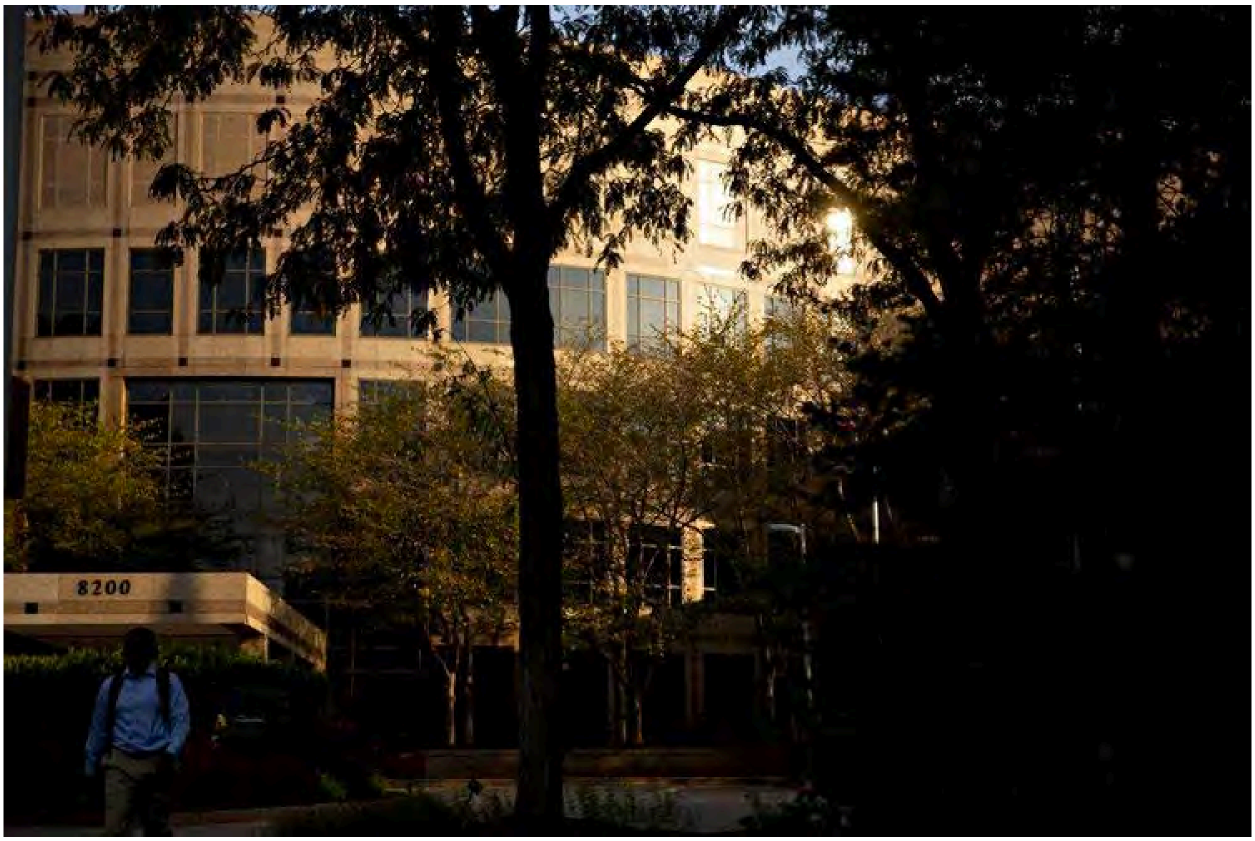
After years of weakened regulatory standards, decreased investor confidence and a pattern of taking on riskier mortgages, Fannie and Freddie began to suffer heavy losses. US housing prices slumped and homeowners began defaulting on their loans. Since Fannie and Freddie guaranteed the securities that bundled these mortgages, they were obligated to cover the losses. They also held investments of their own that suffered, bringing them to the brink of insolvency.

The Federal Housing Finance Agency (FHFA), created in 2008 to oversee the struggling mortgage companies, orchestrated the biggest bailout in US history — to the tune of $191 billion, funded by taxpayers. In return, the government became the effective owner of Fannie and Freddie, with control of 80% (technically 79.9%) of their shares. Existing shareholders saw their investment nearly wiped out, with stocks that had traded above $65 a share in 2007 tumbling to pennies. Under the terms of the conservatorship, private shareholders exercise no control and they don't receive any dividends. In 2010, the companies were delisted from the New York Stock Exchange upon failure to meet the minimum required share price of at least $1 over 30 consecutive trading sessions. The companies now trade as over-the-counter stocks.

So why does Wall Street still care about them?

Traders became fascinated with the idea that cheap Fannie and Freddie stocks could shoot up if the companies and their profits could be wrested from the government. The stocks often stage volatile swings as retail investors pile into the companies at any sign that the conservatorship situation might change.

Hedge funds and other wealthy investors also are awaiting the outcome. Among the most vocal advocates of reprivatization is billionaire Bill Ackman, whose hedge fund, Pershing Square, owns shares in both companies. He has publicly laid out a bull case for how the firms can emerge from conservatorship in the coming years.



Freddie Mac headquarters in McLean, Virginia.
Photographer: Andrew Harrer/Bloomberg

How would reprivatizing Fannie and Freddie work?

While the process is complicated, congressional approval wouldn't be necessary unless the companies' charters need to be changed, according to Keefe, Bruyette & Woods analyst Bose George.

But investors holding shares in Fannie and Freddie face many obstacles before they can get a big payoff. If the companies try to raise some of the money they need to go it alone with an initial public offering of shares, that would dilute existing shareholders' stakes. Also, although the companies have returned more than $300 billion in profits to the Treasury since the bailout — more than taxpayers put in — they still effectively owe a huge sum to the government under the complicated rules of the conservatorship. That would have to be resolved before the companies exit government control.

What do supporters and opponents of privatization say?

Some critics say privatizing Fannie and Freddie could make buying a home more expensive. If investors start to think that the implicit government backing of Fannie and Freddie is diminished, that could raise the likelihood that investors will demand more of a premium for increased credit risk. That would translate into higher mortgage rates, according to Chen Zhao, head of economic research at Redfin Corp. In his second social media post on the topic, Trump added that he wanted to keep the implicit federal guarantee for Fannie and Freddie.

The US housing market has already been facing an affordability problem in recent years. Mortgage rates are more than double what they were at the start of 2022. High borrowing costs have weighed on buyers, with sales of previously owned homes dropping in April to the slowest pace in seven months, according to the NAR.

Many supporters of Fannie and Freddie privatization say that it would introduce helpful competition into the housing market. They also argue that it would rightly shift the risk of failure from taxpayers to private investors — though Trump's pledge to maintain some kind of government backing could affect who shoulders that risk.

Privatization advocates also note that while federal conservatorship of Fannie and Freddie was initially intended as a short-term measure, it has gone on for 17 years. They say that Fannie and Freddie have returned to steady profitability, and that after privatization, the government could bring in revenue by regularly selling the shares it controls to the market.

The Reference Shelf

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Securities Law News

Opinion

Matt Levine's Money Stuff: Fannie and Freddie Get a Guarantee

May 28, 2025, 10:59 AM PDT

Implicit guarantee

I'm sorry but this is a very funny way to do financial regulation:

President Donald Trump said that the US government would retain guarantees and an oversight role over Fannie Mae and Freddie Mac even as he pursues a public offering for the mortgage giants.

"I am working on TAKING THESE AMAZING COMPANIES PUBLIC, but I want to be clear, the US Government will keep its implicit GUARANTEES, and I will stay strong in my position on overseeing them as President," Trump wrote Tuesday night in a post on his Truth Social platform.

The companies, which play a crucial role in the market for mortgage-backed securities, have been under government conservatorship since the 2008 financial crisis. Fannie and Freddie have both returned to steady profitability, with earnings being retained. Shares of both surged last week when Trump said he was considering a public offering. …

The president's post appeared to reduce the risk that the government, as part of privatizing Fannie and Freddie, would leave the two GSEs without a financial backstop. Had it done so investors who participate in the $9 trillion MBS market for agency mortgage bonds might have demanded higher yields to own the securities, ultimately pushing mortgage rates higher. Mortgage rates could still increase in other privatization scenarios but potentially by smaller amounts.

For many years, Fannie and Freddie had what everyone referred to as "implicit guarantees" from the US government. Everyone, that is, *except* Fannie, Freddie, and the government. Because … I just … because if you say it's a guarantee it's not implicit? Like that's what "implicit" means? And so every Fannie and Freddie mortgage-backed security offering said, right on the cover, that the securities were "not guaranteed by the United States and do not constitute a debt or obligation of the United States or any agency or instrumentality thereof."

And then they collapsed in 2008 and the government did in fact step in to guarantee their liabilities. That's what an implicit guarantee is: You *say* there's no guarantee, but there *is*.

We talked in January about the renewed interest in re-privatizing Fannie and Freddie, and I went through the tortured history and the possibilities for returning them to private hands. I won't go through that all again here, though I have a feeling that I will soon enough; the amount of social media posting about this has ticked up, and maybe something will happen. For now, though, the point is that, if they leave government control, then one of three things has to happen:

1. They won't have a government guarantee: They'll guarantee mortgages themselves, with their own balance sheet, like ordinary (but giant) insurance companies; they'll need to have fortress balance sheets and AAA ratings to make that guarantee credible. That will require a lot of capital, and might also lead to higher mortgage rates if the market doesn't trust their guarantees *entirely* as much as it trusts the government.

- 2. They will have a government guarantee: They will take a first-loss risk with their capital, but it will be made explicit that, in the worst case, the government will back the mortgages that they guarantee. US conforming mortgages will continue to be credit-risk-free. There is an economic problem with this: The government will be guaranteeing the debts of regular shareholder-owned companies, so one could worry about moral hazard and about favoritism; the government would presumably charge a fee for that guarantee, but there would be debate about the fair level of the fee. There is also a possible *accounting* problem: The reason that the government historically avoided (explicitly) guaranteeing Fannie and Freddie's debts was that doing so would make them *government debt* , adding trillions of dollars to the US national debt and running into problems with the debt ceiling.
- 3. They will go back to what they were like in 2007: not explicitly guaranteed by the government (so not adding to government debt) but, you know, wink wink. An implicit guarantee.

The third option seems bad and untidy, but also perhaps the most practical outcome. *No* government backstop of the multitrillion-dollar mortgage market seems, at this point, a little optimistic: the re-privatized Fannie and Freddie will be the definition of "too big to fail," and it would be hard to set up a structure to absolutely prevent future bailouts. The explicit government guarantee is optically difficult due to the accounting and moral-hazard problems. But "there's no government guarantee, Fannie and Freddie will be very well capitalized and carefully regulated to make sure that they *don't* fail, but wink wink" might get most of the benefits of a pure private-capital solution, but with the financial stability and low mortgage rates of a government backstop.

How do you communicate "wink wink," though? At this point, after Fannie and Freddie have failed and been bailed out once and are now perhaps being returned to profit-seeking private hands, when any sort of further backstop will be controversial? It's possible that a random Truth Social post from Trump is a pretty effective approach. Then you go re-privatize Fannie and Freddie, they raise a lot of capital, they're carefully regulated, etc., and the prospectuses all say "not guaranteed by the United States." But everyone has read the Truth Social post and thinks "ehh Trump doesn't mean that." And then they come roaring back and become too-big-to-fail and the guarantee — expressed only in this one post — becomes an entrenched expectation and every future president knows that doing anything to walk it back would cause the mortgage market to seize up.

And then in 2075, if Fannie and Freddie collapse again, the future treasury secretary will say "well obviously the market has spent the last half-century assuming that Fannie and Freddie's debt was government-guaranteed, so it is treated as super-safe and used as collateral everywhere, and if we don't bail it out the entire financial system will collapse." And the future president will say "why did the market assume that if the debt says on the front page that it is not guaranteed by the United States"? And the treasury secretary will say "well Donald Trump posted that it was implicitly guaranteed."

Meanwhile if Fannie and Freddie collapse in, like, 2027, and the government *doesn't* bail them out, could a creditor sue the government on the basis of this Truth Social post? Is it … is it … is it *securities fraud?* If Fannie and Freddie issue debt that says "not guaranteed by the United States," but Donald Trump has posted on Truth Social that the debt is "implicitly guaranteed by the United States," can't investors reasonably rely on that? You sue and go to court and the government says "well the securities say on the front page that they're not guaranteed, I don't see how you could have been confused," and you say "but they were *implicitly* guaranteed, and I know because President Trump said so explicitly."

Endowments

The basic situation is that a corporation has revenue, and then it pays its expenses (salaries, etc.), and what's left over is net income. And, in the US, the corporation pays 21% of its net income to the federal government as income tax; the rest belongs to its shareholders.

Meanwhile the situation for a big US *university* is that it has an endowment, and the endowment generates investment income, and if the university is big and rich enough it pays 1.4% of that income to the federal government as an excise tax. And that might change to 21% under the new tax bill. The Wall Street Journal has a story about the potential effects:

If the bill passes, it would lift the tax on investment income for some of the biggest endowments from 1.4% to 21%, in line with what U.S. corporations pay. Other schools would see their taxes jump by significant amounts as well.

Under the new tax plan, universities might pull back from strategies that regularly generate short-term gains and shift money into other investments such as private equity, which generally don't realize gains for years.

The Wall Street Journal spoke to officials at eight private universities and colleges about their thinking on investment strategies in light of the bill. They largely said they would begin using a new lens of tax-efficiency as they think about how to direct—and redirect—their billions. …

Several endowment chiefs said they might consider moving part of their portfolio to indexes, where they could easily pull money from if their schools need cash, and away from active-trading strategies that could generate tax liabilities. Several said certain hedge-fund strategies could be less attractive going forward because they could generate tax liabilities if they frequently realize gains.

For endowments able to shift more of their dollars into longer-term investments, directly investing in private companies or co-investing with private-equity firms could be attractive, some investors said. Those structures have the benefit of not requiring endowments to fund capital calls for years.

It is a big shift. Much of the world of asset management is organized around the facts that (1) some investors are taxable and some are not taxable, (2) you do different stuff if you are trying to maximize pre-tax or after-tax returns, and (3) some of the most adventurous non-taxable investors are, like, Yale and Harvard. If they became taxable, the range of viable adventurous investing strategies will change.

Notice, though, the discrepancy in my first two paragraphs. Corporations pay a tax of 21% on the difference between their revenue and their expenses. Universities would pay a tax of 21% on their *investment income*, with, as far as I can tell, no ability to deduct regular operating expenses. A corporate executive’s salary is tax deductible, but a university professor’s salary isn’t. “The 21% rate matches the corporate tax rate, but the effective tax rate on some schools could in some cases be higher than what for-profit corporations pay, as nonprofits can’t claim certain deductions the way corporations can,” the Journal notes.

That does suggest the germ of a trade, doesn’t it? At big universities, endowment income largely pays for salaries for professors, administrators, football coaches, etc. Those salaries presumably would not be deductible against an endowment excise tax.

It is not that uncommon for professors at big research universities to work on topics — biopharmaceuticals, artificial intelligence, whatever — that have commercial potential. Sometimes there are arrangements: Work that a professor produces in her lab at the university, using the university’s resources and her graduate students’ work, can be commercialized, with some deal in which the professor and the university and a for-profit company all share in the value. And then if it becomes hugely valuable the university gets a big capital gain, in its endowment, somewhere down the line.

In the current framework, a big capital gain is good, for the university. In a 21% excise tax framework, it is less good. (It’s 21% less good.) In the excise-tax framework, $100 of endowment income would pay for $79 of professors’ salaries. But if a for-profit corporation were to pay $100 of professors’ salaries, that payment would be tax-deductible (for the corporation). And so the trade is something like:

1. The for-profit Chemistry Corporation hires all of Harvard's chemistry professors, sets them up with labs, buys their equipment and pays their graduate students. Let's say the operating budget of the chemistry department is $8 million, a number I just made up. The Chemistry Corporation takes over the responsibility for that budget.
- 2. Harvard invests $100 million in the Chemistry Corporation and gets 95% of the stock; the professors get the rest.
- 3. The Chemistry Corporation re-invests that cash with whoever currently manages Harvard's endowment, targeting an 8% annual return.
- 4. The Chemistry Corporation makes $8 million a year on its investments, and pays $8 million a year in operating expenses, for a net income of $0.
- 5. It pays no taxes, because it has no net income.
- 6. Harvard doesn't pay any excise tax on the return on its $100 million Chemistry Corporation investment, because that return is zero.
- 7. Harvard also rents office space to the Chemistry Corporation (not taxable, because not investment income?) and pays, you know, $1 a year for the Chemistry Corporation to provide teachers for undergraduate chemistry classes.
- 8. I guess if they discover a valuable new chemical that's gravy.

There is a precisely analogous approach for the Harvard Professional Football Team Inc., though it could also earn revenue from ticket sales. Or for the Classics Corporation, which probably couldn't.

This is extremely not tax advice, but you get the idea, right? On the current model, Harvard earns an endowment income, which it uses to pay its expenses. In a world of 21% excise tax, there would be a 21% slippage between the endowment income and the paying of expenses. But Harvard's endowment income is generally less than its expenses. If you could pay the expenses *before* income becomes endowment income, you would avoid the slippage: $1 of expenses would reduce endowment income by $1. The big university endowments are already adventurous long-term investors, and "directly investing in private companies ... could be attractive" for them. Perhaps for the tax deductions.

DJT Bitcoin treasury

I have been writing for months now about the fact that the US stock market will pay $2 for $1 worth of crypto. Any company that announces "we're doing a crypto treasury strategy where we will spend $100 million to buy Bitcoin" will see its market capitalization shoot up by *at least* $200 million. We talked yesterday about a company, SharpLink Gaming Inc., that added $2.5 billion of market cap by announcing it would buy $425 million of Ethereum. I wrote:

This keeps working? ... The stock market just consistently loves brand-new crypto treasury companies. I have no explanation for this. "It looks a little bit like crypto keeps playing a prank on the stock market, and the stock market keeps falling for it," I wrote, a month ago, and it looks a lot more like that now.

Well we finally found the limit! We finally found a company that announced it would buy Bitcoin and saw its stock go *down*. You will never guess what it is. I mean, you probably will. It's Trump Media & Technology Group:

Trump Media & Technology Group Corp., the company behind Truth Social, agreed to sell around $1.5 billion in stock and $1 billion in convertible bonds to buy Bitcoin for its treasury.

The company's shares fell as much as 9.8% on Tuesday after rallying premarket following a Financial Times report on its plans to raise capital to spend on cryptocurrencies.

Trump Media is the latest company connected to President Donald Trump to invest in crypto. PSQ Holdings, which his son Donald Trump Jr. sits on the board of, also announced plans on Tuesday to explore a digital asset treasury strategy. They join numerous other companies in following the model that Michael Saylor created at Strategy, by using equity and debt offerings to fund Bitcoin purchases.

Trump Media will add Bitcoin to its balance sheet along with its current cash, cash equivalents and investments, which were worth $759 million at the end of the first quarter, according to a filing Tuesday.

Here are the filing and the press release, which says that "Yorkville Securities, LLC and Clear Street LLC acted as Co-lead placement agents," which may or may not mean they were the lead investors. (Yorkville Advisors previously did an equity line of credit for Trump Media.) The investors agreed to buy stock at $25.72 per share, equal to Friday's closing price; the stock closed yesterday at $23.05. Loosely speaking, $1.5 billion of Bitcoin at Trump Media is worth $1.34 billion to the stock market.

What happened? I think — I hope — that I am partially joking when I say "the stock market will pay $2 for $1 worth of crypto." I do not mean that giant institutional equity managers want to buy crypto, but can't buy it directly or in the form of exchange-traded funds or futures, so they have to buy it in the form of shares of crypto treasury companies, which pushes up the price of those shares. I think there's probably a little of that — MicroStrategy Inc. has some institutional holders — but that's not why SharpLink added $2.5 billion of market cap yesterday. Instead, the obvious appeal of the crypto treasury strategy for *most* small US public companies is probably along the lines of "nobody is paying attention to our tiny company, but if we announce we're buying a big pot of crypto, retail traders will get excited and overpay for our stock."

And then that doesn't work for Trump Media because, you know, retail traders *already* got excited and overpaid for its stock. There is only so much attention that anyone can pay to Trump Media, and just doing more stuff — even otherwise pretty reliable stuff like announcing a Bitcoin treasury strategy — is not really additive. The pool of retail investors who *could* get excited about Trump Media stock, but *were not already* excited about Trump Media stock, is small, and the Bitcoin treasury pivot doesn't seem to have found any more of them.

Various other theories are possible. One reason that you might ascribe a premium to a Bitcoin in the hands of MicroStrategy is that you might think that MicroStrategy will *do some cool stuff* with the Bitcoin. I don't really know what that is, but the big crypto treasury companies tend to talk about a holistic financial strategy, investor education, and otherwise doing stuff with crypto. We talked last month about Twenty One, another big Bitcoin treasury company, which "intends to develop a corporate architecture capable of supporting financial products built with and on Bitcoin." Similarly Trump Media has … some sort of plan:

Trump Media's CEO and Chairman Devin Nunes said, "We view Bitcoin as an apex instrument of financial freedom, and now Trump Media will hold cryptocurrency as a crucial part of our assets. Our first acquisition of a crown jewel asset, this investment will help defend our Company against harassment and discrimination by financial institutions, which plague many Americans and U.S. firms, and will create synergies for subscription payments, a utility token, and other planned transactions across Truth Social and Truth+. It's a big step forward in the Company's plans to evolve into a holding company by acquiring additional profit-generating, crown jewel assets consistent with America First principles."

It's possible that you could think "a Bitcoin in the hands of MicroStrategy is worth two Bitcoins, because Michael Saylor's plans are good, but a Bitcoin in the hands of Trump Media is worth 0.9 Bitcoins, because Devin Nune's plans are so-so."

GME Bitcoin treasury

Ha okay we found another one:

GameStop fell as much as 8.6% after it announced it bought 4,710 Bitcoin tokens. This is the video-game seller's first Bitcoin purchase after it announced in March that it plans to add the cryptocurrency as a treasury reserve asset, following the model set out by Michael Saylor's Strategy.

At current prices, GameStop's Bitcoin holdings are worth over $507 million.

Right, again, GameStop Corp. *got* all the attention already; throwing in some Bitcoin doesn't move the needle.

$30,000 wrench attack

I don't know, if you are kidnapped and held in an eight-bedroom NoLIta townhouse that rents for "at least $30,000 a month," and then tortured for three weeks "in a scheme to get [your] Bitcoin password," one thought that might cross your mind is: "How many other people did this guy torture into giving up their Bitcoin passwords in order to be able to afford this sweet house?" I mean, what:

A 37-year-old cryptocurrency investor was charged on Saturday with kidnapping a man and beating, shocking and torturing him for weeks inside a luxury townhouse in downtown Manhattan, all in a scheme to get the man's Bitcoin password, the authorities said.

The crypto investor, John Woeltz, was taken into custody on Friday after the man managed to escape the townhouse and notify the police. …

The abuse continued for about three weeks until Friday morning, when the man managed to escape and alert the traffic agent. ...

Two butlers who worked at the home were also present and agreed on Friday to be interviewed by the police, the official said.

I have not found a ton of information about Woeltz online, and he does not yet seem to have his own crypto treasury company, so I'm not entirely sure what makes him a "cryptocurrency investor." (Though the New York Post reports that he and an alleged accomplice were "known for dropping $100,000 in a single night partying it up at an exclusive erotic nightclub.") But I would naively have assumed that if you are renting a NoLIta townhouse you are probably rich enough that you do not need to kidnap and torture people for their Bitcoins. But "behind every great fortune is a crime," I guess, and one way to become a crypto investor is to torture some passwords out of other crypto investors.

Things happen

Cantor Fitzgerald Agrees to Buy UBS Hedge Fund Unit O'Connor. Citadel Securities Posts Record $3.4 Billion Quarterly Revenue. Private Equity Fundraising Plunges Amid Struggle to Return Cash. State Street Files for Second Private-Debt ETF as First Fund Stalls. Telegram Set to Raise $1.5 Billion in Bond Issue Despite CEO's Legal Woes. Milei Intervenes in Currency Market Despite Letting Argentine Peso Float. Christine Lagarde discussed leaving ECB early to head WEF, says Klaus Schwab. Shake Shack to Reward Customers for Buying Burgers More Frequently. How a Lawyer in the Hamptons Became the King of DWI Cases. The math tutor and the missing $533 million.

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- 1. Or lower mortgage rates, if the market trusts privatized Fannie and Freddie's Aaa fortress balance sheets *more* than it trusts the US government, which is after all rated Aa1. I do not place a high probability on this outcome.
- 2. I say "first-loss" loosely. In their years under government control Fannie and Freddie have done a lot of credit risk transfer trades in which private capital takes some of the credit risk of mortgage pools. Presumably that would continue, though who knows.
- 3. One possibility that people sometimes suggest is a *lot* of Fannie and Freddies, that is, re-privatizing them not as two giant companies but as 20 fairly large companies. Each of those would be well capitalized and guarantee a lot of mortgages, but not trillions of dollars of mortgages; none of them would be too big to fail. This does not seem like what anyone is contemplating these days, though.
- 4. It's net investment income, so they can deduct investment expenses, but not operating expenses.

Securities Law

Opinion

Matt Levine's Money Stuff: The Tariffs Are Illegal

May 29, 2025, 9:01AM PDT

Regulating importation

The *legal* problem with President Donald Trump's tariffs is that the United States has a Constitution, and the Constitution says that Congress has the power to impose tariffs and the president doesn't. This is not some weird technicality; this is just what the Constitution says. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," and "To regulate Commerce with foreign Nations." But Congress did not pass President Trump's "Liberation Day" tariffs on April 2, or any of the various up-and-down permutations since then. That was all him, acting by executive order.

Congress did pass a law, in 1977, that gives the president powers to "deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat." (This law is called the International Emergency Economic Powers Act of 1977, or IEEPA.) Specifically, the president can "investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States." That long list is usually abbreviated, in this context, to "regulate … importation": The IEEPA allows the president to regulate imports in an emergency. If he can regulate imports, can he impose tariffs on them? Eh, maybe, sounds like a regulation.

And that is the legal theory behind Trump's Liberation Day tariffs:

1. There is an "unusual and extraordinary threat" (trade deficits), so the president can declare that all US trade with every country is a national emergency.

- 2. In an emergency, he has the power to regulate imports.
- 3. He will regulate imports by imposing tariffs on them.

The specific words of the Constitution do not matter, because foreign trade is an emergency and the president must regulate it.

We discussed this theory the day after Liberation Day , and again the following week . I don't love it! As I wrote in April :

The idea seems to be that every trade policy of every country in the world, over the past several decades, constitutes an "unusual and extraordinary threat." This is a strange way to use words! How can every instance of trade with every country be *unusual*? How, after decades of trade deficits, is a trade deficit *extraordinary*?

It is also a strange way to use law. The US is in a perpetual state of emergency with respect to every country forever, allowing the president to use emergency powers to bypass the Constitution to impose tariffs.

We also discussed a doctrine of constitutional law called the "nondelegation doctrine," which says that Congress cannot give up its constitutional legislative power to the executive. It can delegate some decisions to the executive, but only with an "intelligible principle" to guide the executive's action. The executive can fill in the details of congressional legislation, but Congress can't just tell the president "make any laws you want," because the Constitution says that that's Congress's job.

And so, I wrote, there are two possibilities here:

1. The IEEPA doesn't actually give the president the power to impose tariffs on every country just because he doesn't like free trade. IEEPA powers are only for emergencies, and "international trade exists" can't really be an unusual and extraordinary threat to the US.

- 2. If the IEEPA did give the president sweeping powers to impose tariffs, that would be unconstitutional.

This all struck me as obviously correct in principle, but I have become cynical about the Constitution actually controlling anyone's actions here in 2025, so I called it "frankly pretty speculative" as a theory of actually stopping the tariffs. Still, worth a shot.

And here you go !

The bulk of President Donald Trump's global tariffs were deemed illegal and blocked by the US trade court, dealing a major blow to a pillar of the Republican's economic agenda.

A panel of three judges at the US Court of International Trade in Manhattan issued a ruling Wednesday siding with Democratic-led states and a group of small businesses that argued Trump had wrongfully invoked an emergency law to justify some of his levies.

The Trump administration filed a notice that it was appealing the ruling. The US Supreme Court may ultimately have the final say in the high-stakes case that could impact trillions of dollars in global trade. …

The order suspends the vast majority of Trump's tariffs — his global flat tariff, elevated rates on China and others, and his fentanyl-related tariffs on China, Canada and Mexico are all suspended by the ruling. Other tariffs imposed under different powers, like so-called Section 232 and Section 301 levies, are unaffected, and include the tariffs on steel, aluminum and automobiles.

Here is the court's opinion, which starts by laying out the issue pretty clearly:

The Constitution assigns Congress the exclusive powers to "lay and collect Taxes, Duties, Imposts and Excises," and to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cls. 1, 3. The question in the two cases before the court is whether the International Emergency Economic Powers Act of 1977 ("IEEPA") delegates these powers to the President in the form of authority to impose unlimited tariffs on goods from nearly every country in the world. The court does not read IEEPA to confer such unbounded authority and sets aside the challenged tariffs imposed thereunder.

Later the court uses the basic two-possibilities framework I laid out in April: Either IEEPA has no limits (and is therefore unconstitutional), or it has limits (so Trump can't just impose whatever tariffs he wants on everyone):

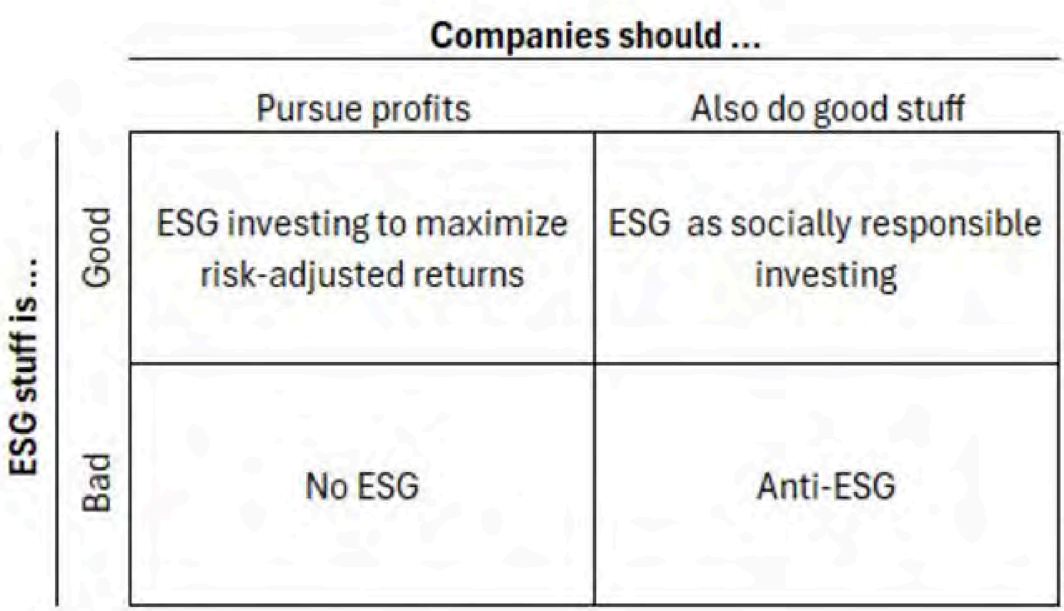
Underlying the issues in this case is the notion that "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments." Federalist No. 48 (James Madison). Because of the Constitution's express allocation of the tariff power to Congress, see U.S. Const. art. I, § 8, cl. 1, we do not read IEEPA to delegate an unbounded tariff authority to the President. We instead read IEEPA's provisions to impose meaningful limits on any such authority it confers. Two are relevant here. First, § 1702's delegation of a power to "regulate . . . importation," read in light of its legislative history and Congress's enactment of more narrow, non-emergency legislation, at the very least does not authorize the President to impose unbounded tariffs. The Worldwide and Retaliatory Tariffs lack any identifiable limits and thus fall outside the scope of § 1702. Second, IEEPA's limited authorities may be exercised only to "deal with an unusual and extraordinary threat with respect to which a national emergency has been declared . . . and may not be exercised for any other purpose." 50 U.S.C. § 1701(b) (emphasis added). As the Trafficking Tariffs do not meet that condition, they fall outside the scope of § 1701.

The court decides that "any interpretation of IEEPA that delegates unlimited tariff authority is unconstitutional": To be a constitutional delegation of power, IEEPA has to impose some limits on the president's powers to regulate trade. And "the President's assertion of tariff-making authority in the instant case, unbounded as it is by any limitation in duration or scope, exceeds any tariff authority delegated to the President under IEEPA."

Again, this all seems pretty obvious to me but, uh, what happens next? The government will appeal; I find this opinion convincing, but there is an audience for the argument that the president can do whatever he wants. ("The Supreme Court may again prefer Trump to precedent," writes UBS's Paul Donovan.) There are statutes other than IEEPA that allow the president to impose tariffs in more limited circumstances and with more procedures and findings; presumably the government will try those. " Nothing's really changed ," said trade adviser Peter Navarro. But those statutes are a bit narrower. "Republicans in Congress have advanced legislation that would give the president wide authority to impose so-called reciprocal tariffs," reports Bloomberg , "but concern about the impact of Trump's widespread levies is expected to limit the appetite for moving that measure now." For now, though, will the tariffs just … go away? Just because they're illegal? Is that how this works?

ESG

I think there are four ways to think about environmental, social and governance (ESG) investing, and I have made you a chart:



That is: You might have one of two views about the purpose of a corporation (or the purpose of investing). One view is that companies should maximize profits within the law and not pursue any social or moral ends; the other is that companies should also pursue some other pro-social goals.

There is a roughly consistent set of goals (reducing carbon emissions, diversity, some other stuff) that are generally associated with the term "ESG." Generally ESG investors would say that these are pro-social goals, but you could disagree. You might have a view that the environment should be several degrees warmer, and you might want companies to emit more carbon to warm things up. That would be a kind of environmental goal, but it would not be "ESG" in the conventional usage of the term. Or you might think that the risk of climate change is overstated and that reducing carbon emissions would be bad for human flourishing. Or you might think that companies overemphasize diversity and should stop. That would be a social position of yours, but it would not conventionally be an *ESG* position. You could use words in a different way — you could say "I am an ESG investor, meaning that I care about making the environment warmer and boards of directors less diverse" — but it would be unusual.

And so there's my matrix:

1. If you think that the standard ESG goals are good, and that companies should just pursue profits, that's no problem! You can just invest normally and keep your ESG goals to yourself. But *probably* you will do something different: Your investments will be skewed toward companies with good ESG scores (companies that limit carbon emissions, have diverse boards, etc.), and you will push those companies to do more, because you will also have some tendency to think that the ESG goals are *good for long-term shareholder value*. "The climate is changing, so the world will transition away from fossil fuels, so I should invest in companies that will benefit from that transition; investing in coal companies is too risky."

- 2. If you think that the ESG goals are good, and that companies have a duty to society beyond the pursuit of profits, you will invest in companies with good ESG scores and push them to pursue ESG goals for their own sake. Even if you think that pursuing ESG goals will reduce long-term shareholder value, you will want companies to pursue them (at least at some margin), because you are not *just* a shareholder : You are a human, you have to live on this planet, you want the planet to be nice, and companies have a role in making it nice that goes beyond the pursuit of profits.
- 3. If you think that the ESG goals are bad, and that companies should just pursue profits, that's also no problem. You can just invest normally and vote against ESG proposals, because you think they are bad and also not likely to increase profits.
- 4. If you think that the ESG goals are bad, and that companies have a duty to society beyond the pursuit of profits, you will do exactly what ESG investors do but in reverse. You will invest in companies and push them to drill more oil, etc., *even if you think that will reduce long-term shareholder value*, because you are a human, you live on this planet, you want the planet to be nice, and more oil would be nice.

People are very confused about these things, in part because it is often in their interests to be confused. And so, in the golden age of ESG investing, big asset managers were *both* saying that their ESG investing enhanced risk-adjusted returns, *and* implying that it was designed to make the planet better. There was some tension in those theories, but you can kind of blend them together for marketing purposes.

And now, in whatever the opposite of a golden age of ESG investing is, people get confused the other way. Sometimes people argue that ESG investing *necessarily* violates fiduciary duties to asset holders, because ESG *has to* lower returns, which is really only true of one of the two ESG theories. More confusingly, though, people will argue *both* that companies should only pursue profits without regard to social goals, *and* that they should drill more oil in order to provide employment for Louisiana oil drillers or whatever. Those theories are inconsistent!

Anyway here's France :

France issued one of Europe's starkest calls yet for the financial industry to support defense companies, as the region shores up its security in face of Russian aggression in Ukraine.

Banks should change their internal rules "so as to no longer systematically exclude defense, but also to voluntarily direct part of the savings entrusted to them toward this sector," an economy ministry spokesperson said in response to questions from Bloomberg.

European states are leaning on banks and investors to funnel money to arms manufacturers so that they can increase production. That's sparking a reset at many financial firms, after years in which they shunned such companies and instead focused on supporting clients that fitted a narrower definition of being environmentally and socially sustainable.

Traditional ESG principles would disfavor making bombs. France wants more bombs. Saying "stop doing ESG investing for bombs" might lead to more bombs: If you care only about the pursuit of profits, you will make profitable bombs, even if you think bombs are bad for society. But France is saying something more: Not just "no longer systematically exclude defense," but also "voluntarily direct" money to defense. "Bombs are good for society, so make more of them, even if that does not maximize risk-adjusted returns." There are more important things than profits.

Endowment tax

Yesterday I wrote about Congress's proposed 21% excise tax on certain university endowment income, and I suggested my own homemade workaround, which is basically that big universities should put their operating expenses into for-profit subsidiaries so that they can be deducted against the endowment income. The idea would be that Harvard University would seed a for-profit company, the Chemistry Corporation, which would pay its chemistry professors and teach the classes and invest Harvard's seed money to earn a return. That way, at least, the salaries of the chemistry professors would be deductible against the investment income, which would *not* be the case otherwise.

Alas, a reader pointed out that the people who wrote the excise tax thought of that. Section 4968(d) of the Internal Revenue Code says that "assets and net investment income of any related organization with respect to an educational institution shall be treated as assets and net investment income, respectively, of the educational institution," and a "related organization" includes any organization controlled by the institution. So if Harvard parked some endowment assets in a for-profit corporation, its investment income would still be attributed to Harvard, and it would still have to pay the excise tax.

But readers emailed me three other proposals, which are arguably simpler. None of them are tax advice! But here you go.

First: The excise tax applies only to schools with "at least 500 tuition-paying students" and an endowment of at least $500,000 per student. The biggest targets have thousands of tuition-paying students. But, you know. Nick Parillo emailed :

With a current 1.4% endowment tax, all schools are much better off eating the tax and continuing to charge tuition to more than 500 students, but with a proposed 21% rate, some of the targeted schools would be much better off simply abolishing tuition — still collecting fees for room and board? increasing fees for room and board? — and avoiding the tax. Back of the envelope example: In 2024, Princeton collected [$137 million] in net tuition and fees, compared to [$1,715 million] in endowment distributions (which would generate a tax liability of roughly [$360 million]).

"Their endowments are so big that they could stop charging tuition" is a long-time criticism of the big rich universities, but in a 21% tax regime it would actually save them money.

Second: The excise tax applies to *educational institutions*, not *other charities*. Not, for instance, donor-advised funds or charitable trusts. So if you give money to Harvard, you will get a tax deduction, Harvard will pop the money into its endowment, and any earnings on that money will be taxable. But if you give that money to your own donor-advised fund, you will get a tax deduction today, you can invest the money, and any earnings will be non-taxable. And then over time you can distribute it to Harvard for its operating expenses, which will also be non-taxable. (Also you can pick where to invest it, which might be appealing if you don't like Harvard's investing policies .)

And so Kelly Shue emailed:

If Harvard remains a non-profit subject to endowment taxes, donors could instead establish a donor-advised fund, let the fund's investments grow tax-free, and then make grants to Harvard for immediate use — thereby avoiding any taxable endowment income.

This doesn't fix the problem of *existing* endowments, which are pretty big, but I can say from personal experience that Harvard and Yale continue to fundraise, so I guess growing the endowments is still a goal. Arguably it shouldn't be. Arguably "get each alumni class to set up a charitable fund that takes donations, invests them, grows tax-free and makes annual donations to the operating budget" should be.

The third reader idea is the simplest: Just become a for-profit company. Under the tax proposal, a rich nonprofit university pays *higher* taxes than a for-profit company (because it pays taxes on all investment income, without being able to deduct operating expenses), so the big universities could become for-profit companies and pay lower taxes. This would cut off their main source of fundraising (tax-deductible donations), but would open up a huge new source of fundraising: *selling stock*. Obviously there is a problem with repurposing the existing huge endowments for for-profit purposes but, you know, if OpenAI can figure it out probably Harvard can.

Public credit is the new private credit

One much-cited advantage of private credit is that, if you borrow from private credit funds, you have a relationship with your lenders. You negotiate a loan with a limited number of private credit funds, and they plan to hold the loan to maturity. It doesn't trade, so it won't end up in the hand of activists or vulture-y distressed debt funds. If you run into financial trouble, you will go back to the nice people who loaned you the money in the first place, and they will sympathize and try to work with you rather than saying "tough luck, we own your company now." Whereas if you borrow in the bond or broadly-syndicated-loan markets, your debt trades freely, and you might wake up one day and find that it is owned by some pretty tough customers .

I have always assumed that this is a continuum, and that in the long run private credit will trade a bit more, while syndicated loans will maybe trade a bit less. If you really don't want someone to own your debt, the market will provide a solution. Here's a Bloomberg News story about disqualified lender lists :

Clearlake Capital Group … has expanded the so-called disqualified lender list for [its portfolio company] container manufacturer Pretium Packaging to almost 100 names in recent weeks, according to people with knowledge of the matter. Typically such lists, which allow borrowers to block certain parties from purchasing their loans, range from a handful of shops to a few dozen, market watchers say.

Blacklists have become a common strategy for company owners that are weighing a potential restructuring to avoid dealing with money managers they consider difficult to negotiate with, and are often used to counter the most aggressive "loan-to-own" players.

But Clearlake is pushing the tactic to the limit after an investor that had made it known it was seeking to take over Pretium got close to acquiring a significant chunk of the company's debt via a block trade, according to one of the people familiar with the situation. In response, Clearlake vastly expanded its ban list, in part to prevent a similar situation from occurring in the future, and the trade ultimately never went through, the person added. Bloomberg couldn't confirm the prospective investor.

A Loomis Sayles & Co. portfolio manager says: "It seems like an intentional strategy to make something that has historically been public almost private," and, yes, of course. Private credit is hot right now; obviously public credit will copy it.

Insider trading

Classically the way insider trading works is that there is an insider and an outsider. The insider works at a public company and has material nonpublic information about a merger or earnings or whatever, but if he traded on that information everyone would notice and he would get in trouble. The outsider is a brother-in-law or college roommate or golf buddy of the insider; the insider gives the inside information to the outsider, who trades on it, with some plausible deniability. The outsider makes a lot of money buying short-dated out-of-the-money call options on a merger target. But what does the *insider* get? The insider had the valuable information and took risks to give it to the outsider, but the outsider is the one who made money. Shouldn't the insider get a cut?

One possible answer is "no, the insider is really fond of his brother-in-law, so he just wanted to see him happy and didn't need any other reward." Another is "the brother-in-law is kind of a moocher anyway, and by giving him this stock tip the insider avoided getting hit up for a loan at Christmas." The most classic solution is that the outsider cashes out his profits in $100 bills, puts half of them in a paper bag, and hands the bag to the insider in a parking lot. More generally, the outsider often shows his gratitude to the insider by giving him *something* of monetary value. We once talked about an insider trading case where the outsider allegedly paid for the insider's family "to travel from Saint Barthélemy to Nantucket using a private jet," which feels right.

Should the outsider go to a bank and get a cashier's check for half of the profits and hand it to the insider? I mean. No? But nobody should do any of this so what do I know. Anyway here's a criminal insider trading case against Rouzbeh "Ross" Haghighat, who was on the board of directors of Chinook Therapeutics Inc. when it was acquired by Novartis AG. Haghighat allegedly did a *little* trading himself (allegedly buying 40 shares of Chinook in his daughter's account, for a profit of approximately $556.80), but mostly he is accused of tipping various friends and relatives.

One of them is Kirstyn Pearl, his step-daughter, who allegedly spent $5,505 buying short-dated out-of-the-money call options on Chinook, and quickly made a profit of $114,081 when the deal was announced. Good trade! "I'm glad this worked out honey," Haghighat texted her, and she replied "So glad it worked out as well — very very grateful." But they kept texting about, as prosecutors say, "splitting the proceeds of PEARL's illicit profits," with Haghighat saying "Kirst, I'd like to close the loop on fund transfer this week. Easiest is to write out a check or transfer to me and I'll redirect into individual accounts." So she gave him a $55,015 cashier's check, "which ROSS HAGHIGHAT later claimed in messages to PEARL that he lost." She had to get a new check, it was a whole thing. Eventually he got his money though. And then:

On or about April 24, 2024, PEARL messaged a family member concerning the purportedly missing check, and said, in part: "I just totally had a brain popping realization — you know how SOMEHOW a $60k check went missing … it was intentional — since it was an illegal insider trading move." … Later in the message thread, PEARL told the family member, "Delete this lol."

I don't think this makes any sense — he deposited the replacement check! — but, sure, if you are splitting the proceeds of illegal insider trading I guess it might be wise not to get a bank check. Not legal advice! Also don't text about it!

Things happen

The 'TACO Trade' That Has Trump Fuming. Musk Exits DOGE Leaving Threadbare Agencies and Strained Workers. Japan Bonds Draw Weak Demand as Rise in Superlong Yields Sparks Concern. Exxon to Operate Guyana 'Business as Usual' If It Loses Chevron-Hess Arbitration. Elon Musk Tried to Block Sam Altman's Big AI Deal in the Middle East. 1MDB scandal exposer seeks $18mn from ex-Goldman executive. VC Funds Are for Sale — at a Discount. UniCredit to Double Stake in Greece's Alpha Bank to Around 20%. ECB governing council member convicted of bribery. "The goal is to break [Harvard], then break peer institutions, and ultimately break American civil society — to create a situation where the idea that an institution has legal rights is irrelevant, because to defy Trump is to invite ruin even if you can eventually win in court." Lawyer Murdered Client in 2013 to Delay Start of Her Divorce Trial, Prosecutors Say.

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- 1. I do not think that this is logically entailed by the combination of "companies should pursue profits" and "ESG goals are good," but there sure is a lot of empirical correlation.
- 2. Again, this is not logically entailed. You could believe something like "it would be good for the world to drill more oil, but bad for profits; I care only about profits, so I will push the companies that I own to drill less oil even though I personally would like more oil." Arguably this *does* describe the views of some oil and gas investors. Still you'll probably vote against a lot of ESG proposals.
- 3. It is fun, but challenging, to imagine doing this in corporations that the university *doesn't* control: Harvard seeds the Chemistry Corporation, but it is majority-owned by its faculty, not controlled by Harvard, and they can do what they want. What if they sell themselves to MIT?
- 4. I have modified his numbers slightly to tie to this Princeton financial report (page 38).
- 5. Note that the "related organization" provision (Section 4968(d)) that I cited above also covers certain related foundations, which might get caught up in the excise tax; I am not *sure* that this works. Using individual donor-advised funds would be messier but maybe safer.

Securities Law News

Musk Departs US Government With His Business Empire in Flux (1)

May 28, 2025, 9:05 PM PDT

Billionaire Elon Musk said Wednesday that his time as formal adviser to President Donald Trump is coming to a close, raising questions about the future of the Department of Government Efficiency effort he spearheaded.

"As my scheduled time as a Special Government Employee comes to an end, I would like to thank President @realDonaldTrump for the opportunity to reduce wasteful spending," Musk posted on X, his social media platform. "The @DOGE mission will only strengthen over time as it becomes a way of life throughout the government."

By law, Musk's status as a temporary government official was set to run out as soon as May 30, although the exact date was subject to an accounting of his actual days worked. A White House official familiar with the move, speaking on condition of anonymity to discuss a personnel matter, said Musk began the off-boarding process Wednesday night and cast the departure as a decision the technology entrepreneur made on his own with the support of the president.

Earlier: Musk Says He's 'Disappointed' That Trump Tax Bill Raises Deficit

The move comes shortly after Musk gave an interview critical of Trump's biggest legislative priority — the tax cut proposal known as the "One Big Beautiful Bill" — as not doing enough to reduce federal deficits.

Tesla Inc. on Wednesday night also railed against “abruptly ending” the US’s energy tax credits, which the EV maker has benefited from over the last few years. Many congressional Republicans have pushed for the rollback of certain clean energy and solar tax credits as a way to minimize the impacts of the tax and spending bill.

Musk’s campaign to slash the size of the US government sent shockwaves through Washington, with some agencies eliminated outright and tens of thousands of federal workers purged or convinced to accept buyouts, but the initiative fell short of its own high expectations for cost savings.

Trump originally gave the effort a sunset date of July 4, 2026, allowing DOGE nearly 18 months to find what Musk originally promised would be $2 trillion in savings. Musk later downgraded that ambition to $1 trillion — and then even further to $150 billion.

Musk, 53, has joked that his White House title was “chief nothing officer” and maintained he was not essential to the mission. But he quickly became a lightning rod for critics of the venture who focused on the optics of the world’s richest man working to help dismantle the government’s workforce and functions.

Elon Musk
Photographer: Samuel Corum/Sipa/Bloomberg

Trump and Musk have previously declined to lay out a succession plan for DOGE. The project was Musk's brainchild — even down to the acronym that paid homage to an internet-famous dog meme that's long been an object of his obsession.

"DOGE is a way of life, like Buddhism," he joked during one briefing, suggesting that the effort would proceed even after his exit. "Buddha isn't alive anymore. You wouldn't ask the question: 'Who would lead Buddhism?'"

The three top lieutenants he brought to that interview — **Steve Davis**, **Antonio Gracias** and **Anthony Armstrong** — have taken up key DOGE outposts at the General Services Administration, Social Security Administration and the Office of Personnel Management. Those agencies have been among the most active in implementing DOGE's anti-fraud, cost-cutting mission.

DOGE's work has drawn lawsuits over its authority and access to government data and some claims about cost savings have been inaccurate, sparking questions about accountability at the endeavor. Musk has also faced questions regarding conflicts of interest for a tech entrepreneur whose varied business interests already make him a major player in federal contracts.

The backlash against Musk over his high-profile political work sparked concerns among investors over the fallout for his companies, most prominently Tesla. Vehicle sales fell to a nearly three-year low in the first quarter of the year and the stock price plummeted, leading many Wall Street analysts to slash growth expectations.

Tesla cars, showrooms and charger stations endured protests and acts of vandalism, with the Cybertruck being a particular target for critics of Musk. Trump and allies have rallied around the CEO, including an event on the White House grounds where the president viewed different Tesla models before settling on buying a a red Model S, in many ways an unprecedented spectacle.

Musk has openly acknowledged the challenges of managing his businesses — Tesla, SpaceX, XAI Holdings, Neuralink and The Boring Co. — along with his work in Washington.

The Tesla CEO told investors in April that he would soon devote “far more” of his time to the automaker, sending shares in the company higher. Earlier this month, the billionaire told Bloomberg News in an interview that he now planned to pull back on political spending because “I think I’ve done enough.”

Read More: Musk Vows to Ramp Up Starship Launches After Mid-Flight Rupture

(Updates with post from Tesla on tax credits, in fifth paragraph.)

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Musk's White House exit refocuses questions about Tesla, other businesses

reuters.com/business/autos-transportation/musks-trump-administration-exit-lifts-tesla-shares-hopes-renewed-focus-2025-05-29

Aditya Soni, Kritika Lamba May 29, 2025

A demonstrator protests against Tesla CEO Elon Musk outside the new Tesla dealership in London

Item 1 of 2 A demonstrator protests against Tesla CEO Elon Musk outside the new Tesla dealership in London, Britain, April 5, 2025. REUTERS/Carlos Jasso/File Photo

[1/2]A demonstrator protests against Tesla CEO Elon Musk outside the new Tesla dealership in London, Britain, April 5, 2025. REUTERS/Carlos Jasso/File Photo Purchase Licensing Rights, opens new tab

- Musk's exit raises questions about Tesla's sales slump and competition
- SpaceX faces setbacks with rocket program
- Musk's focus shifts to robotaxi launch
- Tesla shares down 25% since December

May 29 (Reuters) - Elon Musk's break with the Trump administration means investors will hope he refocuses on his sprawling empire as Tesla (TSLA.O), opens new tab battles slumping sales and after SpaceX's latest rocket launch fell short of expectations.
Musk called time on his White House stint on Wednesday, giving Tesla investors some succor after shares slumped this year in part due to the backlash to his support of U.S. President Donald Trump and right-wing parties in Europe. The billionaire also spearheaded Trump's so-called Department of Government Efficiency, charged with cutting federal spending, which generated controversy.
He now returns to his empire facing several challenges, but also numerous advantages. Tesla's sales slide is testing investor patience, yet SpaceX and Starlink dominate their respective markets, often serving as the default choice for commercial launches and satellite internet deployment. Foreign governments have also increasingly looked to Starlink, with regulatory approvals smoothed by Musk's close ties to Trump.

That relationship, however, has drawn scrutiny. Shortly before he announced his exit from Washington, Musk criticized the tax bill that is making its way through Congress. In addition, he had recently pledged to spend less money on politics after he plunked down nearly $300 million on Trump's presidential campaign and on other Republican candidates last year.
Tesla shares were little changed in afternoon trading on Thursday, but they have lost about 25% of their value since mid-December. The stock initially soared due to Musk's relationship with Trump and expectations for swift regulatory approval for the company's widely awaited

robotaxis. They reversed course as sales dropped and protests erupted against Musk's embrace of far-right politicians and his role in firing U.S. federal workers.

Analysts say deeper operational fixes are needed to reverse its sales slump, however, as EV buyers increasingly seek out competitors, particularly in the fast-growing Chinese market.

"Musk's departure from DOGE will improve market sentiment, but I see no real change for Tesla," said Morningstar analyst Seth Goldstein.

"Tesla's deliveries decline shows its current product lineup is at market saturation and facing strong competition in all three key markets of the U.S., China and Europe."

With a forward price-to-earnings ratio of roughly 165, according to LSEG data, Tesla remains far more expensive than other Big Tech giants like Nvidia (NVDA.O), opens new tab or Microsoft (MSFT.O), opens new tab, not to mention conventional auto companies. Bullish analysts, such as Wedbush's Dan Ives, have long contended that Tesla's future value is tied to autonomous driving, which Ives said on Thursday could be worth about "$1 trillion alone for Tesla."

Tesla did not immediately respond to a request for comment.

RELATIONSHIP WITH TRUMP

Musk's companies have benefited from his relationship with Trump. Reuters reported last week that Musk's DOGE team was expanding use of his artificial intelligence chatbot Grok in the U.S. federal government to analyze data. Experts told Reuters that this could give Musk access to valuable nonpublic federal contracting data at agencies with which he privately does business, and give him an advantage over other AI service providers.

Trump's cabinet will continue to work with DOGE employees across various federal agencies, the White House said on Thursday, even as at least one member of Musk's team was set to depart. Steve Davis, a close associate of Musk and key in running the agency's day-to-day operations, has stepped down from his DOGE leadership role, according to a source familiar with the matter.

SpaceX's launch this week failed more quickly than expected, exploding over the Indian Ocean without achieving some of its most important testing goals. The result puts another pause in Musk's speedy development goals for the rocket, which is bound to play a central role in the U.S. space program. Federal regulators had granted SpaceX a license for Starship's latest flight attempt four days ago, capping an investigation of a mishap that had grounded Starship for nearly two months.

SpaceX has long had its own management team led by Gwynne Shotwell, though after the latest launch, Musk said he planned to spend more time on the company. The Starship rocket is still many steps away from being able to land humans on the moon or Mars.

"He's not an official part of the government, but obviously maintains connections," said Thomas Martin, senior portfolio manager at Tesla investor Globalt Investments. "So I think there's a slight diminishment of influence at the margin, but I don't think it's going to move the needle on regulatory matters anyway."

Musk has been quiet for months about legislation in Congress that takes aim at electric vehicles, but late on Wednesday, Tesla Energy criticized Republican plans to end energy tax credits. "Abruptly ending the energy tax credits would threaten America’s energy independence and the reliability of our grid," Tesla Energy wrote on its X account. The Republican tax plan could cut tax breaks for electric vehicle purchases and leases, phase out battery production credits and cut clean-energy incentives for solar.

Tesla's robotaxi launch next month is crucial to Musk's plan to shift focus from an affordable electric vehicle to autonomous vehicles and the company's Optimus humanoid robots.

Shortly after news of his Washington departure, Musk said Tesla has been testing driverless Model Y cars in Austin, Texas, with plans to deliver the first vehicles in June.
"Next month, first self-delivery from factory to customer," he said.

Reporting by Aditya Soni and Kritika Lamba in Bengaluru; Additional reporting by David Shepardson and Nandita Bose in Washington; Writing by David Gaffen; Editing by Maju Samuel and Matthew Lewis

Opinion **Lex**

Tesla board considers something new – overseeing Musk

But the electric-car maker is an anomaly, and for many investors that's the point

Elon Musk has been the quintessential superstar chief executive — irascible and an undeniable value creator © AFP via Getty Images

Published 5 HOURS AGO

Will Elon Musk start filling out a time sheet? The world's richest man is under pressure to act more like a regular chief executive at his electric-car maker, Tesla. He is even making some gestures in that direction. Expectations of a normal CEO schedule should be modest at best.

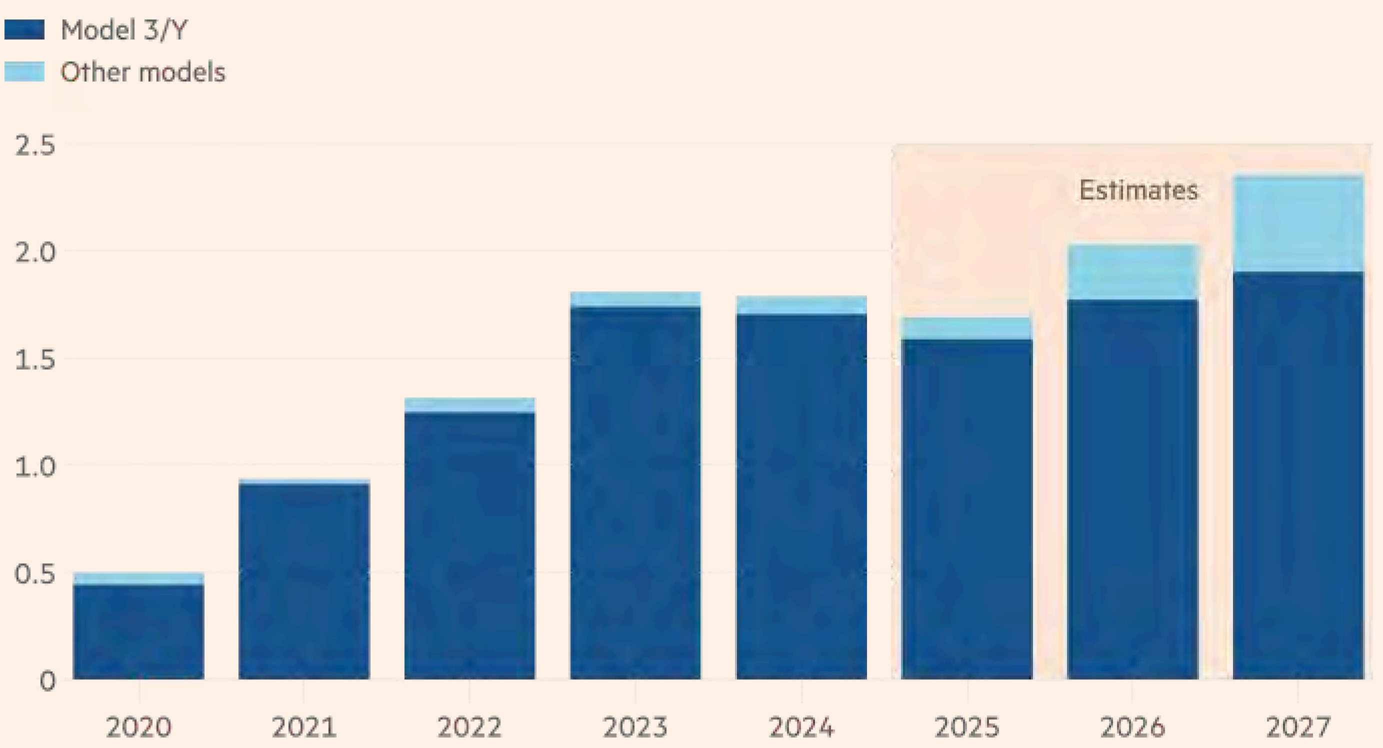
Musk on Wednesday called time on his role at the so-called Department of Government Efficiency. He has plenty of other things to occupy his days and nights. There is the social network X and its new AI division, xAI. Add to that rocket maker SpaceX and brain-mapping company Neuralink.

With such a packed diary, some Tesla investors wonder where they fit in. On Wednesday, shareholders including New York City pension funds sent a letter to the Tesla board demanding, among other changes, that Musk commit to at least 40 hours a week at the carmaker. They collectively only own about 0.2 per cent of Tesla stock, but their agitation could bring others on side.

Musk has been the quintessential superstar chief executive: irascible and an undeniable value creator. But the long leash shareholders afforded him may now have less slack. Tesla shares, even after a recent rally, are down nearly a fifth since December. Deliveries fell 13 per cent in the first quarter, year on year.

Can Tesla get back on track?

Units delivered (mn)



Sources: LSEG via markets.ft.com, Visible Alpha

For shareholders, responsibility sits with Tesla's board which might finally be taking the task seriously. The directors have formed an independent committee to consider a new compensation plan for Musk. It will have to be big to motivate the mercurial mastermind; he already has a $150bn stake in the company.

The trouble is that shareholders have mostly supported Tesla's deviations from the governance norm. Last year, they voted by a strong majority to back a $56bn pay deal a judge had deemed improperly awarded. They also approved moving the company's domicile to Texas, a jurisdiction that has since restricted shareholder rights.

Some of the dissidents' proposals are achievable without cramping Musk's style, such as the creation of a succession plan and the addition of a truly independent board member. Many current Tesla directors have personal or professional ties to Musk. The company recently settled a lawsuit for hundreds of millions of dollars over allegations directors were overpaid.

Musk's pledge to refocus on his entrepreneurial empire may suffice. Being obsessed with Tesla in 2018 when production was ramping up proved to be a game-changer. That success made Musk richer and more influential than ever — though it also left him "fraying" and sleep deprived.

But Tesla is an anomaly, and for many investors that's the point. Any other company with a shaky business and distracted chief executive would have faced an activist campaign to replace or add board members long ago. It's up to Musk to decide whether he wishes to grind like before. It's up to shareholders whether, that being the case, they're happy being passengers.

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Musk says Tesla testing driverless Model Y cars in Austin, aiming June delivery

reuters.com/business/autos-transportation/tesla-deliver-first-self-driving-model-y-car-june-musk-says-2025-05-29

Reuters May 29, 2025

The Tesla logo is seen on a car at the Paris Games Week (PGW), a trade fair for video games in Paris, France, October 27, 2024. REUTERS/Sarah Meyssonnier/File Photo Purchase Licensing Rights, opens new tab

(TSLA.O), opens new tab has been testing driverless Model Y cars in Austin, Texas and aims to deliver the first unit in June, CEO Elon Musk said on Thursday, amid buzz of an imminent robotaxi launch.
Musk had said earlier this year that such a launch would start with 10 or 20 Model Y vehicles.

"A month ahead of schedule," he said on Thursday in his X post, adding that the tests had not seen any "incidents."

He had previously said that Tesla aimed to begin tests of robotaxis only by the end of June.

While the billionaire, who had just hours ago said he was leaving U.S. President Donald Trump's administration, did not give a timeline for the launch, Bloomberg News had reported that Tesla aims to launch its robotaxi service in Austin on June 12.

Tesla did not immediately respond to a Reuters request for comment outside of regular business hours.

Musk said on Wednesday he was leaving U.S. President Donald Trump's administration where he lead a tumultuous efficiency drive, upending several federal agencies and ultimately failed to deliver the generational savings he had sought.

Tesla sales have fallen worldwide with rising competition and as Musk faces a backlash for his right-wing political views and his work for Trump.

Reporting by Gursimran Kaur in Bengaluru; Editing by Nivedita Bhattacharjee

Our Standards:

Securities Law

Ex-Goldman Banker Leissner Gets Two Years in 1MDB Fraud Case (2)

May 29, 2025, 10:01 AM PDT

Former Goldman Sachs Group Inc. banker **Tim Leissner**, who pleaded guilty to helping loot the Malaysian investment fund 1MDB, was sentenced to two years in prison over his role in the massive fraud.

US District Judge Margo Brodie in Brooklyn, New York, imposed the sentence at a hearing Thursday, calling his conduct “brazen and audacious.” Leissner had asked not to go to prison, arguing that his cooperation with prosecutors had resulted in the conviction of a former colleague and billions of dollars in global fines against Goldman.

Tim Leissner, former chairman of Southeast Asia for Goldman Sachs Group Inc., center, exits federal court in the Brooklyn borough of New York on May 29.

Photographer: Yuki Iwamura/Bloomberg

Leissner, 53, had faced as long as 25 years in prison after pleading guilty in 2018 to one count of conspiring to violate bribery laws and conspiring to launder money. While prosecutors had also pushed for leniency, Brodie cited a letter from Goldman and said “without you, it’s unclear these crimes would have taken place.”

“Your brazen and audacious conduct meant you were in a position to provide substantial assistance to the government,” Brodie said. “But in the end, your cooperation does not completely make up for the harm and devastation you knowingly caused through your conduct which was completely selfish. So some punishment is warranted.”

The German citizen was at the center of what US prosecutors described as one of the largest financial frauds in history in which billions of dollars were siphoned from the Malaysian investment fund, 1MDB . Additionally, the US said more than $1 billion was diverted from bond proceeds to pay bribes to officials in Malaysia and Abu Dhabi.

But Leissner cooperated with the US and testified as the government's star witness against his former Goldman colleague **Roger Ng** at a 2022 trial. Leissner spent 10 days on the witness stand describing the sprawling fraud. Ng was convicted and sentenced to 10 years in prison.

Leissner declined to comment after court as did his lawyer Henry Mazurek. The judge said he could be removed from the country after he finishes his term.

The fraud involved staggering sums. A forensic accountant with the FBI who traced diverted funds testified in 2022 that former Malaysian Prime Minister Najib Razak collected at least $756 million, Leissner got $73.4 million, Ng took $35.1 million and fugitive Malaysian financier **Jho Low** got $1.42 billion.

At least $60 million was used to help produce the 2013 **Martin Scorsese** film "The Wolf of Wall Street." The US Justice Department has recovered at least $1.4 billion in assets, including a boutique Beverly Hills hotel, fine art by Monet, Picasso and Van Gogh.

Goldman in 2020 paid more than $5 billion to settle global probes related to 1MDB, including $2.9 billion, which was one of the largest penalties in history for a violation of US anti-bribery laws.

The bank pushed back against leniency for Leissner.

"Leissner's serial lies, fraud and deception at Goldman Sachs continued from the day he first brought the transactions to the firm through the day he left," the bank said in a letter to the court last week. "Mr. Leissner's efforts in this regard are worthy of sanction, not praise."

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Checkpoint Pharma Sued For Docs On $355M Merger Plan

By **Jeff Montgomery**

Law360 (May 28, 2025, 5:15 PM EDT) -- Stockholders of cancer drug developer Checkpoint Pharmaceuticals sued the company in Delaware's Chancery Court for documents on its proposed $355 million acquisition by India-based Sun Pharmaceuticals, alleging conflicts and lack of disclosures regarding the role played by Checkpoint's controlling investor, Fortress Biotech.

Checkpoint stockholders were scheduled to vote on the transaction Wednesday, in a decision that caps years of company exploration of potential deals for the business. The results of the vote were not available as of publication on Wednesday. Terms include a closing on the $4.10 cash per share deal on May 30 and a non-tradeable, 70-cents per share contingent value right triggered by specified performance milestones.

Among other concerns, according to the complaint filed late Tuesday, is an April proxy disclosure that millions of unvested Checkpoint shares held by insiders will vest upon completion of the deal.

A document demand sent to Checkpoint on May 16 said stockholder Gary Fell, plaintiff for the suit, "has a credible basis to believe that Checkpoint's directors and CEO were conflicted because through the merger, they will vest their unvested Checkpoint shares for at least hundreds of thousands of dollars each."

Also cited as a focus of the stockholder investigation are deal terms that would entitle Fortress to receive royalty payments based on future sales of the company's lead drug, cosibelimab, brand name Unloxcyt, prescribed for treatment of some types of local or metastatic skin cancers.

A letter sent to Levi & Korsinsky, counsel to Fell and the stockholders, by Checkpoint asserted that the document demands were overbroad and had failed to show a proper purpose or comply with initial requirements and limitations of the Delaware General Corporation Law's section on books and records access.

"The demand, for example, primarily requests documents, such as emails and text messages, that stretch far beyond what is included in the recently amended definition of a corporation's 'books and records,'" Tim Fitzmaurice of Alston & Bird, counsel to Checkpoint, said in a letter dated May 27.

The company's letter noted that its response "is not intended to be, and is not, a direct or constructive denial of the demand," and that Checkpoint was ready to meet and discuss the demands.

Months after the sales process began, according to the document complaint, Fortress committed to put in place a sales process reflecting the deal process protections that emerged from Kahn v. M&F Worldwide. The "MFW" case and related Delaware Supreme Court decision in 2014 established a deal framework potentially allowing transactions to proceed under business judgment deference rather than more-stringent entire fairness standards.

"Fortress is able to control or significantly influence all matters requiring approval by Checkpoint's stockholders, including the election of directors and the approval of mergers or other business combination transactions," the pre-suit demand said. It noted that at least two Fortress executives serve on Checkpoint's seven-member board.

Fortress also could receive a one-time, in cash change of control fee if the Sun Pharmaceuticals deal goes through.

Sun submitted its initial bid for Checkpoint in September 2024, after having been in less formal discussions for months with both Checkpoint and its controller, Fortress. The first non-binding offer was based on $3.50 per share.

A month later, according to the suit, Fortress "began to demand special benefits" in connection with its decision on supporting a sale, including a potential $20 million in cash and a note sales royalty on Unloxcyt of at least 2%.

The parties did not immediately respond to a request for comment.

Checkpoint Pharmaceuticals stockholder Gary Fell is represented by Stephen E. Jenkins and Tiffany Geyer Lydon of Ashby & Geddes PA, Donald J. Enright and Noah R. Gemma of Levi & Korsinsky LLP and D. Seamus Kaskela of Kaskela Law LLC.

Counsel information for the defendants was not immediately available.

The case is Gary Fell v. Checkpoint Therapeutics Inc., case number 2025-0587, in the Court of Chancery of the State of Delaware.

--Editing by Emily Kokoll.

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Share Control Key To Archegos Suits, 2nd Circ. Suggests

By **Brian Steele**

Law360 (May 28, 2025, 8:54 PM EDT) -- Whether a raft of lawsuits can be restored against Goldman Sachs Group Inc. and Morgan Stanley & Co. LLC may depend in part on how the law defines and treats a controlling shareholder, a panel of the Second Circuit suggested Wednesday as a group of investors tried to save their securities fraud claims arising from the collapse of Archegos Capital Management LP.

The seven dismissed class suits **accuse** the investment banks of illegally avoiding billions of dollars in trading losses by acting on nonpublic information about Archegos, which is not a party, but the three-judge panel questioned plaintiffs' counsel about theories of liability that depend on finding that the defendants breached duties they owed to Archegos and to stock issuers amid the hedge fund's price-pumping scheme, which caused its downfall.

Counsel for investors in the manipulated stocks, David W. Hall of the Hall Firm Ltd., told the three-judge panel that the scheme wiped out $100 billion in market value and was "perhaps unprecedented." It operated largely through total return swaps, derivative contracts through which Archegos collected returns from the banks without holding stock directly and the banks hedged their costs by purchasing their own shares.

Hall characterized Archegos as a controlling shareholder of seven issuers, making it an "insider," but U.S. Circuit Judge Eunice C. Lee was unsure.

"Are they truly a controlling shareholder in the traditional sense?" the judge asked. "I assume you're counting both their shares and the defendants' hedged shares, so do they really have the kind of control that we think of when we talk about a controlling shareholder?"

Hall said beneficial ownership can establish control.

"Has that been found in the context of insider trading, or is that in other contexts where that's considered?" the judge replied.

Hall cited the Second Circuit's 2001 decision in Levy v. Southbrook International Investments in support of using that approach in an insider-trading case.

He said the defendants "enabled" Archegos' market manipulation and then its collapse by offloading their own shares and tipping off others to do the same. At the heart of the matter is the definition of material nonpublic information, which the lower court got wrong by limiting it to inside corporate knowledge held only by the issuers, Hall said.

The plaintiffs' appellate brief said material nonpublic information includes Archegos' "undisclosed, massive beneficial ownership stakes across the issuers, and that these stakes were built by a [total return swap] trading scheme meant to manipulate the market and evade securities laws," as well as word of its imminent implosion.

The plaintiffs alleged two theories of liability: the tipper/tippee theory, claiming that the defendants traded on material nonpublic information that Archegos supplied to them in breach of its duty as a controlling shareholder of the issuers, and a misappropriation theory based on the defendants' "front-running Archegos' block trades of its collateral with sales of their own proprietary shares" in breach of duties of confidence that they owed to the hedge fund.

Under the tipper/tippee theory, the defendants also breached a duty of confidence to the issuers, the plaintiffs said in their appellate brief.

U.S. Circuit Judge Sarah A. L. Merriam said Hall was arguing that all controlling shareholders have the same kind of fiduciary duty "whether or not they have the kind of access we normally associate with it."

"One of the reasons controlling shareholders have a duty as far as, of information, is that they are privy to it," Judge Merriam said. Archegos "was privy to its own financial situation and the fact that it was in big trouble, but I don't think there's an allegation that Archegos had inside information about the kinds of things we often think about. 'Oh, this company's about to release a new product,' or 'The company's product didn't get approval from whatever agency.'"

Controlling shareholders are "traditional insiders," even without any additional showing of access to information or control over corporate affairs, Hall said. He began to compare controlling shareholders to CEOs or other corporate officers and directors, but Judge Merriam cut him off.

"Definitionally, those folks have access to the day-to-day operations of the company, so I don't think that's a helpful comparison," she said.

Using margin accounts and total return swaps with Goldman Sachs, Morgan Stanley and others, Archegos "amassed controlling, non-public and highly leveraged positions" in issuers including ViacomCBS Inc. and Discovery Inc., according to U.S. District Judge Jed S. Rakoff's April 2024 dismissal order. Those positions "dramatically" boosted the issuers' stock prices, but when prices started slipping in March 2021, Archegos collapsed.

Judge Rakoff explained that a total return swap, or TRS, "entitles a client to receive payments on the total return of a referenced asset in exchange for paying fees and posting collateral" to the counterparty. Even though the client does not directly purchase the asset, the counterparty will pay them in the event of an increase in value, but the client pays the counterparty if the value falls.

According to the plaintiffs, the arrangement let Archegos skirt the U.S. Securities and Exchange Commission's disclosure requirements and allowed Goldman Sachs and Morgan Stanley to acquire material nonpublic information about the hedge fund's inability to cover its margin calls.

Judge Rakoff dismissed the operative complaint with prejudice after finding that it did not allege "the critical element of insider trading, i.e., that defendants misappropriated confidential information in breach of fiduciary-like duties," or that the banks had deceived Archegos with their trades, which were authorized by contract in the event of the fund's default. He wrote, "Courts require either that a controlling shareholder has access to confidential corporate information or control over corporate affairs before imposing fiduciary obligations to abstain from insider trading."

"Here, Archegos' beneficial holdings made them 'controlling shareholders' in only an attenuated sense without insider access akin to a director or officer," the decision said. "The only influence Archegos had was over share price, which it manipulated in the marketplace entirely apart from, and unknown to, the issuers themselves."

Archegos founder Bill Hwang was convicted in July 2024 of racketeering conspiracy, securities fraud, wire fraud and stock manipulation and sentenced to **18 years** in federal prison. His co-defendant Patrick Halligan, formerly the hedge fund's CFO, was convicted on racketeering and fraud charges and **sentenced** to eight years in January.

The two executives were accused of lying about the state of the fund's portfolio in order to secure billions of dollars in loans from Wall Street banks. When the pumped-up securities crashed, more than $100 billion in market capitalization "disappeared" in a matter of days, and Archegos was left with billions of dollars in debt, according to an indictment.

Prosecutors said other banks, including Credit Suisse and JPMorgan, lost billions and Archegos employees lost millions of dollars in deferred-compensation investments.

Goldman Sachs and Morgan Stanley argued to the trial court that Archegos was not an insider, did not owe share issuers any fiduciary or other special duty of trust and confidence, and had no contact with or corporate control over the issuers.

Arguing for the defense, Charles S. Duggan of Davis Polk & Wardwell LLP told the panel that Archegos had deceived the banks, which are not alleged to have participated in the scheme and did not know the scale of the fund's concentrated holdings, and although there was a criminal trial regarding abuses of the total return swap system, the arrangements themselves are normal and legal.

"Total return swaps are a feature of the trading marketplace. They are well understood," Duggan said, and "no court" has ever held that they confer insider status.

Archegos did not have beneficial ownership of the shares, he said, and had "merely entered into a contract" that subjected all parties to exposure based on price movements. All the information at issue in the case came from Archegos, and insider trading only occurs when duties are breached, but the defendants did not do that in this case, he said.

Judge Merriam noted that the lower court, even in dismissing the case, flagged Archegos' behavior as a "devious" pump-and-dump scheme.

Speaking to Hall on rebuttal, the judge said the total return swap structure was "uncomfortable" at times, but the SEC allows it.

"How do we consider that in deciding … whether these defendants in particular in this Archegos transaction should be held liable?" Judge Merriam asked.

Hall said Goldman Sachs and Morgan Stanley were the only counterparties who broke SEC rules by front-running. Other institutions "lost their shirt" and "several CEOs lost their jobs," he said.

The fact that the defendants were treated as victims in the criminal case "was not inconsistent" because they had also done wrong, he said.

U.S. Circuit Judges Eunice C. Lee, Sarah A. L. Merriam and Maria Araújo Kahn sat on the panel for the Second Circuit.

The investors are represented by Michael I. Fistel Jr. of Johnson Fistel PLLP, by David W. Hall of the Hall Firm Ltd., by Brian Calandra of Pomerantz LLP, by Daniel Lawrence Berger of Grant & Eisenhofer PA, by Max Raphael Schwartz of Scott + Scott Attorneys at Law LLP, by Alan L. Rosca of Rosca Scarlato LLC, and by Michael Dell'Angelo of Berger Montague PC.

Goldman Sachs is represented by Carmine D. Boccuzzi Jr. of Cleary Gottlieb Steen & Hamilton LLP.

Morgan Stanley is represented by Charles S. Duggan and Daniel J. Schwartz of Davis Polk & Wardwell LLP.

The case is In re: Archegos 20A Litigation, case number 24-1162, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Stewart Bishop. Editing by Karin Roberts.

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Del. Justices Won't Revive Raytheon Incentive Plan Suit

By **Jeff Montgomery**

Law360 (May 28, 2025, 10:42 PM EDT) -- Delaware's highest court on Wednesday declined to revive a derivative suit accusing Raytheon Technologies Corp. directors of wrongly allowing a special committee to change an employee pension plan without stockholder approval, citing no support for alleged bylaw breaches or need for a stockholder vote.

A three-member panel of the state's Supreme Court also rejected arguments that the company's board wrongly delegated decisions on Raytheon's long-term incentive plan to a special committee.

The dispute emerged from United Technologies Corp.'s decision in 2018 to spin off two operating subsidiaries and to merge its remaining aerospace business with Raytheon Co., forming Raytheon Technologies Corp. The changes were completed by April 2020.

Stock prices of the realigned businesses fluctuated, with Raytheon Technologies' board creating a three-member committee to sort out how to adjust pre-conversion equity awards into those applicable to the spin-offs.

The equity awards were issued by United Technologies before it merged with Raytheon, under plans covering thousands of employees in 2014 and 2018. Those changes in turn produced a contested post-merger windfall for Raytheon executives, attorneys for the Vladimir Gusinsky Revocable Trust — the stockholder that sued on behalf of the company's board — alleged.

Before the high court on appeal was Vice Chancellor Morgan T. Zurn's finding that the trust failed to show how Raytheon's directors were wrong in delegating authority to a special committee to amend two long-term incentive plans to account for the spin-off companies.

The board's delegation resolutions "did not prevent the special committee from procuring any other approval necessary for the amendment, including stockholder approval. Plaintiff's improper delegation argument fails," said Wednesday's nine-page decision, written by Justice N. Christopher Griffiths for the panel.

"Delaware directors are presumed to act in good faith," the decision said. "To rebut this presumption, plaintiff must show that the directors acted improperly with scienter, such as an intentional dereliction of duty or a conscious disregard of responsibilities."

Named in the suit are 15 current and former directors as defendants, with Vice Chancellor Zurn citing failure to show that at least seven of the directors acted in bad faith.

The lower court decision pointed to "specific and insistent allegations" that the board "never expressly considered or decided whether" a stockholder vote was required under the plans, making a finding of bad faith impossible, the vice chancellor said.

During Supreme Court arguments in March, Justice Collins J. Seitz Jr. told attorneys for the stockholders that "you've got to climb over the hill of intentional conduct. Maybe you ought to restate your best case for pleading an inference that there was intentional wrongdoing."

Justice Karen L. Valihura said during the March hearing that those who sued "still have to show a clear and unambiguous violation of the plan" on appeal, a hurdle that the Wednesday ruling found was never cleared.

The parties did not immediately respond to requests for comment Wednesday.

Justices Collins J. Seitz Jr., Karen L. Valihura and N. Christopher Griffiths sat on the panel for the Delaware Supreme Court.

Vladimir Gusinsky Revocable Trust is represented by Benjamin I. Sachs-Michaels, Pavithra Rajesh and Robert V. Prongay of Glancy Prongay & Murray LLP, Richard Maniskas of RM Law PC, and Blake A. Bennett of Cooch & Taylor PA.

Raytheon and the director defendants are represented by William Savitt, Graham W. Meli and Sunny S. Jeon of Wachtell Lipton Rosen & Katz, and John L. Reed, Ronald N. Brown III and Peter H. Kyle of DLA Piper.

The case is Vladimir Gusinsky Revocable Trust v. Hayes et al., case number 347,2024, in the Supreme Court of the State of Delaware.

--Editing by Melissa Treolo.

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Coinbase Users Sue Over Terraform Token Conversion Losses

By **Aislinn Keely**

Law360 (May 28, 2025, 10:49 PM EDT) -- A group of crypto buyers sued Coinbase Global Inc. over losses they say they incurred from the crypto exchange's actions in the wake of the historic Terraform collapse, accusing Coinbase of muddling the process of converting their assets and providing them with inaccurate tax documents.

A group of 12 buyers of a Terraform token known as Wrapped Luna, or WLUNA, said in a Tuesday complaint that they felt the fallout after Coinbase suspended trading of the token during the May 2022 collapse of the Terraform ecosystem. According to the buyers, the crypto exchange misled them on what to expect and later issued "materially inaccurate" tax and account documents that didn't match up with blockchain records.

"This misrepresentation and failure to properly handle the digital asset conversion process unfairly benefited Coinbase at the direct expense of retail investors, who were deprived of millions of dollars of potential gains due to Coinbase's actions," said the buyers.

The Terraform ecosystem maintained a suite of interconnected assets, including a so-called algorithmic stablecoin, before it suffered a stunning collapse in May 2022 that sparked wider market turmoil for digital assets and contributed to the onset of a so-called crypto winter. Federal prosecutors charged Do Kwon, the co-founder of the now-bankrupt Terraform Labs, with fraud in connection with the failure.

According to the buyers in Tuesday's suit, Terraform Labs issued WLUNA as a version of its LUNA token meant to be compatible with the Ethereum blockchain. WLUNA was pegged to the value of LUNA, meaning WLUNA could always be redeemed for an equal value of LUNA tokens. The buyers noted that the pegged relationship between the two tokens was coded into the blockchain.

When the Terraform ecosystem crashed, the price of WLUNA dropped and Coinbase announced it would suspend the trading in the token. The buyers argued Coinbase led them to believe the outage would be temporary when "Coinbase never intended, or subsequently failed, to restore WLUNA trading."

Instead, the users claim Coinbase prolonged the outage and inhibited their ability to access a newly issued LUNA token that could have allowed them to make recoveries.

After the suspension of WLUNA, Coinbase "consistently provided false, misleading, and incomplete communications to investors regarding the status of WLUNA and their associated accounts," according to the buyers. In one instance, California-based plaintiff Amy Lucanera said she received tax documents that falsely indicated she acquired $76 million worth of WLUNA, "dramatically contradicting blockchain ledger entries."

The users also accused the crypto exchange of impeding their attempts to access, transfer or convert their WLUNA, arguing the firm "effectively blocked Plaintiffs' ability to independently execute trades or conversions of WLUNA into new LUNA tokens elsewhere, exacerbating Plaintiffs' financial harm and directly benefiting Coinbase by minimizing its own exposure to market losses and conversion obligations."

Their complaints surrounding the handling of the WLUNA outage also went unaddressed, the buyers argued.

"Coinbase systematically disregarded, provided misleading responses to, or inadequately addressed customer inquiries about the WLUNA outage, thereby concealing its misconduct and further aggravating the harm suffered by Plaintiffs," said the buyers.

The suit asserts securities law violations for disseminating materially false or misleading statements about WLUNA, as well as breach of contract, breach of implied covenant of good faith and fair dealing, conversion and fraud.

Coinbase did not immediately respond to a request for comment Wednesday.

The users are represented by Mario Tafur of Bulldog Law PC.

Counsel information for Coinbase was not immediately available.

The case is Heabeart et al. v. Coinbase Inc. et al., case number 3:25-cv-04473, in the U.S. District Court for the Northern District of California.

--Editing by Andrew Cohen.

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Mallinckrodt Investors Get Initial OK For $5.5M Settlement

By **Sydney Price**

Law360 (May 28, 2025, 6:31 PM EDT) -- Investors of drugmaker Mallinckrodt received preliminary approval of their $5.5 million settlement with two executives and a director of the company Wednesday, ending the investors' claims they were misled into believing Mallinckrodt had recovered from bankruptcy and would make a $200 million payment to opioid claimants.

According to the settlement notice that was filed Tuesday and approved by U.S. District Judge Zahid N. Quraishi, lead counsel intends to request up to $1.9 million in fees, or about a third of the settlement fund, as well as up to $350,000 for expense reimbursement.

The parties participated in a full-day mediation session in January, and, after a second half-day session in April, the settling parties agreed in principle on April 15 to resolve all claims against the defendants, which include Mallinckrodt CEO Sigurdur Olafsson, Chief Financial Officer Bryan M. Reasons and chairman Paul Bisaro, the settlement notice states.

A final approval hearing is set for Oct. 9, according to the order preliminarily approving the settlement.

The stockholders sued the company and executives in July 2023 after its share price tumbled in the wake of admissions that the pharmaceutical company was weighing a second bankruptcy and wouldn't pay interest on two bonds.

The claims against Mallinckrodt were dropped after it filed for bankruptcy in the District of Delaware in August 2023.

Mallinckrodt, which initially sought bankruptcy protection in 2020, said in a U.S. Securities and Exchange Commission filing on June 5, 2023, that it might do so again to make its $200 million payment to an opioid victims' fund, leading to a 40% drop in its stock price.

The company, which produces opioids, agreed under its 2020 Chapter 11 bankruptcy plan to make nine payments to a compensation trust, and then spoke optimistically about its financial prospects and ability to make those payments, the investors' suit noted.

However, before it completed its second payment, lenders asked the Dublin-based company to consider entering bankruptcy again to meet the payment, according to an SEC filing.

When Mallinckrodt followed up on June 15 last year with a notification to the SEC that it wouldn't pay the interest due that day for two bonds, its stock price dove again, this time by 30%, the shareholders said.

In September, Judge Quraishi **denied** the remaining defendants' dismissal motion, which argued that the stockholders' amended complaint should be tossed because it failed to plead misleading or material statements or scienter, and since the statements that are cited in the case are forward-looking.

Judge Quraishi said at the time that the amended complaint "clearly and in detail" alleged the officers made false and misleading statements. All the statements the shareholders described as misleading are material, the judge said, since a reasonable investor would want to know the truth about a company's financial projections and standing after it recently emerged from bankruptcy.

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

The investors are represented by Brian Calandra and Jeremy A. Lieberman of Pomerantz LLP and David J. Schwartz of DJS Law Group LLP.

Olafsson, Reasons and Bisaro are represented by Allison M. Wuertz, William M. Regan and Jacey L. Gottlieb of Hogan Lovells.

The case is Continental General Insurance Co. et al. v. Olafsson et al., case number 3:23-cv-03662, in the U.S. District Court for the District of New Jersey.

--Editing by Emily Kokoll.

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Class Suit Against AI Drugmaker Back On After Mediation Fails

By **Brian Steele**

Law360 (May 28, 2025, 7:52 PM EDT) -- After the parties failed to settle through mediation, a Connecticut federal judge has unpaused the latest iteration of a proposed class action accusing artificial intelligence-driven drugmaker BioXcel Therapeutics Inc. of false and misleading statements about U.S. Food and Drug Administration compliance issues surrounding a dementia drug.

U.S. District Judge Sarala V. Nagala on Tuesday granted a joint motion to lift a stay in the case after BioXcel and the plaintiffs, led by a Florida-based investor and the Oklahoma Law Enforcement Retirement System, told her that a private mediation session on May 12 was "unsuccessful."

The operative August complaint is the subject of a pending dismissal motion, and the plaintiffs have separately moved to amend it to add "new substantive allegations" to bolster theories of falsity and scienter.

The securities fraud case alleges investors "were stunned to learn" in June 2023 that trial data for BXCL501, a drug intended to treat agitation in Alzheimer's patients, "was virtually useless" after the FDA found protocol violations. Investors lost millions when the stock price plummeted, according to the putative class.

"Defendants waited six months to disclose the truth to investors, and timed the disclosure deliberately to allow BioXcel's Chief Executive Officer, defendant Vimal Mehta, to realize millions of dollars in gains from exercising his options pursuant to a trading plan that had pre-established when these transactions would occur," the operative complaint said.

Judge Nagala **dismissed** a prior version of the complaint in July 2024, finding it failed to adequately plead the company intended to deceive or defraud investors.

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

The putative class is represented by Adam M. Apton of Levi & Korsinsky LLP and Caitlin M. Moyna of Grant & Eisenhofer PA.

The defendants are represented by Colleen C. Smith, Jessica Bengels, Michele D. Johnson, Sarah Tomkowiak and Meryn C. N. Grant of Latham & Watkins LLP.

The case is Hills et al. v. BioXcel Therapeutics Inc. et al., case number 3:23-cv-00915, in the U.S. District Court for the District of Connecticut.

--Additional reporting by Rae Ann Verona. Editing by Drashti Mehta.

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Duke Energy Settles Proposed Class Action Over Data Breach

By **Hayley Fowler**

Law360 (May 28, 2025, 8:59 PM EDT) -- Duke Energy has reached a deal in a proposed class action alleging that customers' sensitive personal information was exposed in a data breach last year, according to a joint notice the parties filed in North Carolina federal court.

Named plaintiff Matthew Saunders said he was dropping his suit against Duke Energy Carolinas LLC and Duke Energy Corp., with each side to pay their own costs except as laid out in the forthcoming settlement agreement. **The notice** follows a motion in March in which both sides revealed they anticipated finalizing a deal.

The motion indicated the settlement is one of seven Duke reached in other proposed class actions filed in the Western District of North Carolina stemming from the data breach.

Saunders, a St. Petersburg, Florida, resident, brought his suit in December on behalf of a nationwide class and a Florida subclass of customers whose personally identifiable information was accessed by cybercriminals in a May 2024 breach.

Duke revealed the breach in a notice on its website in December, which said that "a third party may have obtained certain customer information" through duke-energy.com.

Counsel for the parties and a Duke Energy spokesperson did not immediately respond to request for comment Wednesday.

Saunders and the potential class are represented by Scott C. Harris of Milberg Coleman Bryson Phillips Grossman PLLC and Jeff Ostrow of Kopelowitz Ostrow PA.

Duke Energy is represented by Robert A. Muckenfuss, Jessica O'Brien Peretz, Elizabeth Zwickert Timmermans and Peter J. Wright of McGuireWoods.

The case is Saunders v. Duke Energy Carolinas LLC, case number 3:24-cv-01074, in the U.S. District Court for the Western District of North Carolina.

--Additional reporting by Brian Steele. Editing by Stephen Berg.

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4th Circ. Finds Towers Watson's Merger Deals Not Covered

By **Hope Patti**

Law360 (May 28, 2025, 5:13 PM EDT) -- Towers Watson's insurers have no obligation to pay out their remaining directors and officers coverage to help fund settlements resolving shareholder litigation over the company's merger with Willis, the Fourth Circuit affirmed Wednesday, saying the deals fall plainly within the scope of a so-called bump-up exclusion.

A Virginia federal court correctly determined that the settlements represented an effective increase in the consideration that Towers Watson's shareholders received for the acquisition of their shares, thus barring indemnification, a three-judge panel for the Fourth Circuit held in a **published opinion**.

To trigger the bump-up exclusion, an underlying suit must contain allegations of inadequate deal consideration and the resulting settlement or judgment must represent an effective increase in the price or consideration for an acquisition.

"There is no real dispute that the shareholders filed a 'claim' alleging that the consideration paid for Willis' acquisition of Towers Watson was inadequate," U.S. Circuit Judge G. Steven Agee wrote for the court. While the parties disagree over the meaning of the terms "represent" and "effectively increase," the judge said it is clear that the second condition of the exclusion is also satisfied.

The shareholders sought to rectify a perceived shortfall, "that is, they sought what was effectively an increase (or 'bump-up') in the consideration paid for their shares," Judge Agee said. "The settlements they eventually received constituted — i.e., 'represent[ed]' — precisely such a bump-up."

Towers Watson's shareholders filed class actions against the company in Virginia and Delaware following its 2016 merger with Willis Group Holdings PLC. The suits alleged that Towers Watson's then-CEO, John Haley, failed to negotiate adequate deal consideration because of an undisclosed conflict of interest, and, as a result, shareholders accepted a deal price that was below fair value for their shares.

The parties ultimately reached settlements of $75 million in the Virginia action and $15 million in the Delaware action.

Towers Watson's insurers, including National Union Fire Insurance Co. of Pittsburgh, Pa., Federal Insurance Co. and others, funded the company's defense in the underlying actions. However, they refused to provide indemnification because of the policies' bump-up exclusion, leading to the filing of the coverage dispute in July 2020.

The ruling at the center of Towers Watson's appeal came in March 2024, after the Fourth Circuit reversed U.S. District Judge Anthony J. Trenga's **previous finding** that the exclusion didn't apply because it was not clear that the merger qualified as an "acquisition." On remand, Judge Trenga **concluded** that the settlements represented an effective increase in deal consideration and thus were barred by the exclusion.

The panel on Wednesday rejected Towers Watson's **contention** that the district court conflated allegations of inadequate deal consideration with what the settlement actually represents, saying the argument is "doubly flawed."

"First, that's not what the district court did. Its opinion was crystal clear on this point and even included separate sections addressing these distinct issues," Judge Agee said. "Second, the court is entitled to review the full record on appeal and independently assess this issue regardless of how the district court reached its conclusion. And for the reasons outlined herein, our independent assessment likewise supports affirmance."

The panel also disagreed with Towers Watson's **argument** that the settlements are exempt from the bump-up exclusion because they resolved a claim under Section 14(a) of the Securities Exchange Act. According to the company, Section 14(a) cannot be used to bring a claim for inadequate consideration, so the settlement of such a claim can't represent an effective increase in deal consideration.

"While a clever argument, it is beside the point," Judge Agee said. For the purposes of this dispute, the panel held that it does not need to determine whether the complaints came within Section 14(a).

The district court also correctly found that the bump-up exclusion bars indemnification for a $17 million portion of the settlement money that went toward the shareholders' attorney fees, the panel said.

"The logistics of the settlement and attorneys' fees arrangement here confirm that the common fund doctrine is applicable," Judge Agee said, referring to a principle that allows courts to award attorney fees from a settlement fund.

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

U.S. Circuit Judges G. Steven Agee, James Andrew Wynn and Allison Jones Rushing sat on the panel for the Fourth Circuit.

Towers Watson & Co. is represented by Robin L. Cohen, Adam S. Ziffer and Orrie A. Levy of Cohen Ziffer Frenchman & McKenna LLP, by Paul D. Clement, Andrew C. Lawrence and Joseph J. DeMott of Clement & Murphy PLLC, and by Marla Diaz of Whiteford Taylor & Preston LLP.

Federal Insurance Co. is represented by Jonathan Hacker, D. Sean Trainor and Allen Burton of O'Melveny & Myers LLP.

National Union Fire Insurance Co. of Pittsburgh, Pa. is represented by Ian Hoffman, Scott Schreiber and Arthur Luk of Arnold & Porter Kaye Scholer LLP.

Travelers Casualty and Surety Co. of America is represented by Charles Chotvacs, Thomas Judge and Jeffrey Ward of Dykema Gossett PLLC.

Liberty Insurance Underwriters and Ironshore Indemnity Inc. are represented by William Mitchell of Eccleston & Wolf PC and by Scott Schechter and Joshua DiLena of Kaufman Borgeest & Ryan LLP.

Allied World National Assurance Co. is represented by Patrick McDonald and Edward Cameron of Cameron McEvoy PLLC and by Kristin Gallagher and William Brennan of Kennedys CMK.

The case is Towers Watson & Co. v. National Union Fire Insurance Co. of Pittsburgh, Pa. et al., case number 24-1302, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Amy Rowe.

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Insurers Get Meta MDL Coverage Fight Kicked Back To Del.

By **Dorothy Atkins**

Law360 (May 28, 2025, 11:30 PM EDT) -- A California federal judge ruled Tuesday Meta Platforms' sprawling dispute with dozens of insurers over coverage for personal injury multidistrict litigation belongs in Delaware state court, where two Hartford Insurance Group units first sued, rejecting Meta's claims Hartford acted in bad faith in suing in Delaware, along with other arguments.

In an 11-page order, U.S. District Judge Yvonne Gonzalez Rogers found Meta Platforms Inc. had no valid basis for removing Hartford's coverage dispute, which also now includes Chubb Group entities as well as at least 17 third-party insurers, to federal court, and the Delaware Superior Court can resolve the social media giant's pending request to either dismiss or pause the coverage dispute.

In granting the motion to remand, Judge Gonzalez Rogers rejected multiple arguments by Meta Platforms Inc.'s allegations that Hartford had acted in bad faith and "gamesmanship" by filing its Delaware state court action shortly after mailing Meta its decision to deny coverage.

Although Judge Gonzalez Rogers had initially **appeared skeptical** of the insurance company's conduct during a hearing on the remand motion in April, the judge wrote in her order Tuesday that she had ordered the parties to submit into the record all of their presuit communications and that evidence revealed that Meta's bad faith accusations were unfounded.

The parties' communications show that before suing, Hartford both mailed and emailed Meta and Meta's outside counsel Hartford's denial letter, and prior to its determination, Hartford, Meta and Meta's outside counsel communicated about the coverage dispute by email and mail, the order says.

"Meta cannot seriously argue that Hartford acted in bad faith in filing suit in Delaware, particularly where Meta was on notice that a suit could be looming," the judge wrote. "Moreover, Meta's bad faith arguments are against Hartford alone. Meta does not allege any facts that show that other removing [insurer] defendants, like Chubb, acted in bad faith. Meta does not satisfy the bad faith exception to the first-to-file rule."

The high-stakes insurance dispute sprung out of underlying multidistrict litigation that was **consolidated** before Judge Gonzalez Rogers in 2022. In the MDL, personal injury plaintiffs, schools and attorneys general generally accuse Meta and other social media giants of designing their multibillion-dollar revenue-generating platforms like Facebook and Instagram to be addictive to the detriment of minors' health and livelihood.

During the early stages of the MDL, Meta had sought coverage for its defense and other costs associated with fighting the MDL under its policies with Hartford. After the parties communicated for months, Hartford notified Meta in November 2024 that it had no duty to defend or indemnify Meta and shortly after, Hartford **filed a lawsuit in Delaware state court** seeking a declaration in that regard, according to court documents.

Hartford's litigation also sought a declaration against other Meta general liability insurers, including Chubb, Old Republic Insurance Co., Starr Indemnity & Liability Co., Zurich American Insurance Co. and 22 third-party insurers were eventually roped into the litigation, although since then, claims have been voluntarily dropped against five third-party insurers.

The insurers filed numerous counterclaims against each other, and in late December, Meta removed the state court case to Delaware federal court. In January, the insurers asked the Delaware federal judge to remand the dispute back to state court, but before the judge ruled, the Judicial Panel on Multidistrict Litigation **transferred** the Delaware action to Judge Gonzalez Rogers' docket as she was presiding over the underlying MDL.

Meanwhile, Meta **filed its own lawsuit** seeking declaratory relief against Hartford in California federal court and raised multiple arguments for why the insurance dispute should be kept in the Golden State. Meta also argued that whether Meta's alleged misconduct in the MDL was intentional is a key issue that likely will determine insurance coverage under many policies, and Judge Gonzalez Rogers is most familiar with the MDL as she is presiding over the complicated case, which involves thousands of claims.

However, in her ruling Tuesday, Judge Gonzalez Rogers rejected all of Meta's "mix-and-match removal theories" based on Meta's arguments of bad faith conduct, realignment, equitable estoppel and fraudulent joinder.

The judge's ruling noted that Meta is incorporated in Delaware, so it can't be unduly prejudiced by litigating the insurance dispute in Delaware. She also rejected Meta's argument that the various third-party insurers had been fraudulently brought into the litigation, and she agreed with the insurers' argument that it is a common practice to bring into the litigation all insurers that might have a stake in the outcome, "in part because Delaware law requires it."

Judge Gonzalez Rogers added that Meta cannot show that it has no relationship with those third-party insurers, and the parties could still amend their claims to add whatever allegations Meta suggests are missing.

The judge additionally rejected Meta's arguments that the California personal injury cases were filed against Meta before the insurance dispute and therefore are the first to be filed for the purpose of establishing forum.

The judge reasoned that although the personal injury cases were filed earlier and may address overlapping issues regarding Meta's intentional conduct, the insurers were not party to any case "in or related to" the MDL, and "one can easily envision a scenario where a plaintiff in the MDL and an insurer's interests might diverge."

Counsel and representatives for the parties didn't immediately respond to requests for comment Wednesday.

Meta and Instagram are represented by Heather W. Habes and Paul W. Schmidt of Covington & Burling LLP.

Hartford Casualty Insurance Co. and Sentinel Insurance Co. Ltd. are represented by Matthew John Antonelli of Ruggeri Parks Weinberg LLP.

The third-party Chubb Group insurance entities Federal Insurance Co., Westchester Surplus Lines Insurance Co., Westchester Fire Insurance Co. and Ace Property & Casualty Insurance Co. are represented by Blair E. Kaminsky and Daniel M. Horowitz of Holwell Shuster & Goldberg LLP.

The MDL case in California is In re: Social Media Adolescent Addiction/Personal Injury Products Liability Litigation, case number 4:22-md-03047, and coverage litigation is Instagram LLC et al. v. Hartford Casualty Insurance Co. et al., case number 4:24-cv-09500, and Hartford Casualty Insurance Co. et al. v. Instagram LLC et al., case number 4:25-cv-03193, all in the U.S. District Court for the Northern District of California.

--Additional reporting by Abraham Gross. Editing by Jay Jackson Jr.

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DOL Tells 5th Circ. It Will Craft New ESG Rule For 401(k) Plans

By **Grace Elletson**

Law360 (May 28, 2025, 7:15 PM EDT) -- The U.S. Department of Labor told the Fifth Circuit on Wednesday that it will launch new rulemaking and move "as expeditiously as possible" to replace Biden administration regulations on whether fiduciaries can consider issues like climate change and social justice when choosing retirement plan investments.

The agency's **status report** comes amid a legal challenge led by Utah and 24 other Republican state attorneys general to a 2022 rule allowing retirement fiduciaries to consider environmental, social and governance, or ESG, factors when making investment choices.

The Fifth Circuit told the DOL on April 28 that it needed to inform the court **within 30 days** about what specific action it planned to take on the challenged rule, after the agency told the court earlier that month that it was considering rescinding the rule.

"This rulemaking will appear on the department's spring regulatory agenda, and the department intends to move through the rulemaking process as expeditiously as possible," the government said in Wednesday's one-page status report.

The states, along with individual retirement investors and energy companies, sued the DOL in 2023, claiming the rule violated federal administrative procedure laws and the Employee Retirement Income Security Act. The rule, finalized in 2022, rolled back regulations issued under President Donald Trump's first administration restricting how retirement plans could consider ESG factors.

While a Texas federal judge **initially upheld** the rule in a September 2023 order, the Fifth Circuit in July 2024 **vacated and remanded** the decision in light of the U.S. Supreme Court's opinion in Loper Bright Enterprises v. Raimondo , which upended the so-called Chevron doctrine handing deference to federal agencies to interpret statutes.

The high court's order rolled back its landmark ruling in Chevron USA Inc. v. Natural Resources Defense Council Inc. , which U.S. District Judge Matthew J. Kacsmaryk based his opinion on in July.

But in February, Judge Kacsmaryk **backed the rule again** on remand. He found that the rule still complied with ERISA's requirements for fiduciaries, because the rule does not interfere with a fiduciary's obligation to abide by their duties of loyalty and prudence when choosing between investment options. The Fifth Circuit subsequently asked the parties in March to shed light on how the ruling would impact the appeal moving forward.

Representatives of the states, the retirement investors, the energy companies and the DOL did not immediately respond to requests for comment.

The states are represented by their respective attorneys general.

The energy companies are represented by Jonathan Berry of Boyden Gray PLLC.

The individual retirement investors are represented by Anna St. John and Neville Hedley of the Hamilton Lincoln Law Institute.

The Department of Labor is represented by Daniel Winik of the U.S. Department of Justice.

The case is State of Utah v. Chavez-DeRemer, case number 23-11097, in the U.S. Court of Appeals for the Fifth Circuit.

--Additional reporting by Kellie Mejdrich, Hailey Konnath and Rae Ann Varona. Editing by Amy Rowe.

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Smartmatic Says Fox Is Trying To 'Bury Proof' In Defamation Row

By **Elaine Briseño**

Law360 (May 28, 2025, 5:17 PM EDT) -- Voting technology company Smartmatic has asked a New York state court to lift the "veil of secrecy" on evidence it alleges Fox News is trying to keep hidden from the public as it faces allegations of defamation related to conspiracy theories it aired about a stolen election in 2020.

Smartmatic told the Supreme Court of New York on Tuesday that Fox's hypocrisy is "staggering" and the public has a constitutional right to court proceedings. Redactions should be the narrow exception, not the rule, Smartmatic said.

"Fox is weaponizing confidentiality rules to shield itself from accountability rather than protect legitimate business interests," the filing said. "Fox's approach turns the presumption of public access on its head."

In litigation involving commercial entities, the parties can in "compelling circumstances" request redactions to protect trade secrets, confidential business information and proprietary information that could give a competitor an advantage. According to Smartmatic's memo seeking to declassify summary judgment filings, Fox cannot meet this burden.

Fox's true intentions are to obscure its actions, but the public deserves to know the truth, Smartmatic said.

"The truth is simple: behind closed doors, Fox mocked the very conspiracy theories it spread on air, mocked President Trump and showed contempt for its viewers," the memo said. "Now it's trying to bury the proof. As always, Fox lies — again and again."

Smartmatic has claimed Fox reported baseless statements that the company was involved in a scheme to rig the 2020 presidential election for former President Joe Biden and that those reports caused a significant hit to its business.

"Smartmatic brings this motion to grant the public its constitutional right to access the court record — specifically, the facts and evidence underlying its summary judgment motion," the filing said. "While neither the media nor public will decide this case, both have substantial, legitimate interests in these proceedings."

The parties already had an established protocol for filing confidential information, but Fox allegedly broke that protocol. The parties had agreed to initially file briefs with sensitive information under seal. The non-filing party would then identify any information requiring redaction and the filing party would submit a new, unsealed version with those identified redactions in place, Smartmatic said.

This procedure, according to Smartmatic, was followed since September 2022 for more than 60 filings. That changed in April this year when Fox included an unredacted introduction in a filing related to summary judgment.

"Fox's motivation became apparent when, shortly after filing, a series of articles appeared in multiple media outlets that parroted Fox's 'introduction,'" the memo said. "As if Fox had not done enough damage to Smartmatic, Fox weaponized its 'introduction' to push more lies about Smartmatic to further undermine confidence in the company."

After ignoring the protocol for its gain, the media company then tried to use the same protocol to hide evidence, according to Smartmatic. It heavily redacted Smartmatic's summary judgment materials, designating most of the information as "confidential."

"Due to Fox's excessive confidentiality designations, Smartmatic's publicly available brief resembles a puzzle with most of the pieces missing," Tuesday's filing said. "It is incomprehensible. Just like Fox wants."

On May 21, Fox News launched a bid for sanctions against Smartmatic, alleging nearly two-dozen executives and other employees destroyed critical evidence by deleting mobile messages.

Smartmatic lobbed its own evidence-deleting accusations at Fox News, filing a motion for adverse inference charges based on spoliation. Smartmatic says network executives, including Rupert Murdoch and his son Lachlan, deleted "critical" and "incriminating" text messages related to allegedly defamatory broadcasts during the election.

"After suffering a major discovery setback and facing proof of willfully destroying evidence, it's clear Smartmatic is once again attempting to distract from their crumbling case," Fox News told Law360 on Wednesday. "The evidence shows that their business and reputation were suffering long before President Trump's lawyers made claims on FOX News and that they grossly inflated their damages claims to generate headlines and chill free speech. We are eager and ready to defend our case that we covered extremely newsworthy events when it goes to trial."

Smartmatic declined further comment.

Smartmatic is represented by J. Erik Connolly, Nicole E. Wrigley, Lee B. Muench and Edward C. Wipper of Benesch Friedlander Coplan & Aronoff LLP.

Fox News, hosts Maria Bartiromo and Jeanine Pirro and former host Lou Dobbs' estate are represented by Mark R. Filip, Chris Stackhouse, Aaron H. Marks, Robert W. Allen, K. Winn Allen, Michael F. Williams, Devin S. Anderson, Erin E. Cady, Leah A. Hamlin and Brad Masters of Kirkland & Ellis LLP, Steven G. Mintz and Scott Klein of Mintz & Gold LLP, and Paul D. Clement and Erin E. Murphy of Clement & Murphy PLLC.

The case is Smartmatic USA Corp. et al. v. Fox Corp. et al., case number 151136/2021, in the Supreme Court of the State of New York, County of New York.

--Additional reporting by Hailey Konnath. Editing by Kelly Duncan.
