News | **Class Actions**

BCBS Denied 'En Masse Opt Out' in Walgreens Prescription Class Action, Judge Rules

August 12, 2025 | By Marianna Wharry

Walgreens pharmacy in Baltimore in August 2020. Photo: Diego M. Radzinschi/ALM

An Illinois federal judge denied two nationwide health insurers' requests to opt out of a $100-million class action settlement late last week.

U.S. District Judge Edmond E. Chang for the Northern District of Illinois granted a motion to invalidate Blue Cross Blue Shield and Health Care Systems Corp.'s attempt to opt out of a settlement agreement for Walgreen Co.'s Prescription Savings Club. The program, now defunct, allowed members to directly purchase generic prescriptions from Walgreens without health insurance at a specified price. The plaintiffs alleged Walgreens used the program to inflate its prices and charge more to customers using their health insurance. Various entities of Blue Cross and Health Care Systems, acting as third-party administrators, asked the court for an en masse opt-out from the settlement agreement, arguing that its opt-out terms are "unduly burdensome" and violated due process rights.

Chang rejected the insurers' arguments, writing in his memorandum and order that the insurers could have sought an extension for the opt-out deadline if they wanted to specify which class members to include.

"The insurers also argue that the court's opt-out procedures would require the ... clients to submit more than 24,000 individual declarations, infringing on the clients' due process rights by 'render[ing] opting out virtually impossible,'" the court said. "But this aggregate administrative burden is the result of the insurers' purported undertaking to analyze settlement participation on behalf of over 24,000 entities."

The plaintiffs are a group of individuals who purchased generic prescriptions at Walgreens with their insurance and employee-benefit plans. They claim Walgreens created a "dual-pricing scheme" and charged those using health insurance a higher price in comparison with its prescription savings club members. The parties reached a settlement agreement in October, and the court granted preliminary approval for it and certified the class in November to include all U.S. individuals who purchased one or more prescription drugs with their health insurance from Walgreens between January 2007 to December 2024, the filing said.

The insurers argued to the court that it had standing to challenge the preliminary settlement agreement under the "plain legal prejudice" doctrine, which allows non-settling defendants in a multiple defendant case to object to a settlement despite not being party to it. They also argued the settlement would interfere with their contractual ability to act on behalf of their clients.

The court denied this argument, noting that the insurers are not "non-settling defendants," but that they are not a party in this case. Chang also said the insurers also failed to provide or show that they had any contractual right to object on their clients' behalf, the opinion said.

"To the extent that the insurers attempt to argue that they have standing because they are objecting on behalf of their clients, who are parties to the settlement agreement, that argument also fails," the court said. "As explained earlier, they have not sustained their burden of proving that there exists any contractual right to object on the clients' behalf—they have supplied no specific contract whatsoever. Any argument that they had a cognizable legal interest in opting out on behalf of their clients also falls short: the opt-out procedures do not forbid opt outs on behalf of others—it forbids deficient, en masse opt outs on behalf of others in the absence of proof of authorization to do so."

Attorneys with Scott & Scott Attorneys in New York; Milberg Coleman Bryson Phillips Grossman, and Lee Segui of Raleigh, North Carolina; Halunen Law, of Minneapolis; Lemmon Law Firm, of New Orleans; Robbins Geller Rudman & Dowd, of San Diego; Levin Sedran & Berman, of Philadelphia; Tusa P.C., of Southold, New York; and Carroll Shamberg, of Chicago, are representing the plaintiffs.

Ropes & Gray and Vedder Price, based in Chicago, are representing Walgreens.

Crowell & Moring is representing the insurers.

Counsel for all parties did not return Law.com's request for comment.

By:
The D&O Diary
A Periodic Journal Containing Items of Interest From the World of Directors & Officers Liability, With Occasional Commentary

False Claims Act Defendant Hit with Follow-On Securities Suit

By Kevin LaCroix on August 12, 2025

Regular readers undoubtedly have noticed that I have been writing a lot lately about the **False Claims Act** (FCA). That is because the Trump Administration has decided to deploy the FCA as one of its principal legal tools to enforce and advance its policy objectives. Insurers wondering what the administration's enforcement approach may mean for their claims portfolios may want to take a look at the securities class action lawsuit recently filed against online insurance broker SelectQuote. The company, whom the DOJ sued in May in a False Claims Act suit alleging the company received "illegal kickbacks" from insurers, has now been hit with a follow-on securities suit relating to the FCA allegations. As discussed below, the new follow-on lawsuit suggests that D&O insurers will want to consider the implications of the administration's active deployment of the FCA as an enforcement tool. A copy of the August 11, 2025, lawsuit against SelectQuote can be found **here**.

The Trump Administration and the FCA

Since its inception in January, the current Trump administration has brandished the FCA as a key enforcement tool. For example, and as I noted in a post last month (**here**), the Trump administration has already demonstrated its intent to use the FCA to pursue companies that seek to evade tariffs. The administration has also declared its intent to use the FCA to target companies it believes engage in "illegal DEI," as discussed in a recent law firm memo (**here**). And as I noted in a **post earlier this week**, the DOJ is now using the FCA to pursue companies for cybersecurity violations. The administration clearly believes the FCA is a multipurpose tool that will enable the administration to advance its policy objectives.

The SelectQuote Lawsuit

On August 11, 2025, a plaintiff shareholder filed a securities class action lawsuit in the Southern District of New York against SelectQuote and certain of its directors and officers. The complaint purports to be filed on behalf of a class of investors who purchased the company's securities between September 9, 2020 and May 1, 2025.

The complaint alleges that on May 1, 2025, the DOJ filed a False Claims Act complaint against SelectQuote. As reflected in the DOJ's May 1, 2025 press release (**here**), SelectQuote was sued along with several other insurance brokers, as well as several health insurers.

The FCA complaint alleges that for several years, SelectQuote received "tens of millions of dollars in "illegal kickbacks" from health insurance companies in exchange for steering Medicare beneficiaries to enroll in the insurers' plans. The FCA complaint alleges further SelectQuote made materially false claims by stating that it offers "unbiased coverge comparisons" when in fact it "repeatedly directed Medicare beneficiaries to the plans offered by insurers that paid them the most money, regardless of the quality or suitability of the insurers' plan." The securities complaint alleges that the company's share price declined nearly 20% on the news of the DOJ complaint filing.

The securities lawsuit complaint alleges that during the class period the defendants failed to disclose "(1) that the Company was directing Medicare beneficiaries to the plans offered by insurers that best compensated SelectQuote regardless of the quality or suitability of the insurers' plans; (2) that SelectQuote did not provide unbiased comparison shopping for Medicare Advantage insurance plans; (3) that SelectQuote received illegal kickbacks to steer Medicare beneficiaries to certain insurers and limit enrollment in competitors' plans; (4) that as a result, Select Quote had not complied with applicable laws, regulations and contractual provisions; (5) that SelectQuote was vulnerable to regulatory and legal sanctions as a result of its conduct, including claims that it had violated the False Claims Act; and (6) that, as a result of the foregoing, Defendants' positive statements about the Company's business, operations, and prospects were materially misleading and/or lacked a reasonable basis."

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

Discussion

The underlying FCA lawsuit here is not related to any of the Trump administration's signature policy initiatives. However, this new securities suit is relevant for insurers thinking about what the Trump administration's willingness to deploy the FCA may mean for their claims portfolios.

To put the issue in the context of insurers' public company insureds, a False Claims Act lawsuit against a public company is unlikely to trigger the company's D&O insurance policy, as the typical public company D&O insurance policy provides entity coverage only for securities claims. As an FCA action is not a securities claim, the FCA action would not trigger the entity coverage in the defendant company's insurance policy. However, were the same company to be hit – as SelectQuote was here – with a follow-on securities suit based on the allegations in the underlying FCA action, the entity coverage in the defendant company's D&O insurance policy would be triggered.

The fact that the Trump administration clearly intends to use the FCA as a way to drive many of its policy objectives has its own set of implications for insurers. The possibility of a follow-on securities suit, of the type filed against SelectQuote here, has further insurance implications. Insurers will want to consider the possibility of an FCA follow-on action in thinking about what the administration's deployment of the FCA may mean.

The D&O Diary

Investors increasingly claim that AI hype is securities fraud

reuters.com/legal/legalindustry/investors-increasingly-claim-that-ai-hype-is-securities-fraud-2025-08-07

Virginia Milstead, Mark Foster, Paige Gillard August 7, 2025

AI Artificial Intelligence words are seen in this illustration taken, May 4, 2023. REUTERS/Dado Ruvic/Illustration/File Photo [Purchase Licensing Rights, opens new tab]

August 07, 2025 - With artificial intelligence (AI) becoming an ever-present part of commerce, it should be no surprise that there has been a wave of securities fraud lawsuits that feature allegations of "AI washing," where companies allegedly exaggerate or misrepresent their AI capabilities or opportunities to boost stock prices. According to Cornerstone Research, AI-washing emerged as a distinct category of securities case for the first time, with 15 securities class actions filed in 2024, doubling the seven cases filed in 2023.

To date, most of the decisions addressing securities fraud claims in the AI context have centered on the alleged hype around AI capabilities with respect to certain products. The securities laws are not violated by statements of corporate optimism — obvious hyperbole and other forms of "feel good" statements that are inherently subjective, aspirational, and incapable of objective verification.

Courts recognize that reasonable investors know how to discount this type of information, which is generally considered immaterial. In the context of claims against companies promoting their AI capabilities, courts have applied this precedent to assess whether statements improperly exaggerate claims and capabilities in a way that misleads investors.

First consider In re Upstart Holdings, Inc. Securities Litigation, 2023 WL 6379810 (S.D. Ohio. Sept. 23, 2023). Upstart's public statements promoted its AI underwriting model to overcome the alleged limitations of FICO scores in consumer lending transactions, considering a far greater volume of variables while also adapting on the fly to changing conditions. The court held that statements about an AI model being a "fairly magical thing" or "doing the right things" were "loosely optimistic statements that cannot be objectively verified" and thus inactionable puffery.

By contrast, the court held that statements about the "significant advantage" of the AI model over "traditional FICO-based models" and its "ability to 'respond "very dynamically" to macroeconomic changes' were 'more specific, material, and verifiable' and thus actionable if false."

The court explained that the advantages were spelled out by defendants and included "higher approval rates and lower interest rates at the same loss rates," matters that could be demonstrably proven true or false, according to the court, which distinguished the statements at issue from other cases where supposed product advantages were undefined.

The court reasoned that those actionable statements were sufficiently alleged to be false based on plaintiffs' allegations that Upstart's AI model "did not provide these verifiable advantages, in general or in times of macroeconomic turbulence."

Other courts have similarly held that objectively verifiable promotional statements about AI are potentially actionable, while vague marketing language is not. In In re General Motors Co. Securities Litigation, investors challenged statements about the safety, capabilities, and commercialization of Cruise's autonomous vehicle (AV) technology, including claims about "fully driverless" operation, "Level 4" autonomy, and safety compared to human drivers. 2025 WL 952479 (E.D. Mich. Mar. 28, 2025).

The court drew an important distinction between statements that could be proven objectively false, such as "no human in the loop" versus statements that cars are "fully driverless." The court concluded that the first statements were actionable because they "did not merely convey the absence of a safety driver," but rather, were "clear enough that a reasonable investor could interpret them to mean" that the company's AVs "operated without human input."

On the other hand, the court found that investors failed to adequately allege the falsity of statements that the company's AVs were "fully driverless." "[R]easonable investors would have interpreted" the "fully driverless" statements to mean that the company's AVs "could drive without a safety driver but not without human input."

The court also examined the defendant's claims regarding "Level 4" autonomy. The plaintiff alleged that these statements incorrectly suggested the vehicles met official standards for Level 4, which require the car to handle driving fully on its own in certain conditions.

The court concluded that the plaintiff pleaded a "strong case," pointing to issues such as the vehicles stalling, requiring human assistance, and relying on remote operators in up to 4% of drives. These factual allegations allowed the court to infer that the AVs did not meet the core requirements of Level 4 autonomy, thus supporting the plaintiffs' claims of objective falsity regarding the "Level 4" statements.

Similar lines were drawn in Reckstin Family Trust v. Cs.ai Inc., 718 F. Supp. 3d 949 (N.D. Cal. 2024). There, the court confronted allegations that a company had exaggerated its relationship with oil services giant Baker Hughes. The court held that general statements about the product's "global reach" were non-actionable statements of corporate optimism.

In contrast, the plaintiff alleged that Cs.ai described a 12,000-person salesforce at Baker Hughes pushing its AI products, when in fact a smaller, less experienced group was involved. Those statements were objectively verifiable and actionably misleading by making it seem like the company's AI product had a greater opportunity in the market than it did in reality.

Descriptions of AI product capabilities are not the only types of statements found actionable. In Genesee County Employees' Retirement System v. DocGo Inc., 2025 WL 951251 (S.D.N.Y. Mar. 28, 2025), an executive allegedly touted his qualifications with a "graduate degree in computational learning, which is a subset of artificial intelligence." The executive's statements were coupled with descriptions of the company's AI product, described as having "high sophistication with our AI systems in order to need as little people as possible."

The court found that the plaintiffs sufficiently alleged that the executive lacked the qualifications that he claimed. The court reasoned that the executive "not only misrepresented his credentials but used his supposed 'graduate degree' in 'computational learning theory' to bolster his assertions that he was a trustworthy steward of the 'technology side' of the company." The court accordingly permitted securities fraud claims to go forward against the company and the executive based on these alleged misstatements.

Other courts have rejected claims where disclosures about AI were precise and accurate. In Jiajia Luo v. Sogou, 465 F. Supp. 3d 293 (S.D.N.Y. 2020), the plaintiffs alleged that a Chinese tech firm misled investors in two ways about AI. The investors claimed that Sogou failed to disclose that it had decided to transition certain products to smart hardware with better-connected AI capabilities and that Sogou wrongly implied that all of its smart hardware was AI enabled.

The court disagreed, finding that Sogou's disclosures carefully specified which products used AI, such as the Teemo Hero Watch, and that the plaintiffs failed to plead "concrete facts" showing Sogou made false representations about the company's AI capabilities. The plaintiffs also failed to plead any facts showing that a decision to apply AI technologies resulting in the phase-out of hardware such as the Teemo Watch "was made at the time" the challenged statements were made.

The courts that have analyzed securities fraud claims relating to AI have focused on alleged overstatements related to AI capabilities. Courts have thus far made it clear that hyperbolic and optimistic statements about AI capabilities will not trigger liability unless they mislead investors about concrete, verifiable information, though the line between actionable statements and puffery can sometimes be hard to draw. Other pending cases that await rulings from courts feature allegations that companies downplayed the risks to business operations or failed to disclose the impact of AI on business prospects.

In sum, with the number of cases challenging AI-related statements increasing, legal and investor relations departments at public companies should make sure they scrutinize disclosures about AI with rigor to minimize the risk of hindsight claims about AI products. Special attention should be given to communications describing the capabilities, features, market share, and competitive advantages of products.

When adjectives or hyperbole are used to describe products, particular care needs to be given to making sure that statements do not exaggerate what AI products can do, especially as it relates to competitive AI products or comparable products with human input. Accompanying product claims with clear definitions and objectively verifiable information that underpins claims about a product can help minimize liability risk. Companies should also evaluate and consider disclosing both the risks posed and any present impacts of AI on operations, revenue streams, and future prospects.

The opinions expressed in this article are those of the authors and do not necessarily reflect the views of Skadden, Arps, Slate, Meagher & Flom LLP or its clients.

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DOES A RECENT COURT DECISION SPELL THE EFFECTIVE END OF *MORRISON*?

SCAS' ANALYSIS OF A RECENT DECISION IN A SECURITIES CLASS ACTION AGAINST BARCLAYS

DATE :
August 2025

AUTHOR:
Donald Grunewald

Global securities litigation surged after a seminal U.S. Supreme Court decision in 2010 limited the adjudication of claims involving foreign-listed securities. While litigation involving U.S.-listed securities has nonetheless continued to grow, litigation of foreign-listed shares has shifted overseas. However, efforts have been made to bring claims on foreign listed securities again in the U.S. A recent decision of a federal court in a putative securities class action regarding supplemental jurisdiction of shareholder claims under U.K. law is both a prime and timely example of these efforts and may be an important harbinger of further such efforts in the future. This decision and related efforts are important matters for institutional investors of global securities, as the evolution of the law could have material impacts on their recoveries and strategies in the securities litigation space.

In 2010, the U.S. Supreme Court handed down its opinion in *Morrison v. National Australia Bank Ltd.,* 561 U.S. 247 (2010), deciding that Section 10(b) of the Securities Exchange Act ("Exchange Act") did not provide a cause of action to foreign plaintiffs suing foreign defendants for misconduct in connection with securities traded on foreign exchanges. The decision had the effect of shifting many such securities cases to jurisdictions outside the United States, leading to a significant development of securities litigation abroad. ISS SCAS currently tracks securities class or group actions in over 20 countries, and there have been many large securities settlements outside the U.S. since 2010, such as the $1.6 billion settlement involving Steinhoff International Holdings NV.

Nonetheless, many large companies headquartered overseas sponsor the trading of American Depository Receipts ("ADRs") or American Depository Shares "ADSs" in addition to listings in their home and potentially other countries. *Morrison* had no real impact on claims made on ADRs or ADSs, as these are listed in the U.S. Similarly, the decision did not bar shareholders from outside the U.S. from participating in settlements involving U.S.-listed securities. Indeed, institutional investors from around the globe routinely participate in these settlements, and such participation is purely an administrative process that entails the filing of certain transaction records after the announcement of a settlement. Furthermore, many global investors have even taken active roles in U.S. cases by seeking and obtaining an appointment as lead plaintiff, leaving the case of the entire class in their hands. These investors have largely served admirably and helped to obtain sizeable recoveries for investors. Nonetheless, securities litigation outside of the U.S., as noted, has continued to gain in importance since *Morrison*, as aggrieved shareholders seek to have their claims heard in at least one forum.

In parallel, however, plaintiffs and law firms in the United States have made efforts to effectively reshore some of these claims and actions. The key tactic is to bring jurisdictionally valid claims on U.S.-listed securities and then ask the U.S. court to grant supplemental jurisdiction over claims under foreign law over foreign-listed securities. U.S. courts—both state and federal—are used to applying the law of other jurisdictions.

For example, federal courts must apply state laws in diversity suits (where the parties are from different states), and state courts may often apply federal laws or the laws of other states. Similarly, U.S. courts can apply laws of other countries (sometimes contracts specify the law to apply). There is an entire subject area called "choice of law", and it should come as no surprise that courts have begun to grapple with this in the context of securities cases.

For example, one noted U.S. plaintiff's firm successfully represented nearly three dozen institutional investors in a direct action against BP plc, asserting claims under US law for ADSs but also UK law for UK-listed shares.[1] Indeed, plaintiffs in direct actions historically could bring a variety of state law claims in addition to federal claims. However, this same firm (along with another prominent plaintiff's firm) was able to make claims in a securities class action that ultimately resulted in a $97 million settlement involving Perrigo plc shares listed on the Tel Aviv Stock Exchange ("TASE"), in addition to various U.S.-listed securities.[2] U.S. courts have allowed claims to proceed for TASE-listed shares in a variety of other cases, such as those against Teva Pharmaceuticals Industries Ltd.[3] and Ormat Technologies, Inc.[4] Although one critical point to bear in mind for cases involving TASE securities is that courts in Israel will suspend parallel actions until the U.S. class action is resolved.

A recent decision by a federal court in a putative securities class action involving U.K. listed shares is another example of these efforts and could presage similar decisions in the future. Plaintiffs Teamsters Local 237 Additional Security Benefit Fund and Teamsters Local 237 Supplemental Fund for Housing Authority Employees and Firemen's Retirement System of St. Louis (together "Plaintiffs") are pursuing a putative class action against Barclays PLC ("Barclays"), James Staley, and Nigel Higgins (collectively "Defendants") in the U.S. District Court for the Central District of California (*"Barclays"*).[5] Plaintiffs made claims on behalf of a class of purchasers of Barclays ADRs traded on the New York Stock Exchange as well as of Barclays ordinary shares traded on the London Stock Exchange ("LSE Shares").

Plaintiffs made their claims regarding the LSE Shares under U.K. law, specifically, Section 90A of the Financial Services and Markets Act ("S. 90A"), while making claims under the Exchange Act with respect to the ADRs. Notably, among other things, Barclays moved to dismiss the S. 90A claims on the basis that the court should decline to exercise supplemental jurisdiction over these claims and, in the alternative, under f*orum non conveniens* a doctrine of transferring cases to courts or jurisdictions that can more suitably or conveniently hear such cases.

On July 10, 2025, Judge Maame Ewusi-Mensah Frimpong issued an opinion (amending an order issued on June 24, 2025)[1] largely denying Defendants' motions to dismiss but granting Barclays' motion to dismiss with respect to the S. 90A claims, with leave for Plaintiffs to amend. Despite dismissing the S. 90A claims, the court nonetheless found that: 1) it had original jurisdiction over the S. 90A claims and therefore did not have the discretion to decline jurisdiction, and 2) Barclays had failed to meet its burden to justify using *forum non conveniens* to dismiss the S. 90A claims. Instead, the court dismissed the S. 90A claims because Plaintiffs' factual allegations were insufficient to plead a S. 90 A claim for dishonest delay.

Defendants have moved the court to reconsider the opinion, and alternatively allow an interlocutory appeal on the parts of the case the court allowed to proceed.[2] It is unclear what will happen in this case and how events might impact the S. 90A claims (e.g., will the court grant reconsideration or will Plaintiffs amend?). What matters is that the court decided it had the power to hear the S. 90A claims, and that had Plaintiffs made more adequate allegations, the S. 90A claims might have progressed further along in the case.

Significantly, there are many potential implications for this decision in *Barclays* and perhaps even more questions posed.

First, the U.S. courts have signaled that they are comfortable applying the securities laws of Israel and the U.K. Like the U.S., the U.K. is a common law jurisdiction, and Israel can be considered a common law system or somewhat similar. Which other jurisdictions' securities laws will U.S. courts be willing to entertain? Presumably, other common law jurisdictions are more likely candidates, but would the U.S. courts apply, say, German securities law?

[1] See BP - Notable Case — Pomerantz LLP.
[2]See Roofer's Pension Fund v. Joseph C. Papa, et al., No. 1:16-cv-02805-RMB-LDW (D.N.J.), ECF No. 438-1, Ex. A at 30656 and ECF No. 449.
[3] Halman Aldubi Provident and Pension Funds Ltd. v Teva Pharmaceuticals Industries Ltd., et al., No. 20-cv-4660-KSM (E.D. Pa.) ECF No. 116 (Nov. 3, 2023).
[4] Mac Costas v. Ormat Technologies, Inc., et al., No. 3:18-cv-00271-RCJ-WGC (D. Nev.), ECF No. 104 (Jan. 21, 2021).
[5] Captioned, Stephen Merritt v. Barclays PLC, et al., No. 2:23-cv-09217-MEMF-KS (C.D. Cal.).

Second, U.S. courts have applied foreign securities law where there have also been valid claims involving U.S.-listed shares, but could plaintiffs successfully undertake cases solely under foreign law only on foreign securities in the U.S.? Somewhat relatedly, the New York Court of Appeals (state court) decided that two shareholder derivative cases against non-US companies (one of which, notably, was Barclays) under foreign laws could not proceed in New York, potentially reversing a recent trend of such cases being filed in New York state.[1] Thus, this process is not moving inexorably in one direction.

If the U.S. courts applied the laws of more countries and/or allowed claims solely on foreign securities, this might well have the effect of many more securities suits reshoring to the U.S. because the U.S. presents several procedural advantages to plaintiffs compared to many other countries such as: 1) the ability for investors to passively participate in class actions and not undertake litigation, 2) contingency fees for attorneys, allowing these attorneys to self-fund cases, 3) no risk of adverse costs upon losing and therefore no need to secure after-the-event insurance, 4) confidentiality to claimants, and 5) a much shorter case timeline, especially from the claims deadline. It would also potentially benefit defendants in resolving claims in one jurisdiction, as opposed to multiple, lowering legal defense costs and resolving matters more expeditiously than in some jurisdictions.

Third, class actions under U.K. securities law (and potentially other countries' law) might present challenges at class certification if passive investors are found not to have valid claims and/or plaintiffs must present significant evidence of reliance, because then defendants might be able to claim that individualized issues predominate.

Fourth, given that a U.S. case will not stay actions in the U.K. (as in Israel), investors who participate in actions in the U.K. need to be aware that if a settlement is obtained in the U.S. in a case involving U.K. listed shares, an investor might be ineligible to participate in such settlement and also achieve a settlement in the U.K. for those same shares in a case with related allegations. Indeed, an investor might at some point have to choose between excluding itself from a U.S. settlement or not participating in or withdrawing from a U.K. case (with potential withdrawal penalties). This, therefore, might add to the calculus of deciding whether to enter into a UK case, as recoveries could, for many reasons, be higher in one jurisdiction than the other.

[6]Id., ECF No. 93.
[7] Id., ECF No. 92.
[8] Ezrasons, Inc. v. Sir Nigel Rudd, et al., 2025 N.Y. Slip. Op. 03008 (N.Y. Ct. App. May 20, 2025); and Rebecca R. Haussman v. Werner Baumann, et al., 2025 N.Y. Slip op. 03009 (N.Y. Ct. App. May 20, 2025).

SCAS reached out to John Evans, Head of Dispute Resolution at Fladgate LLP, based in London, who has considered the *Barclays* decision. He commented:

"Whilst I can see the immediate reaction to the court seizing jurisdiction in relation to the s90A FSMA aspect of the claim is that it opens the prospect for UK-based securities actions being brought in the US under its more developed and claimant-friendly model, I anticipate some headwinds in that regard. Not only will there need to be anchor proceedings in respect of US securities for the same target defendant, but also the Court will need to apply the standards which the English courts impose in relation to reliance and investor engagement, both of which are far removed from the traditional 'passive participation' which is so attractive to the investor community. It seems to us, therefore, that if a claim is being brought against a defendant in respect of a UK security, it will remain attractive to have that claim resolved by the court which is more familiar with the application of the relevant statutory regime which will have to be applied for a claim to be successful, rather than it being conducted as an adjunct to a claim in a foreign proceeding."

In any event, time will tell whether *Barclays* is another case in an emerging trend of litigating claims over foreign listed shares in the U.S., or whether this will turn out to be a little-remembered trivia topic. But it is nonetheless something for investors to pay attention to.

Court says hedge fund's mistake cost it chance to sue over failed Perrigo takeover

reuters.com/legal/government/court-says-hedge-funds-mistake-cost-it-chance-sue-over-failed-perrigo-takeover-2025-08-12

Mike Scarcella August 12, 2025

Birds are seen on the logo of generic drugmaker Perrigo Co outside their new factory in the city of Yeruham, in southern Israel March 2, 2016. REUTERS/Amir Cohen/File Photo [Purchase Licensing Rights, opens new tab]

Aug 12 (Reuters) - Hedge fund Sculptor Asset Management missed its chance to sue healthcare products giant Perrigo for alleged securities violations and cannot now opt out of a $97 million class action settlement, a U.S. appeals court ruled on Tuesday.

A three-judge panel of the 3rd U.S. Circuit Court of Appeals in Philadelphia said Sculptor Master Fund Ltd and a related fund were barred from opting out of the investor class action more than three years after a deadline came and went.

“Sculptor had the opportunity to opt out early in this litigation, but it failed to do so. Having made that mistake, it has to live with the consequences,” [wrote, opens new tab] Circuit Judge Cheryl Ann Krause, joined by Circuit Judges Paul Matey and Peter Phipps.
The hedge fund had argued that its intent to pursue its own lawsuit was clear in the record of the litigation in the federal court in New Jersey. The panel upheld a lower judge’s ruling against Sculptor.

Sculptor and a lawyer representing it at law firm Quinn Emanuel did not immediately respond to requests for comment, and neither did Perrigo.

Grand Rapids, Michigan-based Perrigo settled the shareholder class action for $97 million last year, resolving claims that it made misrepresentations and omissions between 2015 and 2017 in connection with a failed $26 billion takeover bid by drugmaker Mylan.

Perrigo has denied any wrongdoing.

Sculptor held about 2.6 million shares of Perrigo stock, owning 5 percent of the company, court records show.

Class action rules can require companies or individuals to formally opt out of settlements if they want to try to sue individually to seek a better deal or a win at trial.

A former lawyer for Sculptor in the case said in a court declaration that her firm, King & Spalding, did not receive the class action notice explaining the process for exclusion.

Still, the attorney said she had asked an associate at the firm to mail a formal opt-out letter to exclude Sculptor from the class action. The attorney said she was unable to determine whether the letter was mailed or whether it was lost en route.

In addition to arguing that the record in the case showed it clearly intended to opt out, Sculptor also told the court that its actions could be deemed “excusable neglect.”

Perrigo countered in a court filing that Sculptor “had ample knowledge of a class action and were represented by sophisticated legal counsel.”

The appeals court said Sculptor "bears the burden of its former counsel’s mistakes."

The case is Perrigo Institutional Investor Group et al v. Joseph C. Papa et al, 3rd U.S. Circuit Court of Appeals, No. 24-2861.

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Class Action

Manage Newsletters

Elon Musk's Tesla Pay Deal Appeal Set for October Arguments (1)

Aug. 12, 2025, 5:45 AM PDT; Updated: Aug. 12, 2025, 6:00 AM PDT

Summary by Bloomberg AI

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- The Delaware Supreme Court scheduled oral arguments for Oct. 15 in Musk and Tesla's appeal of a trial court's decision striking down the CEO's $56 billion compensation plan.
- Chancellor Kathaleen St. J. McCormick found that the Tesla directors' consideration of the plan was riddled with conflicts of interest, and that the company hadn't properly disclosed all its details to shareholders.
- Richard Tornetta contends Delaware law doesn't support the claim that Tesla's second shareholder vote ratified the board's approval of Musk's pay package.

Elon Musk's next showdown with the Tesla Inc. shareholder who successfully challenged a record-setting pay package for the world's richest person will be in October.

The Delaware Supreme Court scheduled oral arguments for Oct. 15 in Dover, Del., in Musk and Tesla's appeal of a trial court's decision striking down the CEO's $56 billion compensation plan. The high court's full five-member panel will hear the case.

The Delaware Chancery Court in December rejected Musk's attempt to revive the pay deal through a second shareholder vote. Chancellor Kathaleen St. J. McCormick found that the Tesla directors' consideration of the plan was riddled with conflicts of interest, and that the company hadn't properly disclosed all its details to shareholders.

Musk has publicly attacked McCormick ever since—recently calling her "the activist who is cosplaying as a judge in a Halloween costume." Tesla, Musk, and a group of shareholders have appealed McCormick's decision, including a $345 million award in legal fees for the attorneys representing the investor behind the litigation.

That shareholder, Richard Tornetta, contends Delaware law doesn't support the claim that Tesla's second shareholder vote ratified the board's approval of Musk's pay package.

The dispute has fueled debate over the role of Delaware's elite business court in the state's dominance among the Fortune 500. In March, the governor signed a law aimed at persuading high-profile companies to stay in Delaware following Musk's move of Tesla to Texas after losing the pay deal case. The state's high court also will be reviewing those statutory changes that lowered judge-made guardrails around insider conflicts of interest.

The case is In re Tesla Inc. Derivative Litig. , Del., No. 534,2024, 8/12/25 .

(Adds new four paragraphs with additional background on the case.)

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Class Action

Manage Newsletters

Latch’s $2 Million Investor Settlement Wins Initial Court Assent

Aug. 12, 2025, 8:26 AM PDT

Latch Inc.’s $1.95 million agreement to end a former employee’s lawsuit tied to the “smart lock” maker’s blank-check merger and accounting errors received a federal judge’s nod.

Circuit Judge William C. Bryson preliminarily approved the accord covering pre-merger shareholders who got Latch stock pursuant to the 2021 deal to go public’s paperwork. The class’s lead counsel expects to seek a third of the sum in attorneys’ fees, the visiting judge said in the US District Court for the District of Delaware Monday. Latch—which is rebranding to DOOR—is still correcting financial filings after an internal investigation found errors going back years.

- Latch and corporate leaders from the time who approved the special purpose acquisition company merger’s registration statement misrepresented sales revenue, timeline, product viability, and more, the suit said
- Tishman Speyer Properties LP affiliates, Latch, and other SPAC deal architects’ nearly $30 million settlement to end a stockholder challenge in Delaware Chancery Court garnered final approval last month
- A shareholder derivative lawsuit targeting then-Latch leaders with similar allegations is pending in the Southern District of New York

Fishman Haygood LLP, deLeeuw Law LLC, and Bragar Eagel & Squire PC represent the former Latch employee. Latham & Watkins LLP and Richards, Layton & Finger PA represent Latch. None of these law firms nor Latch immediately responded to emails seeking comment.

The case is Schwartz v. Latch, Inc. , D. Del., No. 1:23-cv-00027, 8/11/25 .

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California Brief

Olaplex's $48 Million Investor Accord Gets First Court Nod (1)

Aug. 12, 2025, 5:52 AM PDT; Updated: Aug. 12, 2025, 6:26 AM PDT

Olaplex Holdings Inc. 's $47.5 million settlement got a federal judge's initial blessing to resolve investor allegations that its initial public offering documents didn't disclose the European Union banned an ingredient formerly used in one of its products.

Judge Stephen V. Wilson preliminarily approved the luxury hair care company's agreement in the US District Court for the Central District of California, per an order entered Monday. Wilson had ruled the IPO paperwork was plausibly misleading because Olaplex presented the possibility of prohibitions on certain ingredients and any ensuing business effects as a hypothetical—but the EU had already barred lilial, which had been in one of its key hair treatments.

- Olaplex allegedly quietly removed lilial, banned over potential reproductive health risks, before the 2021 IPO while continuing to sell old inventory
- Its share price plummeted almost 73% from its $21 IPO to close at $5.75 on Nov. 17, 2022, the day an investor originally sued, after a popular TikToker started discussing the issue and Olaplex's sales dropped, the suit said
- The class preliminarily approved for settlement purposes includes those who got stock on or before Nov. 12, 2021, traceable to the IPO documents

Ropes & Gray LLP, which declined to comment, and Israel David LLC represent Olaplex.

Labaton Keller Sucharow LLP is lead counsel for the pension fund helming the case. Glancy Prongay & Murray LLP is liaison counsel. Neither of these law firms nor Olaplex immediately responded to emails seeking comment.

The case is Lilien v. Olaplex Holdings, Inc. , C.D. Cal., No. 2:22-cv-08395, 8/11/25 .

(Updates to include more details about the settlement and litigation starting in the second paragraph.)

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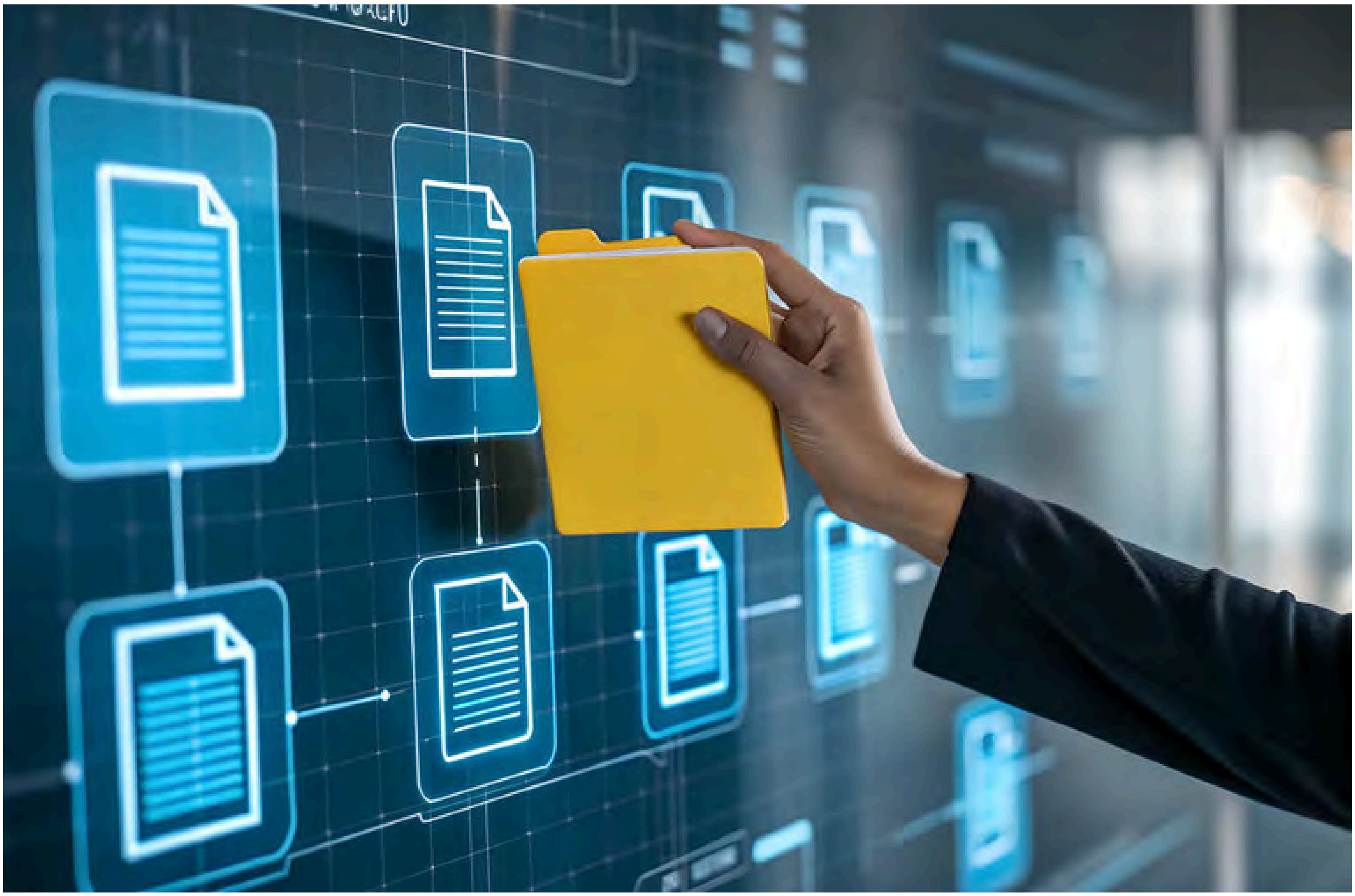
European Class Actions Hit New Heights From Quantity to Complexity

August 12, 2025 | By **Ulrike Barth**



File management; Credit: main_asn/Adobe Stock

European class actions surged in value in 2024, led by the U.K. with €155 billion ($180 billion) in claims—mainly driven by competition and consumer cases—followed by significant activity in Portugal and the Netherlands, according to a CMS study released this week.

One of the largest ongoing cases in London is the Mariana Dam class action brought against BHP and Vale by more than 640,000 claimants affected by the 2015 Samarco dam collapse in Brazil, which caused major loss of life and environmental devastation. Meanwhile, *Merricks v. Mastercard* stands as one of the U.K.'s first major opt-out consumer class actions, representing around 45 million cardholders alleging overpayment due to excessive fees.

Portugal, with €54.8 billion in claims, and the Netherlands, with €36.3 billion, remain major class action centers as well. One of Portugal's largest cases is a €400 million antitrust claim filed by consumer group *Ius Omnibus v Super Bock* that alleges abuse of dominance in the beer market. Meanwhile, Geradin Partners, Stek, and plaintiffs' firm Milberg are suing Sony for market abuse on behalf of a Dutch consumer group that also has four collective actions ongoing against TikTok, AirBnB, Google and ABN Amro bank.

Risk remains heavily concentrated. Britain, Portugal, the Netherlands, and Germany accounted for 78% of cases in 2024. Tech companies—including Google parent company Alphabet, Amazon, Apple, Meta, and Microsoft—face €36.5 billion in U.K. claims alone and nearly €18 billion in the Netherlands.

Consumer protection and competition law account for 54% of all cases, followed by product liability (9%) and data protection (7%), CMS said. Despite the growth in litigation, the financial return for claimants remains uncertain.

"Who is benefitting from all of this litigation?" Kenny Henderson, dispute resolution partner at CMS asked. "We are now seeing some early settlements and it is expected that very low portions of settlements will go to the class members—sometimes 5% and lower."

Big Tech Claims

The EU's' Representative Actions Directive has made a significant impact by requiring 27 European countries to establish or modify collective class action mechanisms to better protect and enforce consumer rights.

"The ultimate intention is to bring in a collective regime along the lines of what exists in U.K. competition cases and certainly inspired by collective actions in the U.S. but not wanting to have the exact same problems," said Cristian Gual, a litigation partner at leading Spanish firm Uria Menéndez.

CMS predicts NGOs will play a growing role in litigation, creating fresh opportunities for law firms and funders, particularly in ESG and climate-related claims.

Regulatory shifts will also be a key factor—most notably the updated EU Product Liability Directive, to be implemented into law by December 2026, which for the first time includes software and AI, lowers the burden of proof for claimants, and eliminates the €500 minimum damage threshold.

Fueling the Growth

Opt-out mechanisms are another key factor fueling the rise in class actions. They automatically include affected individuals in legal actions unless the individual chooses to withdraw. Between 2020 and 2024, the combined total value of opt-out claims in the U.K., the Netherlands, and Portugal rose from €18.5 billion to €168.14 billion, CMS said.

Another major catalyst is the rapid growth of litigation funding, with England and Wales now home to the world's second-largest third-party funding market. The sector is projected to expand from £2.2 billion in 2023 to £3.7 billion by 2028 in the U.K.

Claimant law firms are also using technology and social media to mobilise large claimant groups quickly and secure financing for complex proceedings.

The U.K., the Netherlands, and Portugal are expected to remain high-risk jurisdictions. Spain could join them with a planned opt-out system but there is an increasing tension between access to justice and the commercialisation of litigation, "especially in the context of litigation funding," said CMS's Henderson.

Henderson expects the EU to explore potential regulation of third-party litigation funding.

As European class actions grow in scale and sophistication, the challenge will be balancing greater access to justice with ensuring fair outcomes for claimants amid an increasingly commercialised litigation landscape.

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Research | Litigation

Anti-Establishment Sentiment Prevails In Jurors. What Does That Mean For Corporate Defendants?

August 12, 2025 | By Ross Todd

William "Bill" Oxley (L) and Meghan Kelly (R) of Orrick. Courtesy photos

In an era of increasing polarization in the United States, it seems that everyone is angry about something—just what that is varies. But a rising anti-establishment sentiment—a loss of faith in large institutions, especially large corporations—spans generations, geographies and political parties, according to new survey data from **Orrick, Herrington & Sutcliffe**.

Orrick conducted an online survey of 1,282 jury-eligible adults across 14 states—a mix of red and blue states—in February, asking more than 150 questions, many of which were asked in the firm's prior survey in 2022 and similar pre-pandemic research. Litigation Daily got an early look at the results.

Among the most troubling trends for corporate defendants are some significant jumps in the proportion of prospective jurors who see part of their job as policing corporations and are willing to go beyond the letter of the law to do so.

Seventy-two percent of respondents agreed that an important function of juries in America is to send messages to corporations to improve their behavior—a jump from 62% of respondents in 2022.

Sixty-five percent agreed that judges and juries should prioritize protecting the community over following the letter of the law if the two should come into conflict, a 13 percentage point jump from the 52% who agreed with that statement in 2022.

Litigation Daily sat down with **Meghan Kelly** and **Bill Oxley**, the leaders of Orrick's complex litigation and dispute resolution practice, to chew on the results, as we did with the prior survey. This morning, we'll focus on the overall takeaways. Tomorrow, we'll pick up on some interesting data from the survey concerning juror attitudes towards plaintiffs and litigation funding.

The following has been edited for length and clarity.

Lit Daily: What's important here? Where are you seeing shifts?

Bill Oxley: I think that the most recent survey really sounds an alarm that people in the C-suite should be worried about. Anti-establishment feelings are at an all-time high. People are feeling helpless and afraid, and they feel that the systems that are supposed to protect them just aren't.

When you look at some of the results—86% of people feeling that corporations will use their power and influence to influence the FDA and the EPA, and that they rig the system, 57% of Americans believing that the judicial system has let them down, and they don't trust it anymore—those percentages are higher than in our last survey. And they also feel that corporations don't care about them, that profits are the main driver for corporations—86% of people feel that companies are going to put profits ahead of safety.

So what we are seeing now is that people in America are more likely to take actions on their own, in the jury room, to take back the power that they feel like they've lost. Sixty-five percent now—compared to 52% in August of 2022—think that if what they believe is fair conflicts with what the law says to do, that they will follow what they think is fair rather than following the law.

People are also willing to take to the streets and vote with their pocketbooks by boycotting companies that have beliefs—political or otherwise—that they don't share. Sixty-four percent of people are willing to take to the streets in doing that. So, I think that not only is anti-establishment at an all-time high, but people are now agreeing that they don't like big companies, they don't trust the government, they don't trust the judicial system and they don't think that anybody's looking out for them.

Meghan Kelly: You hear these days so much about polarization: We are so divided as a country, and people can't agree on anything. I think, as Bill said, the key takeaway here is that people can agree. People do agree on one thing—that they don't trust institutions. It's for different reasons when you look across demographics. Obviously, we don't have a question that says, "Why don't you trust institutions?" But when you look behind the numbers, you see the drivers are really different for folks in more stereotypically liberal locations, large cities. Among women on the coasts, you see there's a lack of faith after the *Dobbs* decision. In more of the red states we surveyed, you see younger men feeling really left behind and left out.

While the motivations and the reasons why people may feel this way are very, very different, it ends up with all of the folks that we surveyed really being in the same spot—with just a total loss of faith in institutions, the government, corporations and the judicial system, in a way that I think we didn't expect to see. It was more polarized last time, and it's really becoming much more pervasive.

Everybody's got something to be mad about. And since 2022, that seems to have just increased. So, what does all that mean for folks like you who have the ear of C-suites and who often are in the position of representing companies in disputes?

Oxley: So, I think having this information is not only eye-opening, but it really helps us either craft a message in court, or help advise companies about what to do before they're in court in terms of conducting their own day-to-day business. Seventy-six percent of people feel that if there's an accusation that a product causes cancer—if some people make that claim in a lawsuit that a product isn't safe—then they're not going to use the product. If you're in the C-suite and you're thinking about things like that, then I think it helps. It helps clients put together a message when those kinds of allegations are made, or even before an allegation is made. If they spot an issue or if they have a concern, it's really about transparency and sharing what their values are throughout their day-to-day activities, so that they will gain the trust of the public.

And in the courtroom, it's critically important, because if you come across looking like you're a company or a lawyer that's just got an excuse for everything, then you're in really huge trouble with the jurors. It's going to fit into what they already think about you, which is not good. Be transparent, share what your values are, and hopefully they're going to match the values of jurors. Regardless of why people want to burn down our institutions, the things that they do value are honesty and transparency, and so that should guide folks in making decisions about what their companies are going to do and what they're going to do in the courtroom.

Kelly: I think both in corporate relations and in the courtroom, it's no longer enough to have someone who people like get up and say: "We're a good company." These beliefs are so strongly held and so pervasive that having a great company witness who sits up there and spouts platitudes isn't going to get it done. Pointing to plaintiffs not being able to meet their burden of proof, that's no longer where folks like us, who represent corporations on a day-to-day basis, can start. You need to come in and understand where jurors are at when you start and be able to marshal specifics in a persuasive way to get people to shift away from these beliefs and believe that you are different. You can't just say, "We care about you," without having the facts to back it up. And that's where what Bill was talking about—responses when these sorts of issues arise for your company—really matter, because what you're gonna be able to say to jurors is going to make a big difference. They're going to expect more than just the talking points that people may have been able to use before.

I think it's also a huge wake-up call for jury selection. There is simply no way to get a jury where you do not have folks who feel this way, right? If you're a corporation, you don't have enough peremptories. You're not going to win enough cause challenges. There are going to be people on the jury who hate you. And so it's really a matter of figuring out, can you get someone you can live with—someone who doesn't hate you *and* want to burn the system down *and* be willing to take the law into their own hands *and* be likable and able to persuade other jurors?

Could you possibly get somebody who isn't going to be appealing to other jurors and may cause some friction in the jury room? Could that be the person who hates you? That's a better option. I think looking at inter-juror dynamics is really important, because you are not going to have a jury of 12, 10 or six folks who all think corporations are great. Some of those folks are going to hate you.

California Brief
Perspectives

Practical Protections to Guard Against AI-Powered Algorithm Risk

Aug. 12, 2025, 1:30 AM PDT

Professional Perspectives give authors space to provide context about an area of law or take an in-depth look at a topic that could benefit their practice.

The Bottom Line

- Pricing algorithms are double-edged swords that help businesses enhance competition, but also expose them to legal risk from private plaintiffs and law enforcement.
- Businesses can't rely on pointing to their algorithms only using public information as a shield against legal action.
- The threat of lawsuits shouldn't keep businesses from deploying pricing algorithms, as some basic safeguards can minimize their risk.

Savvy businesses price goods and services using a variety of algorithms that can improve pricing strategies and, in many instances, enhance competition in the marketplace. However, with the introduction of artificial intelligence technology, algorithmic pricing software is becoming more powerful, more complex, and less transparent.

Pricing algorithms are computer programs that use both nonpublic and publicly available information to analyze large amounts of competitive information to develop pricing recommendations. These programs often leverage AI to enable businesses to price products or services rapidly, dynamically, and sometimes automatically. Businesses may also use these programs to determine at what price to purchase goods and services.

While this technology is flourishing, private plaintiffs and law enforcement agencies are threatening businesses that use algorithm-based pricing software, relying on antitrust laws to challenge the legality of such tools. Given the legal risks, organizations and their legal departments should understand how employees are using pricing algorithms in sales and purchasing, evaluate antitrust risk, and adopt sound information governance policies and practices that mitigate such risk.

Using Nonpublic Information

Pricing algorithms have come under scrutiny by regulators as well as the plaintiffs' bar. In July 2024, the Department of Justice, Federal Trade Commission, UK Competition and Markets Authority, and the European Commission issued a joint statement warning of "the risk that algorithms can allow competitors to share competitively sensitive information, fix prices, or collude on other terms or business strategies in violation of our competition laws."

In August 2024, the US sued RealPage, a vendor of pricing algorithm software for landlords, for violating Sections 1 and 2 of the Sherman Act following the filing of multiple federal antitrust class actions by private plaintiffs. Regulators and the plaintiffs' bar claim that pricing algorithms rely on nonpublic competitor information to recommend pricing.

Regulators and plaintiffs further allege that businesses violate antitrust law by training algorithms using nonpublic information from competitors and then use the algorithm to justify inflating prices.

Although some courts have dismissed cases for failure to adequately allege the algorithm used nonpublic, competitively sensitive information to generate pricing, other courts have denied motions to dismiss where the use of nonpublic information was adequately alleged.

In *In re RealPage, Inc*. *Rental Software Antitrust Litig.* , the court denied a motion to dismiss a case involving rental pricing for multifamily apartments because the plaintiff adequately alleged that the "software inputs a melting pot of confidential competitor information through its algorithm and spits out price recommendations based on that private competitor data."

The US District Court for the Western District of Washington also denied a motion to dismiss where the provider of software that makes pricing recommendations "advertised its revenue management software to lessors as a means of increasing rates" and explained that its software would only work as advertised if "each lessor client divulges its confidential and commercially sensitive pricing, inventory, and market data" for use by the software.

The US attorney general filed a statement of interest of the US in *In re Multiplan Health Ins. Provider Litig.*, arguing that:

- By "sharing information through an algorithm," a "provider can create the same anticompetitive effects as a direct exchange between competitors."
- "An algorithm provider's 'pitch' could constitute an invitation for collective action among competitors—by indicating to users that the same pitch was made to their competitors and insinuating that using the algorithm could help them avoid competition—and subsequent joint use of the algorithm could demonstrate acceptance of that invitation."
- "Any formula used to fix benchmark, component, recommended, or 'starting point' prices" can constitute a violation "even if end prices ultimately vary."
- Such a conspiracy can exist not just among sellers but also "among purchasers."

Recent state legislation has similarly focused on regulating the use of nonpublic information. San Francisco and Philadelphia have both passed legislation prohibiting the use of certain software that uses nonpublic information.

At the federal level, the Senate introduced the Preventing Algorithmic Collusion Act, which would make it unlawful for a person to use or distribute any pricing algorithm that uses, incorporates, or was trained with nonpublic competitor data by creating a presumption of an anticompetitive agreement under certain circumstances. A user of the software—but not a developer or distributor—may rebut the presumption by demonstrating by clear and convincing evidence that it couldn't have reasonably known the pricing algorithm used nonpublic competitor data.

Importantly, the clear and convincing standard is a high burden of proof, which, if enacted into final legislation, will heighten the difficulty in invoking this defense. While PACA's fate is uncertain, such a statute would set a heightened standard of scrutiny for pricing tools using algorithms that rely on nonpublic data.

Using Public Data

Even if an algorithm uses publicly available information, its use might be subject to antitrust and price fixing scrutiny.

The statement of interest in *In re Multiplan Health Insurance Provider Litigation* describes how algorithms could be used in a hub-and-spoke conspiracy even without the sharing of nonpublic information. And it argues the "Sherman Act can cover concerted action by competitors on any 'formula underlying price policies.'"

Modes of Analysis

Showing that parties who "collectively enjoy monopoly power" engaged in a concerted action by algorithm isn't the end of the analysis. The question remains whether their action unreasonably restrains trade.

A restraint of trade may be unreasonable in one of two ways. First, it may be unreasonable per se without inquiry into its competitive effects. The classic per se unreasonable restraint is an agreement between competitors to fix prices.

Second, a restraint may be unreasonable under the "rule of reason," which is a fact-specific assessment of the challenged conduct's "effect on competition." The "goal" in applying the rule of reason is to "distinguish between restraints with anticompetitive effects that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."

The courts "weigh[] all of the circumstances" in a fact-specific inquiry. The question is "whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by 'substantially less restrictive alternative' means." This inquiry generally proceeds in a three-step burden-shifting framework:

- The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect.
- Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale or basis for the restraint.
- If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

An assessment of risk associated with the use of pricing algorithms must consider both standards. Circumstances that might give rise to allegations of an agreement to fix prices must be investigated and analyzed. Pro- and anticompetitive effects should be evaluated.

Minimizing Risk

The explosion of AI is not only accelerating the adoption of pricing algorithms but also increasing antitrust risk for employing these algorithms. These pricing algorithms can also quickly proliferate data and create complex information governance issues if organizations don't take proactive steps to manage this data, and document processes and information dissemination.

To mitigate risk, legal departments should determine how an organization is using algorithms in connection with pricing, whether acting as a seller or a purchaser, and whether those uses could implicate antitrust laws. Legal departments should also be consulted as new uses of AI pricing algorithms evolve, and be aware of how these changes affect updates to the organization's information governance strategy.

Technology that combines and uses nonpublic pricing information may come under particular scrutiny and give rise to litigation risk. A health check will involve identifying any such technology in use and evaluating the likelihood of passing muster under antitrust laws. More specifically, legal departments should consider whether users collectively enjoy monopoly power—a threshold question in any antitrust assessment.

Legal departments should also consider how the algorithm was initially represented, sold, and purchased.

For commercial software, counsel should examine marketing materials and related communications. For proprietary software, lawyers should consider the software engineers' input and documentation on the software's development and operation.

A motion to dismiss was denied in *Duffy v. Yardi Systems, Inc.* , because the software provider "advertised its revenue management software to lessors as a means of increasing rates" and explained that its software would work "only if each lessor client divulges its confidential and commercially sensitive pricing, inventory, and market data" for use by the software. This supported both concerted actions in a hub-and-spoke fashion and the unequivocal sharing of confidential information between potential competitors.

Even algorithms that use only publicly available information should be considered under the rule of reason framework to understand whether the adoption of an algorithm could be seen as a hub-and-spoke conspiracy to fix prices. Undertaking this analysis will allow an organization to assess its risk of litigation—the more pricing decisions that are made independently and unilaterally, the lower the risk. The analysis applies both to starting and final pricing.

In addition to assessing the potential for a finding of concerted action, it is also important to analyze whether the use of the algorithm unreasonably restrains trade. To what extent are there procompetitive benefits? Can it be shown that the algorithm lowers pricing for consumers? Does it increase output? Does it have other procompetitive benefits? To what extent could those benefits be achieved by substantially less restrictive alternative means?

Legal departments may also wish to conduct routine audits on the use and business case for pricing algorithms to understand how, when, and where algorithms could be creating unexplored information governance issues for the company.

Risk can be better managed with formal written policies for the use of pricing algorithms and for the retention of data concerning their use. Such policies can raise awareness and prevent the unchecked use of algorithms without a full analysis of the risks and benefits, as well as restrict use to appropriate personnel.

Policy documentation also underscores the good faith intent of an organization's use of algorithms if ever needed in litigation or other proceedings. Policies can also ensure the retention of data and documents that tend to support and defend the use of pricing algorithms if challenged by regulators or private litigants.

Finally, using outside counsel can minimize the risk that any internal investigation and legal analysis of the use of pricing algorithms will be discoverable. The occasional dual purpose role of in-house attorneys as legal counselors and business advisers may complicate the ability to successfully invoke attorney-client privilege.

This difficulty is exacerbated by the uncertainty of what legal standard should be applied to the inquiry, such as the "primary purpose" test or the "significant legal purpose" test. Engaging outside counsel creates a buffer that can minimize the risk of blurred lines regarding attorney-client privilege.

Outlook

Algorithmic pricing software is growing in use, but it has also become a focus of private plaintiffs and law enforcement under antitrust laws. Organizations and their legal counsel will benefit from proactive information governance and related analyses to reduce the risk of allegations that pricing algorithms are a restraint of trade or anticompetitive.

Careful investigation before an inquiry is made or a lawsuit is filed—and thinking through information governance to eliminate unnecessary discovery targets—are critical to realize that goal.

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

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California Brief

Insight

No, Generative AI Didn't Just Kill the Attorney-Client Privilege

Aug. 12, 2025, 1:30 AM PDT

OpenAI Inc. CEO Sam Altman made headlines when he said there's no legal confidentiality for conversations with generative AI tools such as ChatGPT. This prompted warnings that lawyers should avoid using generative AI tools for fear that doing so might waive the attorney-client privilege.

Yet, this initial statement and the responses to it conflate two important but distinct questions about generative AI use and the longstanding attorney-client privilege.

The first is whether information *individuals* share with generative AI tools is protected from discovery or compelled disclosure. The second is whether confidential information that *lawyers* input into generative AI tools when representing their clients is protected by the privilege.

The answer to the first question is relatively straightforward. Even if responses from generative AI tools resemble legal advice, the user prompts that lead to those responses aren't privileged because the initial communication isn't made with an attorney.

This holds true regardless of how secure (or insecure) the tool may be.

All that matters from the attorney-client privilege perspective is that no lawyer is present in the communication. In other words, just as information written in a diary isn't privileged because no person is receiving it, inputting information into a chatbot isn't privileged either.

Of course, if companies such as OpenAI could persuade lawmakers or regulators to create a general AI privilege, then users might become more comfortable sharing confidential information with those tools, and that might boost the financial bottom line of the companies that produce them.

But that doesn't mean the answer to the second question—whether lawyers can use generative AI tools when representing their clients while also protecting the attorney-client privilege—is the same.

Although the attorney-client privilege is lost when information is shared with unauthorized third parties (absent certain narrow exceptions), simply using a third-party technological tool that gains access to confidential client information doesn't categorically render the attorney-client privilege waived.

Instead, as courts and legislators have clarified in the context of email and cloud technology, the privilege is only waived if lawyers fail to take reasonable precautions to prevent disclosure, such as when the tools they use impermissibly disclose too much information to too many individuals too often.

Of course, there are situations in which lawyers can use generative AI tools in ways that would almost certainly constitute a waiver of attorney-client privilege—such as when ChatGPT conversations that were shared using the platform's "share feature" were exposed publicly when Google indexed them.

But the idea that using any generative AI tool by definition constitutes a waiver of the attorney-client privilege is a prediction with a great deal of contrary precedent.

Ultimately, and perhaps counterintuitively, the real lesson from all of this might not be that lawyers can't or shouldn't use generative AI tools. Rather, the lesson should be that if individuals want to protect their confidential information but also gain the benefits of generative AI tools when asking legal questions, they should avoid using those tools themselves and instead hire lawyers who can use the tools in ways that are more likely to protect their confidential information.

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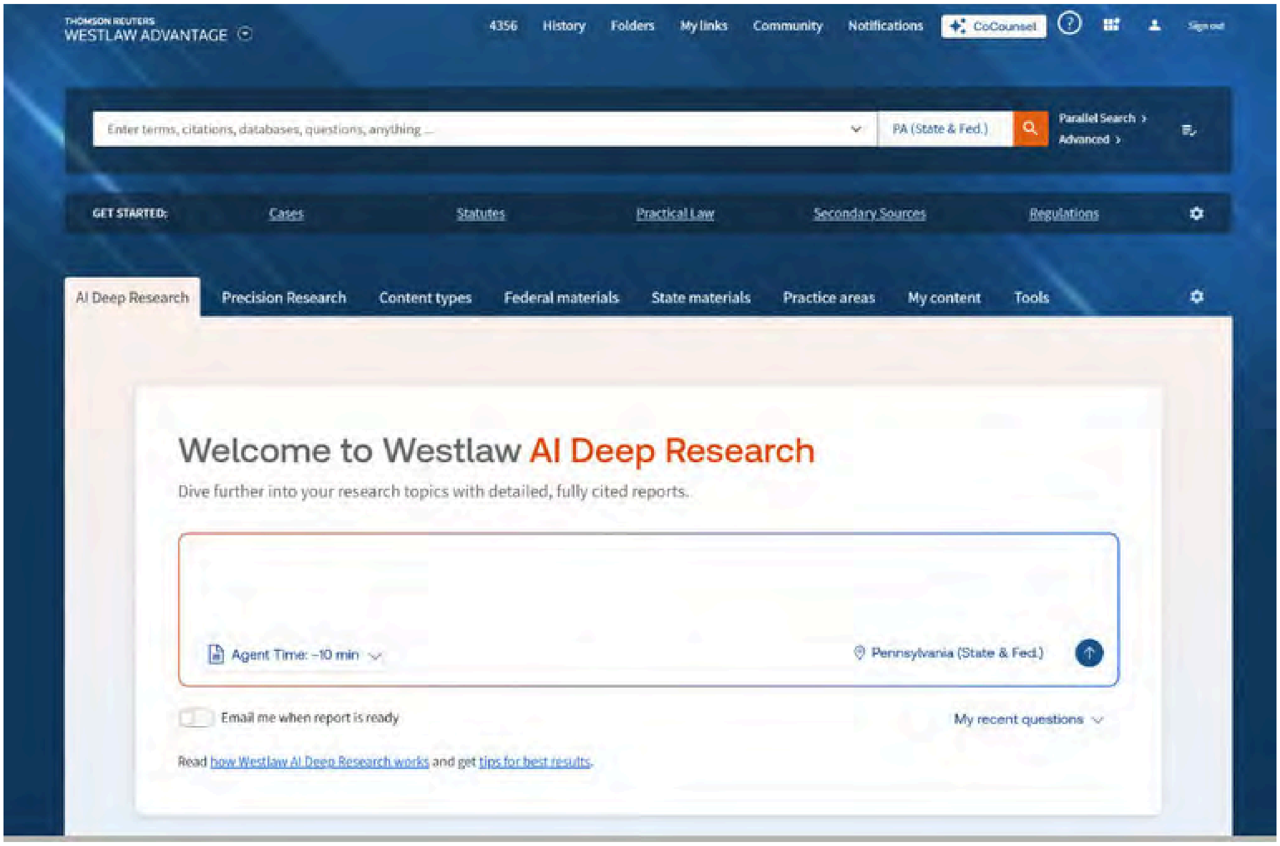
News | **Legal Technology**

Thomson Reuters Launches CoCounsel Legal, Introduces 'Westlaw Advantage' With Agentic AI Deep Research Capabilities

August 05, 2025 | By Rhys Dipshan



Westlaw Advantage from Thomson Reuters

On Tuesday, Thomson Reuters announced the launch of CoCounsel Legal, which integrates the company's research, analysis and drafting capabilities within a single platform, and offers "guided workflows" that use agentic artificial intelligence (AI) to automate legal tasks.

CoCounsel Legal also includes a new version of Westlaw called Westlaw Advantage that comes with deep research capabilities, powered by iterative agentic AI processes, and a Litigation Document Analyzer that replaces Westlaw's former document analysis tool Quick Check with new capabilities and a redesigned interface.

The public launch of the platform comes just weeks after Thomson Reuters announced it integrated agentic AI into CoCounsel and teased a summer release for CoCounsel Legal.

At a press briefing last week, Ragunath Ramanathan, Thomson Reuters' president of legal professionals, called CoCounsel Legal "a seismic shift" toward a more holistic offering. He explained that the solution "completes the broadest range of legal work … [it] combines the power of CoCounsel Practical Law and Westlaw … all deeply integrated into one experience to help lawyers move beyond prompting and into true AI-based transformation."

Such integration is key to the platform's agentic AI-powered "guided workflows" that automate a number of legal tasks, including drafting a lease agreement abstract; generating 8-K forms for U.S. Securities and Exchange Commission filings; benchmarking documents such as contracts against standards; drafting complaints or discovery requests and responses; and reviewing deposition transcriptions.

Thomson Reuters intends to release additional guided workflows, such as drafting employee policies, over the next few months, while eventually giving users the ability to create their own. "We are incrementally releasing them every week, but eventually we'll get to the point, later this year, where you can develop new workflows so the agent can create the workflow for you," said Rawia Ashraf, head of product, CoCounsel Transactional and GCOs, during the briefing.

In addition to its guided workflows, Thomson Reuters is also launching Westlaw Advantage on Aug. 13.

Mike Dahn, Thomson Reuters' senior vice president and head of Westlaw product management, U.S., U.K., Canada, Australia and New Zealand, called Westlaw Advantage "the most transformative new launch of Westlaw that [Thomson Reuters] had in many years" and a "much bigger transformation" than Westlaw Precision or Westlaw Edge.

Westlaw Advantage is not only a significant upgrade, it also represents the end of Thomson Reuters releasing versions of Westlaw in favor of rolling updates.

"There will be thousands of upgrades and improvements to Westlaw … [but] there may not be another version of Westlaw," Dahn said. "We're not going to version it any longer because of all of the rapid improvements that we'll be making basically every month for the next few years."

"So we're moving to a new commercial model … Advantage is likely our last new version of Westlaw," he added.

Deep Research Capabilities

Westlaw Advantage comes with deep research capabilities, which Dahn explained allows the platform to "engage in an iterative agentic process for research, where the agents formulate a plan, and then they execute that plan iteratively. So they're finding relevant documents, they're analyzing the content, figuring out where to go next, what parts of the questions have been answered and what hasn't been answered."

While deep research is already a feature in many consumer gen AI platforms like ChatGPT, Westlaw Advantage looks to differentiate by connecting these capabilities with Westlaw tools and knowledge of how to use them.

Thomson Reuters is "not just relying on the basic capabilities of those language models," Dahn said, "We are instructing our agents in the use of Westlaw's exclusive tool set, so things like the Key Number system, KeyCite, statutes, annotations, proprietary indices, [Westlaw] Precision, research, markup."

With deep research capabilities, Westlaw Advantage can now develop research plans and generate more in-depth and nuanced reports.

These reports, for example, will include an "Arguments" section that shows arguments made in support of a user-selected claim and ones made against it, alongside cited cases. They can also show jurisdictions where claims have been successful or unsuccessful, and related claims one can bring up.

In addition, reports will include a "Sources" tab that allows users to go through all linked sources individually. "You can see the sections of the documents that the agents found to be most helpful for producing the report," Dahn said. "You can use this as part of your verification process, and you can click through right to the documents and read the whole thing. You'll also be able to use filters, just like with any Westlaw list, so you'll be able to filter out unpublished decisions, or filter to just a particular date range." These filters, he added, will be released in September or October.

Westlaw Advantage reports will also have a "Questions" tab, set to be released this fall, that queries users in order to offer more in-depth research.

"While we have one team of [AI] agents that's moving through the material, finding the relevant laws and answering the questions as best they can for the initial report, we have a separate process where agents are combing through the relevant laws, looking for areas of ambiguity and details that might matter for an even better report, and formulating questions back to the user. Sometimes, when you answer these we'll just append the report, and other times, we will run a new report because it's foundational," Dahn said.

Litigation Document Analyzer

Westlaw Advantage will also introduce Litigation Document Analyzer, which replaces Quick Check, and comes with a number of new or expanded features.

The tool can now analyze complaints to produce a summary of its claims; create an event timeline and a list of relevant defenses; offer suggested counterarguments to a motion to dismiss; and, via a language analysis tab, show potential mischaracterizations in court submissions, now expanded from Quick Check to analyze the entire motion or brief.

In addition, the Litigation Document Analyzer will include a "hallucination check" that shows "if there's anything in the opposing brief that we're finding an issue with, with regard to the citations, so that you can see if anything's maybe not real," Dahn said.

He added that Thomson Reuters has "been getting requests from the courts quite a bit for a function like this, because the courts are seeing more and more that litigants are using tools like ChatGPT or Gemini to do their legal research, and those tools make up cases all the time."

Lastly, Dahn noted that a "Related Arguments" feature for Litigation Document Analyzer, which will analyze an uploaded brief to show missing arguments or defenses, will also be released "in September or October."

News | Copyrights

In Copyright Case, Startup Argues Use of Disney, Universal Characters to Train AI Models is 'Transformative Fair Use'

August 08, 2025 | By Kat Black

What You Need to Know

- Disney and Universal sued AI firm Midjourney in June for allegedly producing infringing replicas of their iconic movie and television characters through its image-generating service.
- Midjourney contended in a filing this week that its practice of training its image generator with Disney and Universal characters qualifies as transformative fair use, likening the process to teaching someone how to draw or paint.
- An expert said that two recent landmark rulings in the realm of AI and copyright involving Meta and Anthropic could have a significant impact on this case moving forward.

Disney and Universal Studios. Credit: Adobe Stock

AI startup Midjourney refuted claims of federal copyright infringement alleged by Disney Enterprises Inc. and Universal City Studios Productions, arguing that the practice of training its AI image generator with characters from Disney and Universal movie and television franchises such as "Despicable Me," "Star Wars," "Guardians of the Galaxy" and more qualified as transformative fair use.

Disney and Universal sued the San Francisco-based Midjourney, which was founded in 2021, on June 11 in the U.S. District Court for the Central District of California in Los Angeles.

The studios, represented by Jenner & Block, contended that Midjourney committed direct and secondary copyright infringement under the federal Copyright Act by churning out "endless unauthorized copies" of iconic Disney and Universal characters such as Darth Vader, the Minions and Shrek through its image-generating service.

The 143-page complaint lays out strikingly similar side-by-side comparisons of the allegedly infringing images paired with recognizable characters from Disney and Universal productions such as "Kung Fu Panda," "Boss Baby," "The Simpsons" and "How to Train Your Dragon."

Midjourney, defended by Cooley, submitted an answer Wednesday to the studios' complaint on Aug. 6. The firm and its counsel at Cooley did not immediately respond to requests for comment.

"The AI technology that powers Midjourney is a type of neural network designed to produce original images in response to user instructions ('prompts')," Midjourney's counsel wrote in the filing.

"To develop this capability, Midjourney's AI models had to be trained on billions of publicly available images, which are paired with text descriptions, in order to learn visual concepts and how they correspond to language."

The filing analogized this process to teaching a human how to draw or paint—"not by memorizing individual artworks, but by internalizing patterns and techniques through repeated exposure and practice."

The image generator works, it said, not by retrieving input graphics from storage, but by producing an entirely new image "from scratch, guided by user instruction and the statistical patterns encoded within its artificial neurons."

In addition, it said, Disney and Universal failed to avail themselves of provisions in the Digital Millenium Copyright Act, which afford copyright holders a remedy whereby they may request take-downs of allegedly infringing images from websites.

"I do think that Midjourney did put together a very compelling defense to copyright infringement," said Randy McCarthy, a patent attorney at Hall Estill in Oklahoma who specializes in AI and machine learning systems.

"What Disney is claiming [is that] ... there's all sorts of unjust enrichment going on here. It's outright piracy. We have all of these beloved characters, and Midjourney has created a machine that basically just outputs copyright infringements, and they need to be shut down.

"Midjourney's position is that it's not quite that. We did train on these images among the billions that we also train, and it's not like we have a vault somewhere in our system where we have copies of your various work stored, and we pull those out. But, rather, we use these to train the associations on style and composition and so on to arrive at this ability to create works responsive to these textual inputs."

Midjourney's filing echoes—and cites—the judicial rationales underpinning two recent watershed AI and copyright rulings handed down by California federal judges, *Kadrey v. Meta* and *Bartz v. Anthropic.*

In June, U.S. District Judge Vince Chhabria held that Meta Platforms Inc.'s use of copyrighted books by 13 writers to train its Llama AI models constituted "highly transformative" fair use. Similarly, U.S. District Judge William Alsup ruled that same week that Anthropic's use of purchased books to train its large language model, Claude, did not violate copyright law and was "quintessentially transformative."

McCarthy said that he believes the Meta and Anthropic verdicts will have a "significant" impact on the trajectory of the Disney and Universal case and that there's a "good chance" that the court will follow the same line of reasoning that the use of copyrighted work as training data is "transformative, sufficiently, to qualify as fair use."

What distinguishes this case from the Meta and Anthropic cases, he said, is that the output is image-based—and, given the complaint's seemingly damning barrage of visuals, this fact may prove to be challenging for Midjourney in court.

"We, as humans, understand graphical pictures much better than we can absorb text," he said. "... You've got a picture of Darth Vader here, you've got a picture of the Minions. ... It may be, in this graphical space, that Disney will have a stronger argument on the output side of the model."

One argument that Midjourney could make in court, he added, is that liability for copyright infringement falls on individuals who use the Midjourney image generator—not the company itself.

"I can use Microsoft Word to type up an infringement of 'Harry Potter,' but Microsoft is not responsible for that," he said.

Disney, Universal and their counsel at Jenner & Block did not respond to messages seeking comment on Friday.

California Brief

Anthropic Denied Bid to Delay Groundbreaking AI Copyright Trial

Aug. 11, 2025, 1:23 PM PDT

A California federal judge staunchly rejected Anthropic PBC's attempt to cancel a first of its kind trial set for December to determine whether the AI company is liable for billions of dollars in damages for downloading troves of copyrighted books from online pirate libraries.

A stay of authors' lawsuit against Anthropic is "ill-advised" because the current record fails to answer some of the most fundamental factual points, including why the company retained all copies of the pirated works after it switched to buying and scanning books, Judge William Alsup said in a Monday order. Alsup said the decision is meant to assist the Ninth Circuit in understanding why a stay is unwarranted.

"Anthropic has refused to come clean" about which pirated works it used to train large language models and why it retained them all, he said, and "asks our court of appeals to ignore all these colorations in its piracy."

The US District Court for the Northern District of California handed Anthropic a partial win in June by ruling that training AI on copyrighted works is fair use, but left the piracy issue to a jury. Anthropic wants the US Court of Appeals for the Ninth Circuit to review that decision as well as Alsup's class certification of authors whose books were included in two "shadow" libraries Anthropic used, and sought to pause the case in the meantime.

Allowing an appeal before the record fully develops at trial would enable Anthropic to seek a "sweeping rule" that "an AI company is free to pirate copyrighted materials without ever accounting for the extent to which the pirated materials were ever actually and solely used for a fair use," according to the order.

Alsup noted that the record shows Anthropic's built a "research" library of millions of books for purposes other than training LLMs, but that only the training has been found to qualify as fair use.

Although Anthropic claims that damages could "kill the entire company" absent a stay, Alsup said this "doomsday calculation" assumes the company "will lose and lose badly at every trench."

"If Anthropic loses big it will be because what it did wrong was also big," he said.

Alsup in May announced that he will likely take inactive status by the end of the year, and Anthropic has accused the judge of rushing the case to trial so he can do so. Alsup rebuffed the claims. “Keeping a case on track is not the same as rushing the case to trial.”

Anthropic is represented by Cooley LLP, Arnold & Porter Kaye Scholer LLP, Latham & Watkins LLP, Lex Lumina LLP, and Morrison & Foerster LLP. Susman Godfrey LLP, Lieff Cabraser Heimann & Bernstein LLP, and Cowan Debaets Abrahams & Sheppard LLP represent the authors.

The case is Bartz v. Anthropic PBC , N.D. Cal., No. 24-cv-05417, 8/11/25 .

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News | Artificial Intelligence

Musk's Legal Chief at xAI Resigns, Says Job Was Thrilling Despite 'Daylight Between Our Worldviews'

August 09, 2025 | By Michael Gennaro

Robert Keele resigned this week as chief legal officer of xAI. The photo above is from 2018, when he was an associate general counsel of Acubed, the innovation arm of Airbus. Photo: Jason Doiy/ALM

Robert Keele, who's been chief legal officer of Elon Musk's artificial intelligence startup xAI for 16 months, resigned this week, writing on LinkedIn, "I love my two toddlers and I don't get to see them enough."

The post also noted that he and the company's billionaire founder had different values, but didn't elaborate on those differences or specify whether they contributed to his decision to leave.

“The job was a dream, the team, incredible. Working with Elon on this tech, at this time, was the adventure of a lifetime. Although there's daylight between our worldviews, his vision, commitment, and smarts blew me away on the daily. But I couldn't keep riding two horses at once—the family and the job. Time to pick one,” Keele wrote.

Keele joined xAI in May 2024, 14 months after Musk started the company and just before it completed a $6 billion funding round backed by elite investors that valued the business at $24 billion.

The following spring, Keele helped orchestrate xAI's $24 billion acquisition of X, the social media platform formerly known as Twitter, from Musk. In an X post at the time, Musk said the deal valued X at $33 billion and xAI at $80 billion.

Keele came to the Palo Alto, California-based company from Elroy Air, a developer of autonomous aerial robots, where he spent 10 months as head of legal and compliance. Before that, he spent seven years at Acubed, a Silicon Valley-based innovation arm of Airbus, where he held a variety of roles, including general counsel.

In the wake of Keele's resignation, xAI has promoted Lily Lim to head of legal affairs. Lim, who was a NASA engineer before getting her law degree from Yale in 1997, announced her new role on LinkedIn.

Lim joined xAI in December as legal's head of product, intellectual property, litigation and privacy.

She was formerly assistant general counsel for the tech conglomerate Fortive, director at the workflow automation company ServiceNow, and worked at the law firms Finnegan, Henderson, Farabow, Garrett & Dunner; Day Casebeer Madrid & Batchelder; and Wilson Sonsini Goodrich & Rosati.

Lim and xAI did not immediately respond to Law.com's requests for comment.

Keele closed his LinkedIn post with, "Don't know what's next, just grateful. And way more capable than I was just 16 months ago," and with an illustrated video of a man shoveling coal into a furnace labeled "xAI."

He wrote that he produced it by typing "what's it like to lead legal at xAI" into Grok Imagine, an xAI chatbot that converts a string of text into a video clip. "I may have also mentioned shoveling coal," he wrote.

Class Action

Manage Newsletters

They’ve Got Next: The 40 Under 40 - Robert Braun of Cohen Milstein

Aug. 12, 2025, 2:00 AM PDT

Robert Braun

Age: 40

Law Firm: Cohen Milstein Sellers & Toll

Practice Area: Antitrust

Title: Partner

Location: Washington, DC

Law School: Yale Law School

Please describe two of your most substantial, recent wins in practice.

As co-lead counsel in *Moehrl v. National Association of Realtors,* I had the opportunity to make a tremendous difference to millions of people by reducing the cost of the largest transaction most people engage in during their lifetime.

Nothing about this case was cookie cutter. There was no existing government enforcement action. We had to sort out a working damages and impact model for challenged practices that were over a century old, were still in place, and were pervasive throughout the country. The defendants had every incentive to—and did—fight us tooth and nail.

Despite these challenges, we were able to certify a class and work with our partners in a parallel case to reach significant pre- and post-trial settlements. I was closely involved in those settlements, including the 100-plus page $418 million settlement against NAR that involved industry-wide reforms.

In re Resistors Antitrust Litigation, which held the world’s largest manufacturers of resistors accountable for conspiring to eliminate price competition in the global and US markets, I was trusted with significant responsibility for developing the case theory and evidence and had the opportunity to depose senior executives from several of the world’s largest electronics companies, including in Japan.

What is the most important lesson you learned as a first-year attorney and how does it inform your practice today?

Something I learned early in my career is the importance of taking ownership in your cases. It can be easy for young attorneys to approach a case as a series of discreet assignments. And some firms track their associates this way. But a way to distinguish yourself as a young attorney, or at least one of the ways I tried to distinguish myself, is to think of cases holistically and determine what work is necessary in order to achieve the client's goals. Associates who take that approach, including by generating their own projects, often get more interesting and fulfilling work (as well as the eternal appreciation of their senior colleagues).

As an example, early in my career, I cut my teeth on an antitrust case involving tiny but ubiquitous electronic components called resistors. By throwing myself into the documents and helping to develop the case theory, I was given opportunities as a young attorney to depose senior executives at large international electronics companies.

How do you define success in your practice?

Success for me consists of three things. First, has my work made my clients—whether they be individuals, businesses, or a class— better off? Second, is the work I'm doing helping to create a more just and fair society? And third, am I working on interesting and novel legal issues with colleagues I enjoy being around?

Litigating is incredibly hard work and many of the cases I'm involved in require years of effort to achieve important milestones, let alone a settlement or judgment. But I've been incredibly lucky to find all three kinds of success in my practice and at Cohen Milstein.

What are you most proud of as a lawyer?

I'm especially proud of our real estate commission antitrust litigation against the National Association of Realtors and large brokerage companies. My firm investigated and helped bring the original lawsuit, which sought to make a real difference to millions of people by reducing the cost of what is, for most, the largest transaction they'll engage in during their lifetime.

These were risky and complex cases. They challenged deeply ingrained practices that were over a century old, pervasive throughout the country, and central to the real estate brokerage industry's business model. Not surprisingly, the defendants fought us tooth and nail.

I began working on the case in its early days and am appreciative that my firm trusted me to help lead the litigation. This involved working to develop the core case theory and evidence, deposing several CEOs, overseeing expert discovery—and later—playing a major role in drafting and negotiating the settlement with NAR that has, quite literally, changed the residential real estate industry for the better by impacting how houses are bought and sold across the country.

Who is your greatest mentor in the law and what have they taught you?

I've had several fantastic mentors throughout my life and career. At Cohen Milstein, I've had the great fortune to work closely with Ben Brown, Cohen Milstein's current managing partner, and Kit Pierson, the former chair of our antitrust practice. Both are not only brilliant, exceptional litigators, they are also incredibly thoughtful and generous people.

Many litigators—including me—have a tendency to be dogged and aggressive; and those are certainly essential attributes. But Ben and Kit also taught by example to approach each case with a level of empathy and humanity. Those qualities are often a boon in litigation because they build loyalty in junior colleagues and allow opposing parties to find common ground on tricky issues—often to the benefit of both sides.

Tell us your two favorite songs on your summer music playlist.

I love singing, and my kids often serve as both my captive audience and duet partners. I've been listening to this summer to "Pink Pony Club" by Chappell Roan because my 4-year-old adores it and will sing it with me. Summer also reminds me of "Doin' Time" (aka "Summertime") by Sublime, one of my favorite bands from my middle and high school years.

Robert Braun of Cohen Milstein and wife riding a streetcar on St. Charles Avenue in New Orleans with their younger daughter.
Photo Illustration: Jonathan Hurtarte/Bloomberg Law; Photo courtesy of Robert Braun

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Rising Star: Bernstein Litowitz's Thomas James

law360.com/classaction/articles/2358829/rising-star-bernstein-litowitz-s-thomas-james

Law360 (August 11, 2025, 4:00 PM EDT) · Listen to article -- Thomas James of Bernstein Litowitz Berger & Grossmann LLP has represented numerous classes of investors as they take on corporate misconduct, including winning verdicts worth hundreds of millions of dollars, earning him a spot among the class action practitioners under age 40 honored by **Law360 as Rising Stars**.

Thomas James

Bernstein Litowitz Berger & Grossmann

- **Age:** 35
- **Home base:** New York
- **Position:** Partner
- **Law school:** Boston College Law School
- **First job after law school:** Clerked for Vice Chancellor J. Travis Laster in Delaware's Chancery Court

The biggest case of his career:

James represented a class of former Columbia Pipeline Group Inc. shareholders who accused TransCanada Corp., now called TC Energy Corp., of inducing Columbia's top brass to sell the company at a lower price in exchange for hefty retirement payouts in connection with a 2016 merger.

A Delaware Chancery Court ordered TC Energy to pay $199 million to the former shareholders, which represented one of the largest shareholder verdicts in Delaware history.

However, James said, that verdict **was recently overturned** by the Delaware Supreme Court when the state's justices determined TC Energy's conduct did not reach the level of aiding and abetting liability.

Given this case's recent history, James also pointed to a case he worked on in which he represented a class of former unit holders of Carl Icahn-affiliated petroleum refining company CVR Refining LP.

The **unit holders said** Icahn and his interests tried to keep public investors uninformed and misinformed before they were involuntarily cashed out. Icahn and CVR wanted to end the refiner's status as a master limited partnership for tax reasons and set about a two-step plan that enabled a call-in of minority holder rights after a scheme to drive down the value of their units. The holders said this involuntary buyback cost them $148 million.

Following a trial in July 2022, the parties ultimately settled the dispute for $78.5 million before a judgment could be rendered.

James said that was a "pretty substantial recovery in a case of that level of difficulty, so it was very cool to be part of that trial team."

He added that all the cases he's involved in require gaining an understanding of an industry with which he was not previously familiar.

"With an oil refining company, you have to learn a lot about how oil refining works," James said. "I don't have a background in geology or oil refining or anything, so I find in that case, and other cases that we do, challenging and interesting because you have to effectively get a better than a lay person's understanding of, like, how does all this stuff work anyways before you then depose a bunch of witnesses and then try and explain to a judge or a jury."

Why he focuses on securities class actions:

James said he took a number of classes in law school focusing on securities and corporation law, and he particularly enjoyed a seminar on mergers and acquisitions.

He said that after graduating, he was able to translate that interest into a clerkship with the Delaware Court of Chancery, which allowed him to gain a lot of firsthand experience.

"Seeing litigants bring these cases and how they get litigated, but also seeing how a judge thinks, not just about the case, but also how the law develops was a really cool experience as well," James said. "So, in a way, it was part of my legal upbringing, and I just sort of continued on from there. It was a natural fit."

His biggest motivator:

In some of the cases he's involved in, James said, he represents individual people who have been really harmed by a corporation's conduct. Being able to achieve real results for people like them, or groups like the California Teachers Fund, can be a major motivator, he said.

"The other motivating factor is that I just find the work to be incredibly interesting and intellectually rigorous," James said. "You know, a lot of the practitioners ... in the space, both on the plaintiff and defense side, are very, very smart and very good lawyers. And so it's always a fun challenge to rise to the occasion and try to always get better."

His proudest moment:

Not long after joining Bernstein Litowitz, James said, he had the opportunity to take a case to trial for the first time. In that case, he represented The Williams Cos. Inc. stockholders who accused the pipeline giant of adopting a poison pill, or shareholder rights plan, that had the effect of limiting a lot of stockholder communication and activism, he said.

Vice Chancellor Kathaleen S. McCormick **ultimately struck down** the company's poison pill measure, finding that directors failed to show the measure was a reasonable response to vulnerabilities created by the COVID-19 pandemic. The Chancery Court **in April 2021** also approved a $9.5 million award to the stockholders' attorneys, which was doled out to James and his team as well as attorneys from two other firms.

"I got the best opportunities to take my first couple of depositions, cross-examined my first witness at trial," he said. "It was a very cool experience, and it was something that I was proud to have done because it very much felt like, oh, right, this is why I'm doing this, I feel like I've made the right decision in my career. And we got a very good result out of it as well, which didn't hurt."

--As told to Emmy Freedman. Editing by Kristen Becker.

Law360's Rising Stars are attorneys under 40 whose legal accomplishments belie their age. A team of Law360 editors selected the 2025 Rising Stars winners after reviewing more than 1,100 submissions. Attorneys had to be under 40 as of April 30, 2025, to be eligible for this year's award.

Securities Law News

Liberty Mutual Gets First DOJ Bribery Deal in New Trump Term (1)

Aug. 11, 2025, 7:22 AM PDT; Updated: Aug. 11, 2025, 8:23 AM PDT

Liberty Mutual will pay $4.7 million to avoid criminal bribery charges involving an Indian subsidiary, the first corporate action since the Trump Justice Department unfroze enforcement of foreign corruption law.

President Donald Trump issued an executive order in February halting new overseas bribery cases and DOJ subsequently issued a policy that resumed probes with a narrower scope to benefit US businesses. The resolution Monday suggests white-collar prosecutors still have at least some leeway to pursue matters at US-headquartered multinationals.

Under the agreement, known as a declination, published by DOJ's criminal fraud section, Liberty Mutual disclosed evidence—verified by prosecutors—that its operation in India paid nearly $1.5 million in bribes through an intermediary to six state-owned banks. The banks then referred customers to Liberty Mutual insurance products in India, resulting in $9.2 million in revenue and $4.7 million in profits, DOJ said.

The global insurance company is paying back the full profit total in a case DOJ officials may use to demonstrate that the 1977 Foreign Corrupt Practices Act hasn't disappeared even after Trump declared the statute harms global development of US companies.

While declinations are coveted by defense lawyers for eliminating a company's criminal exposure, the department managed stricter terms for Liberty Mutual than had it outright closed the investigation or dismissed a pre-charged case ahead of trial—as other defendants and corporate targets have lobbied DOJ to do this year.

It's still a relatively small dollar figure, and it's uncertain whether the company's declination after stepping forward to confess to DOJ in March 2024, rather than a guilty plea or deferred prosecution agreement, will lead to deterrence. Declinations provide public accountability and require penalties but are viewed by defense lawyers as a successful outcome for businesses taking the risk of voluntarily disclosing internal wrongdoing.

“We are pleased the DOJ acknowledged our proactive approach and affirmed our commitment to integrity and compliance across our global enterprise,” said a Liberty Mutual spokesperson in a statement. “We welcome this conclusion and, in addition to already taking decisive steps to address this matter, will continue to uphold our values and act responsibly everywhere we do business.”

The company was represented by lawyers from Holland & Knight in the matter.

The department didn’t specify whether charges are being pursued against any of the individuals who facilitated the bribes, but noted Liberty Mutual’s “separation from personnel involved in the misconduct” and its cooperation with the government’s ongoing investigation.

The Liberty Mutual resolution would require senior DOJ review to ensure adherence to FCPA enforcement guidelines issued by Deputy Attorney General Todd Blanche in June. Blanche called for a focus on matters with links to cartels and transnational criminal organizations, that advance national security, and prioritize serious misconduct.

The Liberty Mutual enforcement action doesn’t on its face appear to meet that criteria, but Blanche said the guidelines weren’t exhaustive.

After months of debate on the impact of Trump’s order, the latest resolution resembles the structure of prior declinations DOJ has published—most recently for Boston Consulting Group.

In the department’s corporate enforcement and voluntary self-disclosure policy, declinations are offered to companies that self-disclose misconduct, cooperate with investigations, remediate, and have no aggravating factors—such as a recent history of similar violations.

(Updated with additional reporting in paragraphs seven through nine.)

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Liberty Mutual Resolves $4.7 Million Enforcement Action

fcpaprofessor.com/liberty-mutual-resolves-4-7-million-enforcement-action

August 11, 2025

The DOJ recently released this so-called declination with disgorgement letter regarding Liberty Mutual Insurance.

The letter begins:

"Consistent with the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy, the Department of Justice, Criminal Division, Fraud Section and the United States Attorney's Office for the District of Massachusetts (collectively, the "Government") have declined prosecution of your client, Liberty Mutual Insurance Company ("Liberty Mutual" or the "Company"), a global insurance company with its principal place of business in the United States, for violations of the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2. We have reached this conclusion despite evidence of bribery committed by certain employees of the Company's subsidiary in India who were acting as agents of the Company."

The letter then states:

> The Government's investigation found evidence that, from in or around 2017 until in or around 2022, Liberty Mutual, through its subsidiary in India, Liberty General Insurance ("LGI"), paid bribes totaling approximately $1.47 million to officials at six state-owned banks in India, in order to obtain or retain business with those state-owned banks. Specifically, in exchange for the bribes, the officials caused the state-owned banks to refer bank customers to LGI's insurance products. Certain LGI employees took steps to conceal the true nature of the payments, including by classifying the payments as marketing expenses and using third-party intermediaries to make the payments to the officials. In total, the bribe scheme resulted in revenue of approximately $9.2 million and profits of approximately $4.7 million.
>
> The Government has decided to decline prosecution of this matter based on an assessment of the factors set forth in the Criminal Division's Corporate Enforcement and Voluntary Self-Disclosure Policy, as revised in May 2025, and the Principles of Federal Prosecution of Business Organizations (Justice Manual 9-28.300), including, but not limited to: (1) Liberty Mutual's timely and voluntary self-disclosure of the misconduct to the Fraud Section in March 2024, which was identified during an internal investigation that was still ongoing at the time of the disclosure; (2) Liberty Mutual's full and proactive cooperation in this matter (including its provision of all known relevant facts regarding the misconduct, including information regarding the individuals involved) and its agreement to continue to cooperate with any ongoing Government investigations and any prosecutions that have resulted or might result in the future; (3) the nature and seriousness of the offense; (4) Liberty Mutual's timely and appropriate remediation, including the Company's early and fulsome acceptance of responsibility, its thorough and systematic root-cause analysis, and the Company's separation from personnel involved in the misconduct; (5) Liberty Mutual's significant improvements to its compliance program and internal controls, including enhanced vetting, monitoring, and oversight of payments to third parties throughout its global markets, structural reorganization coupled with increased legal and compliance resources, and the implementation of enhanced compliance policies, including with respect to use of social media and ephemeral messaging applications for business purposes; (6) the absence of aggravating circumstances; and (7) the fact that Liberty Mutual agrees to disgorge the amount of its ill-gotten gains.
>
> […]
>
> Liberty Mutual further agrees to disgorge $4,699,088 (the "Disgorgement Amount"), which represents the profits to Liberty Mutual from its commercial relationships with the six stateowned banks, as calculated by the Government and agreed to by the Company."

Libor scandal

How a decade of banker prosecutions collapsed

Rate-rigging convictions have been overturned on both sides of the Atlantic. What remains of the crackdowns?

Suzi Ring in London and **Kaye Wiggins** in New York

Published YESTERDAY

Tom Hayes raised his clenched fist in the air outside the UK's Supreme Court, surrounded by friends and supporters. Last month the former UBS and Citigroup trader — the face of one of the biggest financial scandals since the 2008 crisis — had achieved something that for years seemed an outside chance.

Four and a half years after his release from prison, his conviction for rigging the Libor benchmark rate had been overturned.

Prosecutors started investigating the alleged rigging of multiple benchmarks on both sides of the Atlantic more than a decade ago. Over a dozen convictions have since come unstuck. They have been quashed for a range of reasons, including technical mis-steps and subsequent legal changes.

Together, the rulings undermine the biggest global set of white-collar prosecutions of the post-2008 era, opening the floodgates to further appeals. The decisions also raise questions over whether prosecutors will find themselves unable — or unwilling — to bring similarly tough financial crime cases in the future.

Rate-rigging:
How a scandal unfolded

The 2008 financial crisis turned bankers into public enemy number one. The Occupy Wall Street movement, which spread from New York to London and cities around the world, had protesters asking: why had none of them gone to jail?

1/6 ›

The crisis drew authorities' attention to a benchmark interest rate known as Libor — a reference underpinning some $300tn worth of financial contracts including mortgages, student loans and derivatives. When lending markets seized up, regulators wondered: why did some banks' numbers not reflect the chaos?

2/6 ›

Hayes came to personify the Libor scandal when he was sent to prison in 2015 for conspiring to manipulate the benchmark. The former Citigroup and UBS banker said he was made a scapegoat for the sector and claimed vindication last month when the Supreme Court ruled the jurors in his original trial had been misdirected.

The trial judge had been wrong to tell the jury that a bank's Libor submission was inherently not honest if it had been influenced by a trading advantage, the panel of judges ruled. The verdict followed a US ruling that cleared the names of two ex-Deutsche Bank traders in 2022, and came days after a former HSBC banker had his conviction for forex rigging quashed.

"The scorecards don't look good from a prosecutor's perspective," said a former US prosecutor who investigated rate-rigging. "Does that mean we shouldn't have brought these cases? That's a different question."

The Supreme Court ruling was not a complete exoneration — the judges found there was "ample evidence" that could have formed a basis for conviction. But it undermined a core theory of rate-rigging that prosecutors had relied upon, and has paved the way for further appeals.

The benchmarks behind the scandals

Swipe left for more ›

Libor

The London Interbank Offered Rate was designed to approximate the average rate at which banks could borrow from one another. The benchmark – since phased out – was based on estimates submitted every day at 11am from a panel of up to 18 banks and underpinned securities including student loans and mortgages. ›

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Images: Bloombe

Four former Barclays traders — Jay Merchant, Jonathan Mathew, Philippe Moryoussef and Alex Pabon — and Christian Bittar, a former star trader at Deutsche Bank, have set out to clear their names.

"Judges across the various trials for most of the convicted traders in the UK gave a version of the jury direction that has now been shown to be wrong by the Supreme Court," said Tom Bushnell, a lawyer acting for some of the group appealing. "Therefore, we are hopeful that we will see more of these convictions overturned."

Lawyers say rulings on both sides of the Atlantic will make prosecutors' lives harder in any future rate-rigging cases by raising the legal threshold to secure convictions. Those include a US Supreme Court ruling that struck down a legal theory relied on by prosecutors in the Johnson case.

The US court that overturned the ex-Deutsche Bank traders' convictions said prosecutors had not shown that the banks could not have borrowed at the Libor rates they submitted. "Nobody thought that was the standard you have to meet," the former US prosecutor said. In a similar situation today, they added, authorities might well decide "we don't have a case here".

In the UK, a specific offence was introduced criminalising rate-rigging in 2013, but Corker Binning lawyer Maia Cohen-Lask said it seemed increasingly unlikely that any banker would be prosecuted under it.

The law was "a knee-jerk reaction to the issues of the day, designed to address the perception that the [UK financial regulator] lacked teeth to criminally prosecute for benchmark manipulation", she said. But Hayes and his fellow traders were prosecuted under broader fraud laws, meaning "nobody has ever been prosecuted for this offence".

A record unravels: The Libor/Euribor cases

Swipe left for more ❯

Nineteen Libor and Euribor traders were originally **convicted** by UK and US authorities

1/11

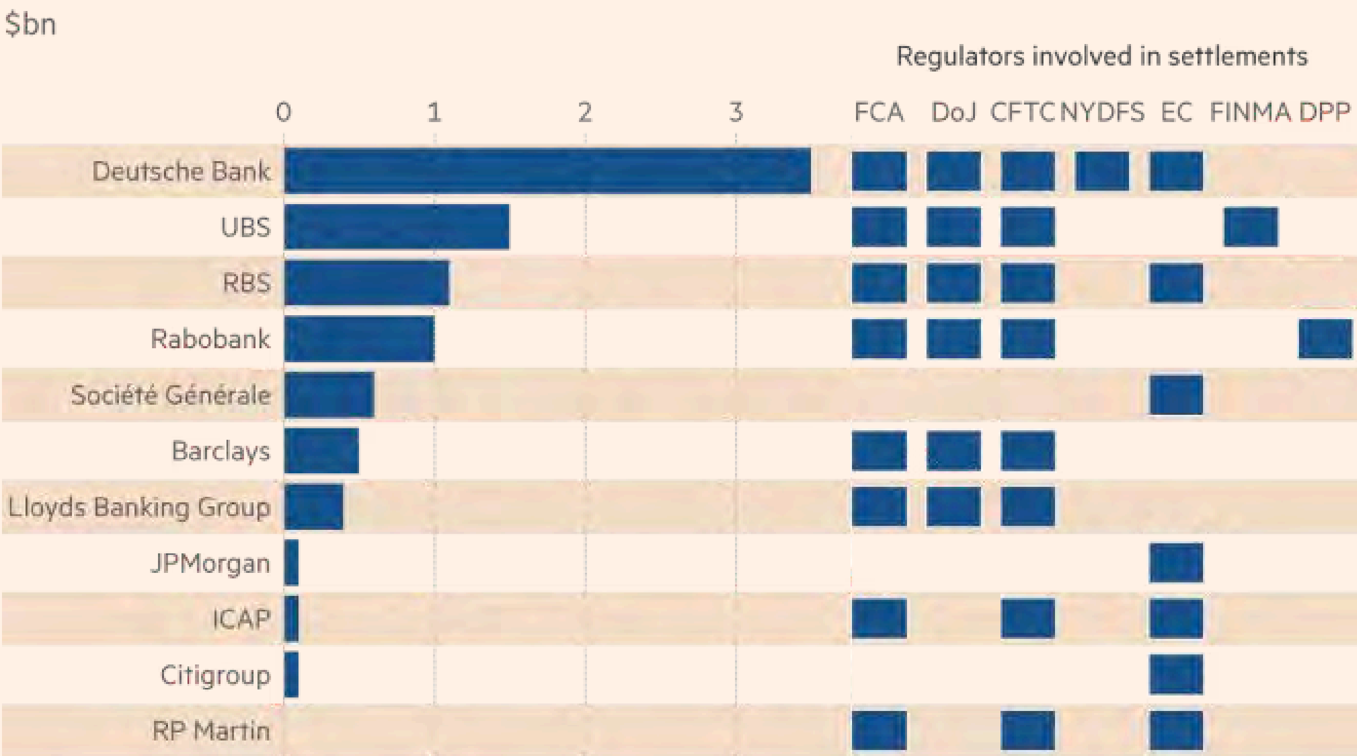
Resources were hurled at prosecutors to pursue bankers for benchmark rigging in the wake of the financial crisis, with politicians baying for blood.

The UK's Serious Fraud Office was granted special ringfenced funding to pursue a Libor probe. Banks, reeling from the reputational wounds of 2008, rushed to agree billions of dollars in settlements over Libor, Euribor and the then $5tn-a day foreign exchange market.

The rate-rigging cases took place against a backdrop of "political and public pressure that gave rise to this idea of finding someone to blame, that bankers had acted badly", said Alexandra Shapiro, a lawyer who helped overturn ex-HSBC trader Mark Johnson's conviction last month.

"That can create an environment where prosecutors over-reach . . . It can lead to charging people for criminal conduct that should be dealt with as a civil or regulatory problem."

Libor settlements with global regulators



FCA=Financial Conduct Authority; DoJ=US Department of Justice; CFTC= US Commodity Futures Trading Commission; NYDFS=New York State Department of Financial Services; EC=European Commission; FINMA=Swiss Financial Market Supervisory Authority; DPP=Dutch Public Prosecutor
Source: Reuters

Pressure on the UK and US authorities to put traders behind bars led to tensions over who would net the biggest fish during the Libor, Euribor and forex probes. That included Hayes, who has claimed he had a "nervous breakdown" when he was told he could face a decades-long prison sentence in America, before ultimately facing trial in Britain.

The white-collar enforcement climate has since changed radically on both sides of the Atlantic. In the US, President Donald Trump's administration has signalled that it should focus on areas including tariff evasion and healthcare fraud.

The administration has disbanded several Joe Biden-era white-collar task forces, and has instructed prosecutors to balance the need to crack down on wrongdoing with avoiding "over-reach that punishes risk-taking and hinders innovation".

The SFO, meanwhile, has suffered reputational blows, while a push for economic growth is leading to deregulation in the UK. "I think public opinion has moved on substantially since these prosecutions started," said Bushnell.

David Green, who presided over the Libor prosecutions as head of the SFO at the time, said the probe "fitted the bill of the sort of case I wanted to investigate and the sort of case the SFO should [have been] doing".

But several jurisdictions took the view from the outset that rate-rigging was not a criminal offence, with a Frankfurt court ruling in 2016 that the alleged rigging of Euribor did not meet that threshold.

Cohen-Lask said: "By the time of the Hayes Supreme Court judgment, the UK criminal justice system was a global outlier."

Some argue the rate-rigging cases should never have led to criminal charges in the first place. Shapiro said she was so troubled by Johnson's treatment that it inspired her to write a novel, *Presumed Guilty*, about an innocent financier charged with federal white-collar crimes.

However, others are concerned the fallout from the overturned rate-rigging probes could have a chilling effect on future prosecutions. Susan Hawley, founder of UK non-profit body Spotlight on Corruption, said: "The most dangerous thing would be for law enforcement agencies and regulators in big financial centres to take away from this that it's not worth bringing complex financial prosecutions."

Nick Vamos, a criminal defence lawyer at Peters & Peters in London, said: "After 10 years of criminal proceedings, and the banks having paid vast fines, we will never know what a properly directed jury would have concluded in the Libor cases.

"This looks like a profound failure of criminal justice to address alleged fraud in financial markets."

Additional reporting by Stefania Palma in Washington. Story design by Rory Griffiths and Freya Hyde

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Deep Dive

Market Surveillance Tool's Future in Jeopardy After Citadel Win

Aug. 12, 2025, 2:00 AM PDT

The SEC will soon be forced to renovate or scrap its system to collect trading data and prevent "flash crashes," after Citadel Securities prevailed in a court challenge over the tool's funding model.

Citadel and the American Securities Association notched a partial win when a federal appeals court last month held the Securities and Exchange Commission's funding plan for its Consolidated Audit Trail—effectively relying on broker-dealers and their customers to foot the bill, now reaching $250 million annually—was "arbitrary and capricious."

The US Court of Appeals for the Eleventh Circuit stayed its ruling for 60 days, giving the SEC a short window to conduct further economic analysis and reconsider how to allocate costs for the market surveillance tool. But the agency under Chairman Paul Atkins may also determine that the system is altogether too burdensome to operate in its current form, securities lawyers said.

"It could be abandoned entirely, particularly under the current administration," said Brenda Hamilton, a securities lawyer and founder of Hamilton & Associates Law Group PA. "Atkins' focus has really been on cost efficiency, reducing burdens, reducing regulation, and the audit trail seems to be contrary to his mission."

Atkins' public statements suggest the agency would more likely work quickly to overhaul the surveillance system.

An exemptive order in February already limited the system's access to sensitive customer data, while the SEC is considering a proposal that would end the CAT's practice of collecting and storing personal customer information, according to an agency brief in a separate case.

"I do think it's a meaningful priority for Atkins, because it's a big industry issue and a big expensive mess right now," said Jason Noto, payments & fintech counsel at Polsinelli. "Atkins would have made changes no matter what, but it is possible this could speed it up."

An SEC spokesperson in an emailed statement said the commission is "reviewing the decision and will determine next steps as appropriate."

Adjusted or Abandoned

Privacy and cost concerns associated with the CAT have generated controversy beyond Wall Street.

A separate suit by a conservative think tank and investors in Texas federal court called on the SEC to "kill the CAT," describing it as a "dystopian surveillance scheme."

First proposed after the 2010 "flash crash" wiped out $1 trillion in market value, the CAT collects as many as 500 billion records a day and lets the SEC keep an eye on markets in real time without further expanding its workforce or dedicating existing staff to watching activity that occurs across securities exchanges.

The agency may be hard-pressed to make the CAT legally sound absent explicit legislative support, according to Lenin Lopez, corporate securities attorney at Woodruff Sawyer.

Rather than ditching the system entirely, however, the SEC could pull back on certain aspects of the CAT's data collection and related fees that sparked the legal challenges, Hamilton said.

The SEC operated efficiently to address market issues prior to the CAT's introduction and the agency isn't completely dependent on the system as its sole regulatory tool, she added.

Getting Industry on Board

The CAT's future may hinge on the support of industry groups and exchanges including the Securities Industry and Financial Markets Association, Nasdaq, and Cboe Global Markets Inc. that have issued their own proposals to rework the tool.

"The SEC is going to have to move quickly. They're going to have to get the exchanges to cooperate," Noto said. "I strongly suspect there will be a scaling back by the SEC of the amount of information collected, and then presumably that will flow through to it being a cheaper process to actually report and collect the data."

SIFMA implored the SEC to include CAT costs in congressional budget requests, allowing appropriators to more closely monitor the fees associated with the surveillance system.

"The exchanges have come back critical of CAT after learning what the costs are going to be to operate it," Hamilton said. "A lot of people think that some of the opposition to CAT might go away if the cost of CAT was paid under the SEC's normal budget, like any other enforcement tool, instead of being passed on to FINRA's members and ultimately a portion of it to investors."

Barring any meaningful SEC action on CAT funding, a return to the Eleventh Circuit could spell doom for the system.

Judges on the appeals panel already acknowledged Wall Street’s appetite for throwing out the system entirely, according to Noto.

An ultimately successful attempt to thwart the CAT’s funding model as an “arbitrary and capricious” application of securities statutes also opens the door for similar challenges to other agencies.

“This funding is paramount to its survival,” Lopez said. “I suspect a year from now, it will be like that was the real first domino.”

The case is American Secs. Assn. v. SEC , 11th Cir., No. 23-13396, 7/25/25 .

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Tiny Investment Bank's Revenue Surges After Trump Sons Join (1)

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Tom Maloney, Annie Massa August 12, 2025

Dominari Holdings Inc. reported a 452% revenue jump in its first full quarter of results since adding **Donald Trump Jr.** and **Eric Trump** to its advisory board.

The investment bank, with headquarters in Manhattan's Trump Tower, reported total revenue of $34 million, up from $6.17 million a year earlier. Shares were up 1.7% to $5.42 at 10:11 a.m. in New York, after climbing as much as 5.4% earlier Tuesday.

Since enlisting President Donald Trump's eldest sons, Dominari appeared in a series of deals involving the Trumps and their allies. One of the highest profile of these is American Bitcoin Corp., a company spun up with help from another publicly traded Bitcoin miner called Hut 8 Corp. At the end of June, Dominari held a stake in American Bitcoin valued at $32 million, the largest of its long term private holdings, according to its quarterly financial statement. Soon American Bitcoin will become public, in another transaction expected to close in the coming weeks.

Another major deal came in June: crypto entrepreneur **Justin Sun**'s father invested $100 million in SRM Entertainment Inc., with Dominari acting as placement agent. SRM, a money-losing toymaker, re-branded as Tron Inc. and pivoted to accumulating TRX, the virtual token that backs Sun's Tron network.

Eric Trump and Donald Trump Jr.

Photographer: Ronda Churchill/Bloomberg

Read More: Trump-Linked Bank Helped Set Up $120 Million Tron Deal Windfall

Weeks earlier, a fund led by Dominari executive **Soo Yu** invested in the company, which spiked in value following the deal with Sun.

Other recent deals included equity offerings for Hong Kong brokerage Waton Financial Ltd., Taiwanese hotpot restaurant Masterbeef Group and Cambodian bagmaker Kandal M Venture Ltd., according to data compiled by Bloomberg.

In March, Dominari partnered with the Trumps and cryptocurrency operation Hut 8 Corp. to create American Bitcoin, a crypto miner expected to go public as early as the third quarter. Dominari booked a gain of $32 million on its position in the company after it raised $220 million in June. It also acted as placement agent on the deal.

The stake in American Bitcoin represents almost 75% of its long-term equity holdings.

Compensation at Dominari, which has a market capitalization of about $84 million, also soared. Stock options that went to Chief Executive Officer **Anthony Hayes** and **Kyle Wool**, who heads its financial arm, cost $26.1 million. An additional $15 million was reserved for commissions. General and administrative expenses totaled $53.5 million in the quarter, a sixfold increase from a year earlier.

Eric Trump owns about 6.3% of the company, according to data compiled by Bloomberg. Eric and Trump Jr. each received 750,000 shares for joining the company in February, and for meeting certain milestones.

Dominari and its financial subsidiary pay a total of more than $60,000 a month for office space leased in Trump Tower.

(Updates with shares in second paragraph, ownership in 10th.)

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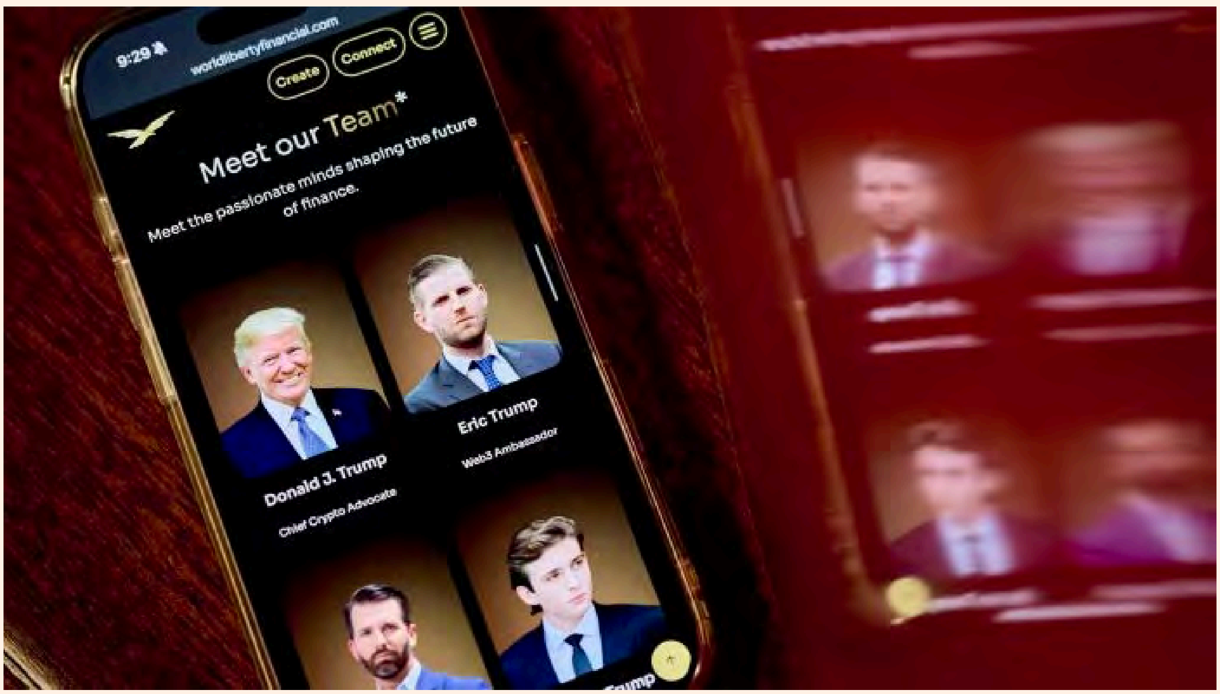
Cryptocurrencies

Trump-backed World Liberty Financial sets up $1.5bn ‘crypto treasury’

Venture co-founded by US president’s sons is using a publicly listed company to buy its own $WLFI tokens



World Liberty Financial was founded last year and purports to ‘bridge the gap’ between traditional finance and the digital asset industry © Bloomberg

Nikou Asgari in London

Published AUG 11 2025

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World Liberty Financial, a crypto venture backed by Donald Trump and his sons, is using a publicly listed company to buy $1.5bn of its own crypto tokens, in a deal that deepens the family’s involvement in the digital asset market.

The company on Monday said it would create a so-called crypto treasury business with Las Vegas-based blockchain company ALT5 Sigma Corporation, which is traded on Nasdaq.

The deal involves ALT5 selling $1.5bn in shares, with half of that paid by World Liberty Financial in the form of its in-house $WLFI token. The remaining proceeds will be used to purchase $WLFI “as well as to settle existing litigation, pay existing debt” and other activities, it said.

The company said several institutional investors and venture capital firms participated in the share sales, without naming the investors.

Crypto treasury companies — which sell debt or shares and use the proceeds to buy cryptocurrencies, often in an attempt to boost flagging stock prices — have soared in popularity this year amid a benign US regulatory environment for digital assets. Trump has appointed friendly officials to oversee the industry, dismissed lawsuits against major crypto companies and encouraged traditional financial players to get involved with crypto.

Trump’s full-throated support for the crypto industry has helped to push the price of bitcoin to repeated record highs since he returned to the White House in January.

World Liberty Financial was founded last year and purports to “bridge the gap” between traditional finance and the digital asset industry. The company launched $WLFI, which investors could buy but which is not yet publicly tradeable, and also created a stablecoin called USD1. In June, Trump disclosed he had earned $57mn in fees from World Liberty Financial, making it among his largest sources of income.

The president is listed on World Liberty Financial’s website as its “co-founder emeritus”, while Donald Trump Jr, Eric Trump and Barron Trump are co-founders, alongside other executives. Alex and Zach Witkoff, the sons of Trump’s Middle East envoy and longtime friend Steve Witkoff, are also co-founders.

Zach Witkoff will become chair of ALT5 while Eric Trump will become a board director as part of the deal announced on Monday.

“Super excited about this partnership,” Donald Trump Jr wrote on X.

ALT5’s shares climbed 2.5 per cent on Monday and have gained more than 30 per cent since last Wednesday.

The deal comes after the president’s Trump Media & Technology Group recently announced it had acquired about $2bn in bitcoin. He also released his own $TRUMP memecoin earlier this year, netting his team at least $350mn.

ALT5 is chaired by serial entrepreneur Tony Isaac. He previously led waste management company Appliance Recycling Centers of America, which in 2019 decided to “champion new initiatives to combat the opioid crisis” by pivoting to become JanOne, a biotech company. JanOne bought fintech ALT5 last year and adopted its name, focusing on digital assets.

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Securities Law News

Do Kwon May Plead Guilty Over $40 Billion Terra Collapse (2)

Aug. 11, 2025, 2:36 PM PDT

Terraform Labs Pte. co-founder Do Kwon may plead guilty in a US fraud case tied to the $40 billion collapse of the TerraUSD stablecoin in 2022.

US District Judge Paul Engelmayer in New York scheduled a change of plea hearing for Tuesday. The judge said in an order Monday that Kwon should be ready to explain how he violated the law if he pleads guilty.

Kwon, 33, pleaded not guilty in January following a two-year extradition battle over whether he would first face prosecution in the US or his native South Korea. A call to Kwon's lawyer was not immediately returned.

Kwon was charged in both countries in connection with the implosion of Singapore-based Terraform's TerraUSD, which shook the crypto world in the spring of 2022. The downturn that followed played a role in the collapse of cryptocurrency exchange FTX.

Kwon had been a fugitive from the South Korean charges for months when he and Terraform's former chief financial officer were caught trying to board a Dubai-bound private jet at the airport in Montenegro's capital, Podgorica, with fake passports in March 2023.

Kwon, who owned 92% of Terraform, was held in Montenegro for months as officials in the Balkan nation spent most of two years battling over whether he should be extradited to the US or South Korea.

Meanwhile, Terraform and Kwon were found liable for civil fraud in a 2024 suit by the US Securities and Exchange Commission. A jury in New York, at the end of a two-week trial, determined that Kwon and Terraform misled investors.

Jurors found that Terraform and Kwon falsely claimed that Chai, a popular Korean payment application, was using Terraform's blockchain technology to make transactions. The jurors also found investors were misled about the stability of the UST stablecoin, which Kwon and Terraform claimed was algorithmically pegged to the US dollar.

Terraform and Kwon later agreed to pay the US $4.47 billion to resolve the case. The deal required Kwon to wind down the business and use any remaining assets to pay off the company's creditors.

The case is US v. Kwon, 23-cr-0151, US District Court, Southern District of New York (Manhattan).

(Adds details of case in fifth paragraph.)

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Anthony Aarons, Erik Larson

Securities Law News

Bitcoin in 401(k) Plans: What to Know About the Investing Risks

Aug. 9, 2025, 8:00 AM PDT

Americans looking to supercharge 401(k)s may soon get the chance to invest in crypto, if they're willing to stomach the risks.

President Donald Trump's recent executive order clears the way for digital assets to be added to the mix of investments available in workplace retirement plans — and for ordinary investors dissatisfied with the returns from target-date funds or the traditional 60/40 portfolio to push their savings into riskier assets.

Read more: How Private Equity and Crypto Could Reshape 401(k)s

Still, many retirement experts and employers remain wary of crypto being in workplace plans like 401(k)s, citing volatility and potential employer liability as concerns.

Here are some issues to consider when thinking about Bitcoin's place in a retirement portfolio.

Beware of Volatility

For those behind on retirement savings or simply hoping to boost their portfolio, Bitcoin's recent strong performance is enticing. The largest cryptocurrency has been hitting new recordssince early April, but has suffered many swift and brutal drops over the years. If you have the urge to sell whenever the stock market is experiencing volatility, that impulse could be even more severe with Bitcoin's exaggerated moves.

"Bitcoin's return depends entirely on future demand, and price swings of 50% or more in a year are normal," said financial planner Bob Wolfe, founder of HealthyFP in Pennsylvania. "Regulatory shifts, security breaches and competition from other digital assets can all move the price sharply in either direction."

There are also questions about the idea that Bitcoin can act as a potential diversifier for a portfolio. The cryptocurrency is sometimes considered a non-correlated asset, meaning it doesn't track the behavior of stocks or bonds. But during stock market selloffs, Bitcoin has shown a correlation to stocks, calling into question its value as a diversification tool.

Determine the Right Amount

The percentage of Bitcoin to have in your retirement portfolio depends on your risk tolerance and time horizon. If you're age 30 and you can handle price spikes, then 1% to 5% of investable assets could make sense, Wolfe said. This assumes the rest of your portfolio is well-diversified across stocks, bonds and cash.

In your 50s, with maybe 10 to 15 years until you might consider withdrawing from retirement funds, Wolfe said he would drop that to 2%. And if a 20% drop would derail retirement goals, he recommends steering clear entirely.

Financial planner Kevin Feig, founder of Walk You to Wealth and a former head of risk at two of the largest crypto exchanges, generally recommends 8% to 15% in Bitcoin to clients. He doesn't think age should dictate exposure to crypto.

"Personality, financial goals and current wealth should guide those decisions," he said. "If you're naturally conservative and cautious, investing aggressively at any age probably doesn't make sense, and if you've already got all you need for a secure retirement, reducing the risk in your portfolio is generally wise."

Try Bitcoin ETFs

Crypto true believers, many of whom don't trust in fiat currency, argue the purpose of Bitcoin is to own it directly. But that can be complicated and make taxes tricky. Bitcoin ETFs like BlackRock's iShares Bitcoin Trust ETF (IBIT) can be purchased through brokerage platforms and issue standard 1099 forms during tax season.

For those who want to invest in crypto in their workplace retirement accounts, 401(k) plan provider ForUsAll offers plan sponsors the ability to add a self-directed brokerage window connected to Coinbase. Plan participants can allocate up to 5% of their current balance to cryptocurrencies, and participants get an alert when their allocation rises above 5%.

Savers in 401(k)s may also be able to access a Bitcoin ETF if their plan allows participants to use a regular brokerage window. However, access via an outside IRA is far more common. Retirement savers using robo-adviser Wealthfront can buy IBIT or the iShares Ethereum Trust (ETHA) for their IRAs on the platform, although the amount is capped at 10% of portfolio value. At Robinhood, users with self-directed IRAs can also invest in Bitcoin and Ethereum ETFs. Betterment doesn't currently allow crypto investments in retirement accounts.

Consider Roth IRAs

For all the talk of crypto in 401(k)s, holding a high-growth asset in a traditional pre-tax 401(k) might not make sense from a tax perspective. Assets in 401(k)s grow tax-free, but when you withdraw money from the account later in life, you will pay income tax on the appreciation.

You could avoid paying income tax or capital gains on future appreciation by holding crypto in a Roth IRA, where you contribute after-tax dollars but can make tax-free withdrawals in retirement. This type of fund is also advantageous when it comes to rebalancing since there aren't any tax consequences, said Alex Michalka, head of investment strategy at Wealthfront.

Some financial planners point out that health savings accounts, or HSAs, can also be a good place to hold a crypto ETF, if the HSA custodian allows access to the ETFs. The key there is being able to fund your medical costs out of pocket, so you can use your HSA as a long-term, tax-advantaged savings account.

Of course, if you hold a crypto ETF in a taxable brokerage account, the tax hit will be lower if you hold the asset for longer than a year, since long-term capital gains rates are lower than short-term rates. In a taxable brokerage account, you could also use a loss in a crypto ETF to offset gains elsewhere in the portfolio.

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Investors Sue CTO Realty Over Alleged Dividend Deception

By **Isaac Monterose**

Law360 (August 11, 2025, 1:46 PM EDT) -- A proposed class of shareholders in retail-focused real estate investment trust CTO Realty Growth Inc. filed a lawsuit in Florida federal court claiming the REIT misled them about its financial metrics, the sustainability of dividends and the profitability of an Atlanta mixed-use community.

In their Aug. 8 suit, shareholders Charles J. O'Connor Jr. and Judy A. O'Connor alleged Florida-based CTO Realty Growth started making the misleading statements with a Feb. 18, 2021, press release.

The REIT's announcement at that time stated its shareholder dividends were "attractive and sustainable," according to the proposed class. The company would also regularly inflate its metrics for adjusted funds from operations and mislead shareholders about the profitability of its Ashford Lane property in Atlanta, they alleged.

According to CTO Realty Growth's official website, Ashford Lane takes up 277,153 square feet and features major tenants such as Crunch Fitness.

The proposed class claimed CTO Realty Growth kept misleading shareholders until research firm Wolfpack Research posted a report on June 25 about the REIT's finances.

According to the proposed class, Wolfpack's report stated that whistleblowers and former CTO Realty Growth employees spoke up about the REIT failing to make enough money to pay off capital expenditures and support shareholder dividends.

The report also found CTO Realty Growth used share dilution to pay off a $38 million dividend shortfall that lasted from 2021 to 2024 and that the company doesn't include "recurring" capital expenditures as part of its AFFO metrics, the proposed class claimed.

The report stated CTO Realty Growth not including recurring capital expenditures contrasts with how other retail-focused REITs handle AFFO metrics, they alleged.

Additionally, according to the proposed class, Wolfpack found the REIT used "a sham loan to hide the collapse of a top tenant from shareholders at Ashford Lane."

"Finally, Wolfpack predicted imminent further dilution of the company, noting that CTO has just $8.4 million in cash while facing quarterly dividends of $14 million and average recurring capital expenditures of $5.7 million per quarter, along with approximately $12 million in additional planned capital expenditures," the proposed class claimed.

After the Wolfpack report dropped, CTO Realty Growth's stock price dropped on the same day, the proposed class alleged. The REIT's stock price declined by 5.42%, landing at $17.10 per share, they added.

The proposed class seeks to represent CTO Realty Growth shareholders who owned or bought the REIT's shares from Feb. 18, 2021, to June 24, 2025. They estimate there are "hundreds or thousands" of class members.

CTO Realty Growth declined to comment on Monday.

Class counsel did not immediately respond to a request for comment. The REIT's counsel information was not immediately available.

The proposed class is represented by Nathan C. Zipperian and Jayne A. Goldstein of Miller Shah LLP and Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz LLP.

The case is O'Connor et al. v. CTO Realty Growth Inc. et al., case number 6:25-cv-01516, in the U.S. District Court for the Middle District of Florida.

--Editing by Philip Shea.

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Kellogg Sued Over 'Misleading' Statement On $3B Acquisition

By **Danielle Ferguson**

Law360 (August 11, 2025, 7:20 PM EDT) -- A WK Kellogg shareholder is asking an Illinois federal judge to block The Ferrero Group's $3.1 billion acquisition of the breakfast food company, alleging WK Kellogg and its board of directors submitted an "incomplete and misleading" proxy statement to the U.S. Securities and Exchange Commission to convince shareholders to support the transaction.

George Konel said in a complaint filed on Friday that WK Kellogg submitted a proxy statement on Aug. 7 that failed to disclose a potential conflict of interest with the company's financial adviser Goldman Sachs. Konel alleged WK Kellogg misled shareholders by not informing them of the compensation Goldman Sachs was set to receive from its work advising the food manufacturer's sister company, Kellanova, on a merger last year.

Because Goldman Sachs provided a fairness opinion in WK Kellogg's proposed transaction with The Ferrero Group, the proxy statement should have described any preexisting relationships between Goldman Sachs and WK Kellogg or any of its affiliates, according to the complaint.

"A company cannot conceal the amount of compensation that will be paid upon the closing of a pending transaction with an affiliated company by disclosing compensation received but arbitrarily excluding compensation that is 'to be received,'" Konel said in the complaint.

The suit seeks to enjoin the board from proceeding with the vote or moving the transaction forward until further disclosures are made, or alternatively, to recover damages if the proposed transaction does go through.

Konel said a special meeting of WK Kellogg shareholders will be scheduled soon and that the proxy statement will be used to solicit stockholders' final votes.

"It is imperative that the material information that has been omitted from the proxy statement be disclosed immediately so public stockholders may make an informed determination as to how to respond when they receive the forthcoming definitive proxy statement," Konel said in his complaint.

Italian food company The Ferrero Group agreed to acquire WK Kellogg Co. in a $3.1 billion all-cash deal, the **companies announced in July**. The $23-per-share transaction would take Kellogg, headquartered in Battle Creek, Michigan, private.

WK Kellogg is the North American cereal division spun off from the original Kellogg Company. The remaining global snacking and international cereal business, Kellanova, retained faster-growing product lines like Pringles, Cheez-It and Eggo, while WK Kellogg took with it the legacy U.S. and Canadian breakfast cereals.

In August 2024, Kellanova announced it had entered into a **merger agreement to be acquired** by Mars Inc.

A September 2024 proxy statement in connection with that acquisition indicated Goldman Sachs acted as financial adviser for Kellanova and that the "engagement letter between Kellanova and Goldman Sachs provides for a transaction fee of approximately $93.2 million upon the completion of the merger, $5 million of which was payable upon the announcement of the merger," according to the complaint.

The proxy statement in the WK Kellogg and Ferrero transaction omitted the fact that Goldman Sachs was still to receive compensation in connection with the closing of the Kellanova acquisition, according to the complaint. The amount remaining "substantially dwarfs the $22 million that Goldman Sachs has 'recognized' during the two-year period ended July 10, 2025," according to the complaint.

Konel alleged WK Kellogg and its board violated the Exchange Act with the misleading proxy statement. He said the individual leaders of the company knew the statement was misleading or were at the least negligent in preparing and reviewing it.

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

Konel is represented by Shpetim Ademi, John D. Blythin, Guri Ademi and Jesse Fruchter of Ademi & Fruchter LLP.

Counsel information for the defendants was not immediately available on Monday.

The case is Konel v. WK Kellogg Co. et al., case number 1:25-cv-09418, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Al Barbarino. Editing by Philip Shea.

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Nike Investors Say Biz Strategy Was 'Ticking Timebomb'

By **Jessica Corso**

Law360 (August 11, 2025, 6:51 PM EDT) -- Shareholders suing Nike Inc. over what they say was a failed business strategy responded Monday to a motion to dismiss the proposed class action, arguing that they have 19 confidential witnesses who can prove that the company painted an overly rosy picture of its prospective growth.

Suing investors claim that Nike lost them billions of dollars by switching to a business growth strategy in 2020, known as consumer direct acceleration, or CDA, that was a "ticking timebomb."

While Nike **has argued** that the allegations amount to "fraud by hindsight" and should be dismissed, shareholders responded Monday that they have the testimony of over a dozen former employees who will say otherwise.

Nineteen confidential witnesses "detail severe, contemporaneous problems in all six CDA components — accounts that are further corroborated by defendants' later admissions and news reports — undermining their positive public statements when made," according to a **motion opposing dismissal** that was filed in Oregon federal court Monday.

Investors, led by the City Pension Fund for Firefighters and Police Officers in the City of Pembroke Pines, Florida, sued in 2024 claiming that a series of poor financial results released by Nike beginning in December 2023 led to multiple stock drops, with the price at one point falling by 20% — the largest such drop in Nike's history, according to suing shareholders.

They say those financial reports reflect the failures of the CDA business strategy and argue that the company and its leadership, including then-CEO John Donahoe and Chief Financial Officer Matthew Friend, knew about those flaws at the time they were publicly praising the strategy.

The strategy was meant to shift Nike's focus away from a wholesale model of selling through established athletic retailers and onto a direct-to-consumer model both through online traffic and brick-and-mortar Nike stores, according to suing investors.

But they said the strategy ran into a number of problems that were hidden from shareholders, including a lack of inventory and a "dysfunctional" internal group that failed to develop the necessary technology to make the direct-to-consumer model work.

Nike claimed in its May motion to dismiss the lawsuit that the company "never promised, as plaintiffs imply, flawless execution and zero obstacles to the ambitious CDA strategy."

"To the contrary, Nike repeatedly disclosed the risks and uncertainties in the strategy, that CDA was a work in progress, and that Nike was continuing to invest in supply chain, technology, and innovation as part of the strategy," the company said.

Attorneys for the company didn't immediately respond to a request for comment Monday.

The proposed class is represented by Carol Villegas, Irina Vasilchenko, Matthew Grier, Nicolas Apter-Vidler and Mark Willis of Labaton Keller Sucharow LLP, Jonathan Cohen of DRRT, Steven Toll, Molly Bowen and Margaret Wydman of Cohen Milstein Sellers & Toll PLLC and Timothy DeJong, Keith Ketterling and Cody Berne of Stoll Berne.

Nike and the individual defendants are represented by B. John Casey and Alex Van Rysselberghe of Stoel Rives LLP and Brian Lutz, Jessica Valenzuela and Jeff Lombard of Gibson Dunn & Crutcher LLP.

The case is In re: Nike Inc. Securities Litigation, case number 3:24-cv-00974, in the U.S. District Court for the District of Oregon.

–Additional reporting by Katryna Perera. Editing by Michael Watanabe.

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Catching Up With Delaware's Chancery Court

By **Katryna Perera and Jeff Montgomery**

Law360 (August 11, 2025, 5:03 PM EDT) -- Nielsen Holdings Ltd. and consumer intelligence spinoff Nielsen Consumer IQ agreed to end their dispute over NIQ's effort to unilaterally sever data flows to Nielsen Holdings, just days after a Delaware vice chancellor issued a permanent injunction against NIQ. A sole investor asked the court to name him lead plaintiff in a suit challenging Endeavor Group's $13 billion take-private deal in March, and the Chancery Court announced a new, automated case assignment regime to try and balance jurists' workloads.

In case you missed it, here's the latest from the Delaware Chancery Court.

Top News

Nielsen Holdings Ltd. and its consumer intelligence spinoff Nielsen Consumer IQ jointly agreed to **end a suit** that had seen the two parties battle over NIQ's effort to unilaterally sever data flows to Nielsen Holdings and another user. The parties filed a single paragraph before the Chancery Court stating that a permanent injunction, issued by the court earlier in the week, barring NIQ from directly or indirectly terminating or interfering with Nielsen's data access would remain in effect.

Just a few days before the accord, Vice Chancellor Nathan A. Cook, in a post-trial ruling from the bench, **barred** NIQ from carrying out a "fairly blatant" plan to cut off its parent and a competitor from accessing its data, a move the spinoff purportedly described as "D-Day."

Dismissal Bids

A former director of credit repair company Credit Glory, who is accused of fiduciary duty breaches and sexual harassment of employees, told a Delaware vice chancellor that a co-director's purported conflicts in bringing the suit **warrant its dismissal**. Some of the allegations against Christopher Lundgren, a former manager and Credit Glory corporate secretary, figured in two separate New York Supreme Court awards of more than $1.8 million last year to two former company employees who sued Lundgren and the company for sexual harassment, hostile work environments and related claims.

Settlements

The top brass of Fat Brands Inc. have agreed to **settle a pair** of shareholder derivative suits in Chancery Court that alleged breaches of fiduciary duties concerning a 2020 merger and a 2021 recapitalization. Under the terms of the deal, Fat Brands will receive $10 million, a portion of which will go towards the shareholders' counsel fees, and the company will implement corporate governance improvements. Additionally, Fog Cutter Capital Group Inc., which merged with Fat Brands, will surrender 200,000 shares of Twin Hospitality Group Inc. stock to Fat Brands.

New Cases

The top brass of footwear and clothing venture Allbirds Inc. were hit with a **new derivative suit** in Chancery Court, citing in part a now-third-amended securities action in the Northern District of California. The California case and an earlier Chancery suit accuse many of the same parties of failing to warn investors about the risks of the company's shifting business strategy ahead of its initial public offering and subsequent troubles.

Stockholders of international student loan provider MPower Financing PBC filed suit in Chancery Court

to block new "highly dilutive" borrowing from the company's top lenders and stockholders, alleging unfair terms that could hand control to two hedge funds, Tilden Park Capital Management LP and King Street Capital LP. The suit claims that the currently allowed borrowing will allow Tilden Park and King Street to lend MPower $25 million while securing the right to convert $108.9 million of debt currently held by the two entities into common stock at an "extremely low price." The debt-for-equity swap would allegedly boost the two hedge funds' collective share of the company's stock from 25.5% to 85.5%, according to the suit.

Chicago-based renewable energy venture Hecate Holdings LLC, which is purportedly insolvent, was **sued by lenders** for allegedly breaching an $82 million loan agreement, holding collateral "hostage" and shifting collateral sale proceeds to unsecured accounts.

Taking the Lead

Attorneys of a sole Endeavor Group investor have urged a Delaware vice chancellor to **appoint** them as lead counsel in a lawsuit challenging the company's $13 billion take-private deal in March. The suit claims the sports and entertainment company sold itself short and short-changed public stockholders, allegedly by a billion or more, in a "squeeze-out" deal with affiliates of Silver Lake Capital.

Attorney Fees

Former Boston Heart Diagnostics Corp. CEO Susan Hertzberg wants the medical testing company **to advance her legal fees** to pay Jenner & Block LLP for its defense of her in criminal and civil cases brought by the government in Texas federal court. In 2023, Hertzberg and other Boston Heart executives were convicted by a Texas jury of conspiring to pay doctors in the state bribes for referring patients' blood work to the lab as part of a multistate scheme to obtain inflated payouts from federal insurance programs. Boston Heart has challenged Hertzberg's fee request, calling it "excessive" and "grossly inflated."

Discovery Disputes

Attorneys for Fox Corp. have asked a Delaware vice chancellor to **"set boundaries"** for summary judgment discovery in a derivative suit linking Fox's board and officers to the defamation of companies involved in the 2020 election vote tabulation, arguing that counsel for stockholders want an "overbroad" probe. The suit accuses Fox Chairman Rupert Murdoch, his son Lachlan Murdoch and others of knowingly allowing the network to "broadcast, promote and perpetuate" a false 2020 election fraud story to maintain the network's ratings.

Going to Trial

A lawsuit claiming that a bankrupt former customer of a steel products company fraudulently transferred millions that could have covered its debts **must go to trial**, a Delaware vice chancellor ruled. Indiana-based Cleveland-Cliffs Burns Harbor and Cleveland-Cliffs Steel, its Chicago-based parent, sued in May 2022 for what they alleged was more than $7.35 million worth of steel delivered to steel tube manufacturer Boomerang Tube LLC, an interest of private equity firm Black Diamond Capital Management. The complaint accused Black Diamond, purportedly Boomerang's majority owner, of trying to thwart creditors by holding a sham auction and fraudulently transferring Boomerang's assets.

Chancery Court Changes

The Chancery Court announced a **new, automated case assignment regime** that will begin in September, intended to pull more factors into the mix when distributing new cases. The system will enable automated case assignments, in part, based on the use of a uniform, electronic graphical user interface for case filers, featuring pull-down menus and pick lists, rather than the current limited "supplemental" information sheet. The new system is designed to focus on "related case" factors, directing, in some instances, lawsuits to members of the court who have handled, or are handling, similar actions based on the parties involved, or similar transactions or underlying facts — while also ensuring an even distribution of work.

Quotable

"There are some very important policy considerations at play here in terms of what class action litigation may look like in this court going forward ... The idea that large stockholders have some fundamental entitlement to lead litigation over and above [other] stockholders, that's not Delaware law," said Ned Weinberger of Labaton Keller Sucharow LLP, counsel to stockholder Ricardo Garcia, in a suit challenging Endeavor Group's $13 billion take-private deal in March.

During arguments before Vice Chancellor Lori W. Will, Weinberger urged the court to choose lone stockholder Garcia as lead plaintiff in the suit.

--Editing by Jay Jackson Jr.

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EY Says SPAC Investors' Fraud Suit Is 'Blame-Shifting'

By **Katryna Perera**

Law360 (August 11, 2025, 6:22 PM EDT) -- EY's Middle East affiliates asked a New York federal judge to toss claims that they botched audits of United Arab Emirates-based Brooge Petroleum before its merger with a blank-check company to enable a fraudulent scheme against investors, arguing it was up to the plaintiffs to "kick the tires" before recommending the merger.

EY's Middle East unit and its Abu Dhabi branch, which are named alongside their parent company in the action, filed a dismissal **motion** Saturday, saying the suit is "blame-shifting of the highest order."

"Plaintiffs want this court to make defendants pay for failing to identify an alleged fraud that plaintiffs themselves missed — despite the fact that plaintiffs were sophisticated sponsors of a special purpose acquisition company considering a merger with Brooge Petroleum and Gas Investment Company FZE, [and] plaintiffs hired their own lawyers and advisors to examine Brooge," the motion states.

Plaintiffs Anvil Trust, Stephen Cannon, Bryant Edwards and Neil Richardson filed suit in December, claiming that EY's "unqualified" audit opinions for Brooge **enabled** the company to defraud investors in its $1 billion 2019 merger with a SPAC.

However, EY, formerly known as Ernst & Young, pushed back on Saturday, arguing that it was a fellow victim of Brooge's scheme, since the company "concealed" its inflated revenues from auditors and fed them with "false audit evidence" to avoid detection.

The suit's federal claims are also time-barred, according to Saturday's motion, since the five-year statute of repose expired months before the plaintiffs filed suit.

"The last alleged misstatement by defendants that plaintiffs claim they relied on when purchasing shares occurred in October 2019, more than five years before plaintiffs sued on Dec. 17, 2024," the motion states. "The two-year statute of limitations also lapsed, because plaintiffs were on notice of the potential fraud in August 2022 when Brooge publicly announced that the financial statements EY Bahrain audited could no longer be relied upon. It is far too late for plaintiffs to bring these claims."

The plaintiffs refer to EY's Middle East unit as EY Bahrain.

The suit also fails because the court lacks personal jurisdiction over the defendants for the common law fraud claims, according to the motion, since the defendants did not conduct any business or commit any tortious acts that would satisfy New York's long-arm statute, nor do they have any connections to the state.

The suit also fails to identify any actionable misstatements made by the defendants and offers nothing more than conclusory assertions that they knew of Brooge's deception, the motion argues.

"EY Bahrain's audit opinions are just that — opinions — and the complaint alleges no facts necessary to transform these opinions into actionable misstatements," the motion states. "Unlike plaintiffs, who stood to profit handsomely from the merger, EY Bahrain had no financial motive to risk its reputation and global franchise to engage in fraud on behalf of a small new client who paid a modest fee for labor-intensive audit work. Plaintiffs' bald assertion that defendants knowingly engaged in fraud to benefit Brooge is implausible."

Finally, the suit should be dismissed on forum non conveniens grounds, since it is a dispute between "foreign plaintiffs and foreign defendants concerning the audit of a United Arab Emirates-based company," the motion argues, and it fails to plead loss causation.

"[The plaintiffs] allege that a stock drop followed the revelation of Brooge's fraud in the December 2023 U.S. Securities and Exchange Commission Order, but by that time, the market had already known for more than a year that the financial statements EY Bahrain had audited could not be relied on. So, the corrective disclosure revealed nothing new about EY Bahrain's audit," the motion states.

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

In their complaint, the plaintiffs claim that when they decided to invest in the SPAC, they had been reassured by the relationship between "the supposedly reputable Ernst & Young" and SPAC acquisition target Brooge.

The plaintiffs said they were among a group of investors who in 2018 executed a merger agreement in advance of the planned merger with Brooge.

But, the investors claim, "the fundamental financial picture presented by Brooge to plaintiffs was a fraud: in fact, Brooge fabricated between 30% and 80% of its 2018, 2019 and 2020 revenues."

According to the investors, Brooge faked its revenues by making fraudulent invoices for customers it didn't do business with. To keep the scheme from being discovered, the investors claimed, Brooge received checks for its listed amounts from an affiliate — but then sent that money back to the affiliate.

The investors say Brooge couldn't have pulled off its scheme without support from its auditor, specifically EY's Middle East unit and its Abu Dhabi branch.

According to the suit, the EY defendants also "blessed" the scheme with audit opinions, stating that the company's financial statements fairly presented its financial position ahead of the merger.

The scheme allowed Brooge "to report tens of millions of dollars in fake revenue" to investors and the U.S. Securities and Exchange Commission, the investors claimed, and its SPAC merger secured a valuation of over $1 billion.

In connection with the scheme, the investors said, Brooge became the target of a lengthy SEC investigation. When the probe's findings were announced, along with a $5 million fine, that news precipitated a falloff in trading prices for Brooge shares.

The plaintiffs are represented by Serine Consolino and Alison Van Horn of Aegis Law Group LLP.

The defendants are represented by Tawfiq S. Rangwala, Jed M. Schwartz, George S. Canellos and John J. Hughes III of Milbank LLP.

The case is Anvil Trust et al. v. Ernst & Young et al., case number 1:24-cv-09731, in the U.S. District Court for the Southern District of New York.

–Additional reporting by Emilie Ruscoe. Editing by Michael Watanabe.

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FTX Customers Aim To Beef Up Case Against Fenwick & West

By **Jack Karp**

Law360 (August 11, 2025, 4:38 PM EDT) -- New information that has emerged since customers of the now-collapsed cryptocurrency trading platform FTX Trading Ltd. sued Fenwick & West LLP over the firm's alleged role in that collapse justifies updating the complaint against the firm, those customers told a Florida federal court Monday.

Details that came out during ex-FTX CEO Sam Bankman Fried's criminal trial and through numerous investigations since the class action complaint was filed against Fenwick in August 2023, as part of sprawling multidistrict litigation over FTX's fate, further shore up allegations that Fenwick was deeply involved in FTX's fraud, according to a motion for leave to amend filed by FTX customers.

"For example, at SBF's criminal trial, FTX insider and co-founder Nishad Singh testified that he informed Fenwick of the misuse of customer funds, improper loans, and false representations, and that Fenwick advised on how to facilitate and hide these very acts," the plaintiffs said in their proposed amended complaint.

The FTX bankruptcy's independent examiner also issued a report since that original complaint was filed, finding that Fenwick lawyers were "directly involved" in helping FTX insiders misappropriate customer funds and hide misconduct, according to the plaintiffs.

"Finally, MDL counsel has learned many more details on Fenwick's relationship to FTX, based upon the interviews [and] cooperation of the settled FTX insiders," the FTX customers said in their motion.

Their amended complaint "is extremely unique," they added, pointing out that "this court now has the advantage of reviewing the past 2½ years, and all of the completed FTX investigations, which provide the court with a unique 'look into the future' of these specific FTX Fenwick allegations."

The court's May order **freeing several high-profile celebrities** from a majority of the claims FTX investors lodged against them in the MDL also clarified that "promotion of FTX is an implicit promotion of the alleged securities offered by the platform," according to the plaintiffs.

So in addition to fleshing out the evidence for their allegations against Fenwick, the plaintiffs want to add two new claims under the Florida Securities and Investor Protection Act and the California Securities Law.

"These claims allege, among other things, that Fenwick played an active role in designing, promoting, and facilitating the sale of unregistered securities in the form of [yield-bearing accounts], FTT tokens, and interests in other FTX-controlled instruments," the plaintiffs' motion to amend said. FTT tokens are FTX's native cryptocurrency.

In August 2023, the FTX customers accused the bankrupt cryptocurrency exchange's former counsel Fenwick of **creating "shadowy entities"** through which FTX and SBF misused billions in customer deposits.

Fenwick asked the Florida federal court to **dismiss the litigation** against it the following month, arguing attorneys cannot be held liable for conspiracy or aiding and abetting a client's wrongdoing as long as their conduct "falls within the scope of representation of the client."

The customers **also sued** Sullivan & Cromwell LLP for allegedly helping facilitate FTX's massive fraud, but that firm was **dismissed from the case** after an investigation by the customers' counsel into the firm and dialogue with the FTX bankruptcy estate and appointed examiner resolved concerns about the law firm's conduct.

"While the report cleared Sullivan & Cromwell, the report did not clear or mention 'Law Firm-1' (which is Fenwick)," the plaintiffs said Monday in their motion to amend.

"While many FTX defendants have decided to settle, Fenwick has every right to continue strenuously litigating these claims. We all look forward to additional guidance from the court, such as the order denying the FTX promoters' efforts to dismiss," an attorney for the plaintiffs, Adam Moskowitz, told Law360 Pulse in a statement Monday.

Attorneys for Fenwick didn't respond to a request for comment Monday.

The plaintiffs are represented by Adam M. Moskowitz and Joseph M. Kaye of the Moskowitz Law Firm PLLC and William M. Audet and Ling Yue Kuang of Audet & Partners LLP.

Fenwick is represented by Kevin S. Rosen, Michael Holecek and Samuel Eckman of Gibson Dunn & Crutcher LLP and David R. Atkinson and Nicole K. Atkinson of Gunster Yoakley & Stewart PA.

The case is In re: FTX Cryptocurrency Exchange Collapse Litigation, case number 1:23-md-03076, in the U.S. District Court for the Southern District of Florida.

--Additional reporting by Rae Ann Varona, Lauren Berg and Ryan Boysen. Editing by Janice Carter Brown.

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Judge OKs Becton Dickinson's $9M Investor Settlement

By **Katryna Perera**

Law360 (August 11, 2025, 5:22 PM EDT) -- A New Jersey federal judge on Monday granted the final green light to a $9 million deal that will end shareholder derivative claims that the top brass of medical tech manufacturer Becton Dickinson tried to hide regulatory problems regarding sales of its Alaris pump.

U.S. District Judge Stanley R. Chesler issued an **order** granting final approval to the settlement, finding it fair, reasonable and adequate. In addition to the $9 million payment, Becton Dickinson has also agreed to hire an independent corporate governance expert to scope the company's governance practices and compare them to industry best practices.

Counsel for the shareholders leading the consolidated derivative action will receive approximately $3.5 million in fees and expenses, and each named plaintiff will receive a $5,000 service award, according to court filings.

The suit's individual defendants included Becton Dickinson's current CEO, Tom Polen, and former CEO Vincent A. Forlenza. The action alleged that the defendants' misconduct exposed the company to financial and regulatory risk, including an **$85 million securities class action settlement** and a **$175 million settlement** with the U.S. Securities and Exchange Commission.

The suit focused on the company's Alaris pump, which was introduced several years ago and was a critical product and a leading revenue generator. The pump was designed to deliver fluids, medications, blood and blood products to patients, according to the suit.

In November 2019, Becton Dickinson announced it was making certain "improvements" to Alaris that would simply shift the timing of sales to later in the fiscal year, according to the suit.

The company did not tell investors until February 2020 that it had stopped shipping the pumps and would not continue normal sales until completing the lengthy U.S. Food and Drug Administration clearance process, prompting a 12% drop in its share price, the suit alleged.

The defendants knew, or should have known, that Becton Dickinson's actions were not in compliance with a consent decree it had signed with the FDA several years prior, leading to additional risk, the complaint claimed.

The investors are represented by Serina M. Vash of Herman Jones LLP, Lisa J. Rodriguez of Dilworth Paxson LLP, Brian J. Robbins, Craig W. Smith and Shane P. Sanders of Robbins LLP and Benjamin I. Sachs-Michaels, Matthew M. Houston, Robert V. Prongay and Pavithra Rajesh of Glancy Prongay & Murray LLP.

Becton Dickinson and the individual defendants are represented by Matthew Adam Sklar of McCarter & English LLP.

The case is In re: Becton Dickinson & Co. Stockholder Derivative Litigation, case number 2:20-cv-15474, in the U.S. District Court for the District of New Jersey.

--Additional reporting by Sydney Price. Editing by Vaqas Asghar.

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A Simple Way Courts Can Help Attys Avoid AI Hallucinations

By **John Siffert, Terrence Connors and Jeannie Rubin** (August 11, 2025, 3:54 PM EDT)


John Siffert


Terrence Connors


Jeannie Rubin

In recent years, several federal courts of appeals have implemented automated quality control programs that review briefs for compliance with the Federal Rules of Appellate Procedure and applicable local rules.

These programs identify potential deviations from the rules and provide litigants an opportunity to correct errors prior to formal filing. The U.S. Court of Appeals for the Eighth Circuit, in August 2022,[1] and the U.S. Court of Appeals for the Sixth Circuit, in May of this year,[2] each announced brief quality control programs based on a program originally developed by the U.S. Court of Appeals for the Fifth Circuit.

Courts have implemented these brief QC online programs with the worthy goal of reducing the number of deficiency notices issued by the courts and the substantial attendant burdens on the clerk's offices and counsel.

Now, there is an opportunity for courts to expand the coverage of these brief QC programs in ways that will benefit both the bench and the bar.

The exploding use of generative artificial intelligence in the legal profession has resulted in a wave of attorney filings that erroneously include citations to nonexistent cases that were hallucinated by the AI programs. In most, if not all, of these cases, the lawyers' citation of hallucinated cases resulted from their improvident reliance on AI and failure to confirm that the fictitious cases existed. However reckless, the offending lawyers did not knowingly attempt to palm off hallucinated cases.[3]

Clearly, counsel are responsible for making sure that the legal authority cited in court submissions is real and for accurately representing the propositions for which they are cited. However, it is equally clear that some lawyers have not exercised the care required, and that their failures require judges to expend time and effort grappling with whether and how to sanction lawyers who do not discharge their responsibility.

These trends suggest that it may be beneficial for brief QC programs to be expanded to identify hallucinated cases, permitting counsel to correct their mistakes and sparing courts the burden of imposing sanctions.

AI Use by Lawyers

AI use among lawyers for legal research, document review and drafting, among other tasks, has increased dramatically in recent years and is rapidly becoming pervasive. Legal-specific AI products are marketed as having the potential to perform tasks in just seconds that would have consumed hours — or even days or weeks — of lawyer or paralegal time. Lawyers and clients cannot ignore such potential gains in efficiency and productivity.

However, several high-profile cases in the last few years illustrate the pitfalls of lawyers' use of generative AI technology without fully understanding its limits and risks.[4] As noted, in several cases, lawyers have unwittingly submitted briefs including citations and quotations from cases that did not exist and were hallucinated by AI programs.[5]

Such failures can be potentially devastating to the lawyers involved, who may face sanctions and disciplinary action,[6] in addition to embarrassment and potential loss of business.[7] Citations to nonexistent cases also can derail litigation and negatively affect the parties.[8]

Because the judiciary views lawyers as officers of the court, it is appropriate for courts to help lawyers avoid the pitfalls that accompany the use of AI.[9] This is particularly so because — while large and well-resourced law firms have been among those sanctioned for citing fictitious cases — practitioners with limited resources may be at greater risk of such errors.

Many solo or small firm practitioners lack the resources to pay for — or help needed to effectively use — Westlaw, LexisNexis or other online subscription legal services, and instead may rely on free search engines such as Google and, increasingly, ChatGPT, for research.

These circumstances only increase the risk of a citation to a nonexistent case, especially if the lawyer lacks access to online research programs to confirm that the case exists.

This is not to suggest that courts are responsible for lawyers' mistakes. Under judicial rules, the lawyer has a duty and responsibility to cite existing authority and accurately argue the authority's meaning.[10]

In fact, some courts have issued rules or orders specifically warning litigants against reliance on AI without verification,[11] as have numerous bar associations.[12] And some courts have even promulgated policies and procedures requiring disclosure of what generative AI tools they have used.[13]

Nonetheless, it is in the judiciary's interest — as much as lawyers' — for the court to facilitate lawyers' compliance with applicable rules, especially when help can be provided without expending significant judicial resources.

That is what the Sixth and Eighth Circuits did by implementing their brief QC programs to help lawyers comply with the Federal Rules of Appellate Procedure and local rules. Extending that program to flag potentially fictitious cases should not be difficult, because the federal judiciary has access to and already uses technology that can flag potential hallucinations.[14]

The Burden of AI Errors on Courts

Until now, the citation of a nonexistent case has been a distraction for judges. Instead of focusing on the merits of the matter in front of them, judges have been required to decide whether and how to impose sanctions.

Among other things, courts must review submissions, take testimony, and hear arguments to assess the lawyer's conduct and knowledge in connection with the citation of fictitious authority and any mitigating circumstances.

Courts consider factors including, among other things, the lawyer's lack of financial resources to purchase an online research subscription, acceptance of responsibility, reliance on other counsel to do the research, and attempts to cover up their own negligence.

In addition, courts need to determine the nature of the sanction: whether a fine is appropriate, whether to strike a submission, or whether to require the lawyer to notify other judges and clients of their mistake.[15] In some cases, grievance committees or disciplinary authorities may also be tasked with finding facts and recommending appropriate discipline.[16]

The Potential of Brief QC for Hallucinated Cases

The Sixth and Eighth Circuits have recognized the propriety of helping guide lawyers who try to comply with the logistics of filing briefs on appeal. Their brief QC programs are intended to identify and enable lawyers to correct formatting and other common errors.

The logic is simple: With automated quality control processes, the court can catch effortlessly mistakes that lawyers can correct if such mistakes are pointed out. And the benefits of the programs accrue both to counsel and to the courts.[17]

The problem of mistakenly citing hallucinated cases poses much more serious risks than formatting errors do — to the lawyers, the parties, the courts and, arguably, the justice system as a whole.[18] It is also easily corrected once the lawyer is made aware.

Courts have access to legal research programs, such as Westlaw, that can quickly review a brief, check legal citations and identify potentially hallucinated cases. Incorporating this technology into a brief QC program would allow lawyers to identify potentially hallucinated cases cited in a brief and remove them prior to formal submission of the brief.

Including this function in a brief QC program will not remove the burden from counsel to comply with their legal and ethical duties, including the duties of competence and candor, in connection with their use of AI programs. However, in an evolving technological world, such a brief QC program could be beneficial to the courts as well as the lawyers who appear as officers of the court — not to mention their clients — in assuring the efficient and fair administration of justice.

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[1] U.S. Court of Appeals for the Eight Circuit, Announcement of New BriefQC Functionality in CM/ECF (Aug. 8, 2022) ("Eighth Circuit Announcement"), https://www.ca8.uscourts.gov/news/announcement-new-briefqc-functionality-cmecf.

[2] U.S. Court of Appeals for the Sixth Circuit, Announcement of New Brief QC Functionality in CM/ECF (May 21, 2025) ("SixthCircuitAnnouncement"), https://www.ca6.uscourts.gov/sites/ca6/files/6CA%20Announcement%20of%20Brief%20QC%20Functionality%20%28002%29_0.pdf.

[3] It should be noted, however, that in some cases, courts have found that the lawyers made subsequent misrepresentations to the court and/or otherwise acted in bad faith.

[4] See Tracking Federal Judge Orders on Artificial Intelligence, Law360, https://www.law360.com/pulse/ai-tracker.

[5] Even judges themselves may not be immune to the perils of AI. A district court recently withdrew an opinion after counsel in the case raised concerns about several material errors in the opinion, including fictitious quotations. Although the court has not commented on or explained the errors, many reporters have noted the similarities of the errors to those made by lawyers using AI. See, e.g., Justin Henry, Judge Scraps Opinion After Lawyer Flags Made-Up Quotes(Correct), Bloomberg Law (Updated Jul. 24, 2025), https://news.bloomberglaw.com/business-and-practice/judge-withdraws-pharma-opinion-after-lawyer-flags-made-up-quotes.

[6] See, e.g., Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 464-66 (S.D.N.Y. 2023) (finding bad faith and imposing $5,000 penalty on counsel who cited fictitious cases); Wadsworth v. Walmart Inc., 348 F.R.D. 489, 499 (D. Wyo. 2025) (imposing penalty of $3,000 on lawyer who drafted motion

papers including fictitious cases, $1,000 penalty on lawyer who signed papers, and $1,000 penalty on local counsel who signed); United States v. Hayes, 763 F. Supp. 3d 1054, 10772 (E.D. Cal. 2025), reconsideration denied, No. 2:24-CR-0280-DJC, 2025 WL 1067323 (E.D. Cal. Apr. 9, 2025) (collecting cases issuing sanctions against attorneys and pro se parties for submitting fictitious case citations, fictitious quotations, and related misrepresentations).

[7] In a recent case, a federal judge in Alabama concluded that the fines and reprimands imposed to date have not succeeded in deterring citation of fictitious cases. In addition to those elements (and others), the court disqualified counsel who cited fictitious cases from further participation in the case and required them to provide a copy of the sanctions order to their clients, opposing counsel, and the presiding judge in every state or federal case in which they are counsel of record and to every lawyer in their law firm. Johnson v. Dunn, Case No. 2:21 Civ. 1701 (N.D. Ala.) (Manasco, J.), Jul. 23, 2025 Sanctions Order, Dkt. 204, at 50.

[8] See, e.g., Grant v. City of Long Beach, 96 F.4th 1255, 1256 (9th Cir. 2024) (striking opening brief and dismissing appeal where brief was "replete with misrepresentations and fabricated case law" and included "only a handful of accurate citations," which "were not accompanied by coherent explanations of how they supported Appellants' claims"); Mata, 678 F. Supp. 3d at 448 (noting that where counsel relies upon fictitious cases, the "opposing party wastes time and money in exposing the deception," and the "client may be deprived of arguments based on authentic judicial precedents").

[9] See, e.g., Supreme Ct. of New Hampshire v. Piper, 470 U.S. 274, 282-83, 105 S. Ct. 1272, 1273, 84 L. Ed. 2d 205 (1985) (recognizing that "a lawyer is 'an officer of the court'").

[10] See Fed. R. Civ. P. 11(b). See also Grant, 96 F.4th at 1257 (noting that appellants' citation of only a handful of accurate citations, unaccompanied by coherent explanations, violated Federal Rule of Appellate Procedure 28(a)(8)(A)).

[11] See, e.g., S.D.N.Y. Bankruptcy Court Local Rule 9011-1(d) ("Litigants remain responsible for the accuracy and quality of legal documents produced with the assistance of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services). Litigants are cautioned that certain technologies may produce factually or legally inaccurate content. If a litigant chooses to employ technology, the litiga[nt] continues to be bound by the requirements of Fed. R. Bankr. P. 9011 and must review and verify any computer-generated content to ensure it complies with all such standards.").

[12] See, e.g., N.Y.C. Bar Ass'n Comm. On Prof. Ethics, Formal Opin. 2024-5 (Aug. 7, 2024); ABA Standing Comm. on Ethics and Prof. Resp., Formal Opin. 512 (July 29, 2024).

[13] See Sarah Martinson, Judges' AI Orders Keep Trickling In As Fake Citations Persist, Law360, July 21, 2025.

[14] See Thomson Reuters, Westlaw Precision with CoCounsel, Practical Law, and CoCounsel to be provided to US Federal Courts as the essential information provider for the Federal Judiciary, (Apr. 9, 2025), https://www.thomsonreuters.com/en/press-releases/2025/april/westlaw-precision-with-cocounsel-practical-law-and-cocounsel-to-be-provided-to-us-federal-courts-as-the-essential-information-provider-for-the-federal-judiciary.

[15] See, e.g., United States v. Hayes, 763 F. Supp. 3d 1054, 1071 (collecting cases); Johnson v. Dunn, Case No. 2:21 Civ. 1701 (N.D. Ala.) (Manasco, J.), Jul. 23, 2025 Sanctions Order, Dkt. 204 at 50 (disqualified counsel who cited fictitious cases from further participation in the case and required them to provide a copy of the sanctions order to their clients, opposing counsel, and the presiding judge in every state or federal case in which they are counsel of record and to every lawyer in their law firm).

[16] See, e.g., Park v. Kim, 91 F.4th 610, 616 (2d Cir. 2024) (referring attorney who cited fictitious cases to the Court's Grievance Panel pursuant to Local Rule 46.2 "for further investigation, and for consideration of a referral to the Committee on Admissions and Grievances").

[17] See Eighth Circuit Announcement (noting that the program permits correction of deficiencies

"before counsel incur the expense of printing and transmitting the paper copies of the brief" and hopefully will reduce the number of Deficiency Notices, which create "a substantial amount of work for the clerk's office and counsel"); Sixth Circuit Announcement (noting that the program was intended to mitigate the issuance in the preceding year over 700 deficiency notices, which "created a considerable administrative burden for the Clerk's Office and practitioners").

[18] See Mata, 678 F. Supp. 3d at 448–49 (noting that citation of fictitious cases "promotes cynicism about the legal profession and the American judicial system" and that "a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity").

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Consumers Say Vape Makers Can't Escape Price-Fixing Suit

By **Jonathan Capriel**

Law360 (August 11, 2025, 10:08 PM EDT) -- Buyers of cannabis vape brand CCell are pushing back on two bids seeking to dismiss their consolidated proposed consumer class action in California federal court accusing the Chinese manufacturers and U.S. distributors of organizing a price-fixing scheme, saying the companies' interpretation of antitrust law creates a legal loophole.

Shenzhen Smoore Technology Co. Ltd. and Smoore International Holdings Ltd., related entities that manufacture vape cartridges, argued in a July 30 motion to dismiss that if they really wanted to overcharge consumers for the popular vapes, they would simply cut off the domestic distributors and continue to sell directly to consumers, therefore the scheme that the litigation alleges doesn't make sense.

But the consumers rejected the Smoore companies' presentation of how the market actually works. They said in opposition motions Thursday that the manufacturers' argument, if accepted, would create a world where it is legal for manufacturers to orchestrate price-fixing so long as they also act as a distributor.

"According to defendants, there should be no consumer product antitrust law whatsoever, because nothing — not price fixing, not market division, not boycotts — could be more anticompetitive than a manufacturer terminating all of its distributors and retailers and unilaterally hiking its prices dramatically on its own," the consumers said. "This, of course, is not the law."

The opposition filings asked the court to reject Smoore's motion to dismiss and the one from the U.S.-based distributors, noting that the domestic companies raised "almost all of the same arguments" as the Chinese companies.

The buyers claim that Smoore worked out a scheme so it could allocate market dominance. All participants in the scheme agreed not to charge customers below a certain price for CCell goods, the suit alleges.

Pre-consolidation, the plaintiffs named as defendants only the four distributors: 3Win Corp., Jupiter Research LLC, CB Solutions LLC aka Canna Brand Solutions, and Greenlane Holdings Inc. Later iterations named Smoore as the ringleader.

Smoore's and the distributors' motions to dismiss chiefly argued that the economics of the scheme does not make sense because Smoore, as the maker of the vapes, doesn't need to conspire with others when it could just continue to sell to consumers directly.

The consumers said this argument ignores other elements alleged in the complaint. Forcing distributors to agree to minimum prices is only one element of the conspiracy, they said: Distributors who wanted to stock the popular CCell brand were also prohibited from selling rival products, which created an obstacle for other existing vape manufacturers or up-and-coming ones who wanted to get their products out there.

"There are high barriers to entry in this market, and defendants' conduct has made those barriers more substantial," the consumers said. "As a result, defendants' scheme effectively eliminated any meaningful competition in the United States which afforded Smoore the ability to engage in anticompetitive conduct and raise prices to supracompetitive levels."

The consumers also said the companies' reliance on the Ninth Circuit's 1982 ruling in Krehl v. Baskin-Robbins to argue the companies are not horizontal competitors is misplaced, partly because the ruling was made at a later stage of litigation, not at the pleading stage.

And the Krehl ruling makes clear that "dual role" activity, such as a manufacturer who also acts as a franchisor, is not in and of itself automatically anticompetitive, the consumers said. But the allegations against Smoore are far more explicit.

The consumers "allege much more illicit conduct which includes pricing agreements, exclusivity agreements and refusals to deal with competitors, territorial allocations and information sharing. Further, the court found that [indirect purchasers] had failed to show anything other than that the challenged conduct was 'dictated unilaterally by [BaskinRobbins].'"

The consumers are represented by Steven N. Williams of Steven Williams Law PC, Jeffrey K. Brown of the Leeds Brown Law PC, Jason R. Sultzer and Scott E. Silberfein of Sultzer & Lipari PLLC and James L. Ferraro and James L. Ferraro Jr. of The Ferraro Law Firm PA.

The distributors are repeated by Jaikaran Singh, Diane R. Hazel and Timothy J. Patterson of Foley & Lardner LLP.

The Smoore companies are represented by Kevin Teruya, William Sear and Lynette Lim of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In re: Closed Cannabis Oil Vaporizer Systems and Components Indirect Purchaser Antitrust Litigation, case number 3:24-CV-09090, in the U.S. District Court for the Northern District of California.

--Editing by Brian Baresch.

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DOJ Consumer Branch's End Leaves FDA Litigation Questions

By **John Korba, William Holtz and David Rosen** (August 11, 2025, 3:25 PM EDT)

John Korba

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With the dissolution of the U.S. Department of Justice's Consumer Protection Branch set to occur by Sept. 30, a vital question that remains to be fully answered is who will be responsible for litigation matters typically handled by the CPB — such as civil and criminal enforcement cases related to products regulated by the U.S. Food and Drug Administration.

Companies must remain vigilant and adaptable in order to mitigate any risks associated with this evolving regulatory framework, and any upcoming turmoil associated with the end of the CPB era.

It will be important to review quality management systems and procedures, enhance employee training as needed, and investigate consumer complaints promptly, while continuing to track enforcement efforts at both the federal and state levels.

CPB Background

For years, the CPB has been part of a consolidated approach in focusing the federal government's enforcement efforts to protect consumers through civil and criminal enforcement.[1]

Established in 1971, the CPB has focused its work on statutes administered by the FDA, the Federal Trade Commission, the U.S. Consumer Product Safety Commission and the National Highway Traffic Safety Administration.

The CPB, charged with enforcing the Federal Food, Drug, and Cosmetic Act, or FDCA, includes highly specialized prosecutors that work closely with the FDA to investigate and litigate civil and criminal matters involving food and drug safety, deceptive business practices, and other fraudulent activity that negatively affects consumers.

The CPB has also led efforts in conjunction with U.S. attorney's offices around the country and federal law enforcement agencies to combat the nation's opioid crisis.

Notable and recent cases litigated by the CPB have included:

- U.S. v. Valley Processing Inc., in the U.S. District Court for the Western District of Washington: In 2024, the former president and owner of now-closed juice manufacturer Valley Processing Inc. in Sunnyside, Washington, pled guilty to a multiyear conspiracy to distribute tainted and potentially unsafe apple and grape juice to customers, including some who provided grape juice for the National School Lunch Program;[2]

- U.S. v. Johannes Vulto and Vulto Creamery LLC, in the U.S. District Court for the Northern District of New York: In 2024, a former raw milk cheese manufacturer pled guilty to the introduction of adulterated food into interstate commerce that was linked to a 2016-2017 outbreak of listeriosis, the disease caused by the pathogen Listeria monocytogenes;[3] and

- U.S. v. Drogueria Betances LLC, in the U.S. District Court for the District of Puerto Rico: In 2023, one of Puerto Rico's largest distributors of pharmaceutical drugs entered a consent decree requiring it to pay $12 million and make extensive improvements to its compliance program, resolving allegations that from 2016 to 2019, the company failed to report to the U.S. Drug Enforcement Administration hundreds of suspicious orders for opioids and other controlled substances distributed to the company's customers.[4]

In handling a wide range of investigations and cases such as these, the CPB shouldered a large portfolio that will now have to be reprioritized and reallocated.

CPB Dissolution

The DOJ's decision to disband the CPB was reported by news outlets as early as April, with a target dissolution date of Sept. 30, which coincides with the end of the current fiscal year.[5] According to reporting, the over 100 attorneys who currently work in the unit will be relocated to the DOJ's Criminal Division, Civil Division and the Federal Programs Branch.[6]

The reported move comes in the wake of the DOJ announcing the decriminalization of regulatory offenses in the digital assets industry in an April 7 memorandum from the deputy attorney general titled "Ending Regulation By Prosecution."[7] This was followed by decriminalization as a general policy matter as well, under Executive Order No. 14294, issued on May 9.[8]

This executive order asserts that it is intended to "ease the burden on everyday Americans and ensure no American is transformed into a criminal for violating a regulation they have no reason to know exists," by disfavoring criminal enforcement of criminal regulatory offenses and strict liability offenses.[9]

This change will have a direct impact on FDA-related litigation, as the misdemeanor provision of the FDCA creates a form of strict criminal liability, which may no longer be enforced.[10]

In light of the disbanding of the CPB and the deprioritizing of criminal enforcement of regulations as a policy, it remains to be seen exactly how the consumer protection landscape will take shape over the course of the next few years.

Future FDA-Related Enforcement Priorities and Responsibilities

While deregulation may be the new normal for the foreseeable future, the Trump administration has provided some guidance as to policy goals surrounding FDA responsibilities and authorities, which may inform both civil and criminal enforcement priorities.

Reducing Regulatory Barriers to Domestic Pharmaceutical Manufacturing

On May 5, President Donald Trump signed an executive order with the stated purpose of improving domestic production capabilities for pharmaceuticals.[11]

Among other things, the order directed the FDA to increase fees and inspections of foreign manufacturing plants, and also directed the FDA to improve enforcement of active pharmaceutical ingredient source reporting by foreign drug producers.[12]

Available enforcement actions in this context might include court-ordered seizures of products that enter the marketplace, or injunctive relief sought to prevent foreign-based pharmaceutical products that do not meet source reporting requirements from entering interstate commerce.

Make America Healthy Again

Another initiative introduced through executive order has been the Make America Healthy Again Commission, established on Feb. 13.[13] The executive order's stated purpose was to address health problems in the U.S. by working to lower chronic disease rates through nutritional choices, physical activity, and improving food and drug quality and safety, among other efforts.[14]

Pursuant to the Make America Healthy Again initiative, the FDA has been actively involved in seeking to eliminate certain common food dyes; exploring how to roll back the Generally Recognized As Safe rule, a policy that allows food companies to decide whether food additives are safe; and collecting research relating to exercise and contaminants in school meals.

But in order to fully enforce such policies, the FDA will likely still need some form of litigation support from the DOJ.

Opioid Crisis

Combating the nationwide opioid crisis has been prominently featured in the Trump administration's agenda. Efforts to halt the influx of illicit drugs to the U.S. have been referenced in multiple memoranda and executive orders, including:

- The presidential memorandum of Jan. 20, asserting an "America First" trade policy;
- Proclamation 10886 of Jan. 20, declaring a national emergency at the southern border;
- Executive Order No. 14157 of Jan. 20, designating cartels and other organizations as foreign terrorist organizations; and
- Executive Order No. 14195 of Feb. 1, imposing duties to address the synthetic opioid supply chain in China.

The CPB has recently spearheaded the pursuit of criminal and civil matters targeting companies involved in the manufacture and distribution of fentanyl-laced products, working in tandem with the FDA and other agencies to enforce the Controlled Substances Act and the FDCA. The elimination of the CPB will certainly leave a void in this area that will need to be filled by other experienced branches and agencies.

Any investigations into illicit drug trafficking tied to cartels may now be shifted to the DOJ's National Security Division, which typically handles violations of the International Emergency Economic Powers Act and allegations surrounding the provision of material support or resources to designated foreign terrorist organizations.

While approval requirements for terrorism and International Emergency Economic Powers Act charges related to cartels and administered by the National Security Division were suspended by the attorney general on Feb. 5, this suspension was only for 90 days, so such authority may now be reasserted by the National Security Division.[15]

Various U.S. attorney's offices responsible for border districts may also see an uptick in cases, as the DOJ has indicated its intention to shift resources to such offices to deal with immigration-related issues.

Regardless of the offices within the DOJ that oversee such matters, companies should anticipate an increase in enforcement tied to opioids that will include the utilization of new tools and authorities.

Practical Impacts and Guidance

As is the case with the reallocation of resources within any large organization, growing pains should be expected.

Various U.S. attorney's offices throughout the country will likely be tasked with shouldering the weight of enforcement responsibilities. This may lead to inconsistent or fragmented approaches regarding the FDCA and other consumer protection laws.

State attorneys general may also step up to ensure consumers in their jurisdictions are adequately protected.

Coordination efforts between agencies within the federal government may suffer, as the CPB played a key role in fostering communication between agencies such as the DEA, the FDA and the FTC.

Companies should consider taking the following steps to prepare for such uncertainty on the horizon, so that they are in the best position to navigate this evolving regulatory environment:

- Review and strengthen quality management systems and compliance programs to ensure internal policies and procedures are in line with the FDCA and relevant consumer protection laws.
- Track enforcement efforts by various U.S. attorney's offices and state attorneys general, and maintain open lines of communication and relationships with such offices when possible.
- Enhance training efforts, particularly for employees involved in product development, manufacturing, marketing and sales.
- Stay informed about administration priorities, and actions undertaken by agencies such as the FDA and the FTC.
- Conduct internal investigations in response to consumer complaints or internal red flags, and implement corrective actions before they escalate. Consider self-disclosure, if applicable.

Taking these steps will help adequately prepare companies and persons subject to FDA jurisdiction and consumer protection laws for the inevitable uncertainty that will come with the closure of the CPB.

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[1] Aside from proactive enforcement, the CPB is also authorized to defend the FDA, the FTC, the CPSC and other federal agencies in civil litigation to include challenges to agency actions related to food, drugs, medical devices, tobacco and other consumer products.

[2] U.S. v. Valley Processing Inc., 1:22-CR-02097-SAB-2. See https://www.justice.gov/usao-edwa/pr/fruit-juice-manufacturing-company-and-its-former-president-plead-guilty-food-safety.

[3] U.S. v. Johannes Vulto and Vulto Creamery LLC, 3:24-CR-0061-TWD. See https://www.justice.gov/usao-ndny/pr/former-new-york-cheese-producer-sentenced-selling-raw-milk-cheese-products-linked.

[4] U.S. v. Drogueria Betances LLC, 3:23-CV-01538-RAM. See https://www.justice.gov/usao-pr/pr/federal-court-orders-puerto-rico-pharmaceutical-distributor-pay-12-million-connection.

[5] See Dayen, David, Justice Department Shutting Branch That Prosecutes Consumer Fraud Cases,

The American Prospect (April 24, 2025), https://prospect.org/justice/2025-04-24-justice-department-shuts-branch-that-prosecutes-consumer-fraud-cases/; see also Lynch, Sara N., US Justice Department unit for drug and food safety cases being disbanded, Reuters (April 25, 2025), https://www.reuters.com/business/healthcare-pharmaceuticals/us-justice-department-unit-drug-food-safety-cases-being-disbanded-2025-04-25/.

[6] Id.

[7] Deputy Attorney General Memorandum, "Ending Regulation By Prosecution" (April 7, 2025), https://www.justice.gov/dag/media/1395781/dl?inline.

[8] Executive Order No. 14292 (May 9, 2025), https://www.presidency.ucsb.edu/documents/executive-order-14294-fighting-overcriminalization-federal-regulations.

[9] Id.

[10] U.S. v. Watkins, 278 F.3d 961, 964 (9th Cir. 2002).

[11] Executive Order No. 14293 (May 5, 2025), https://www.whitehouse.gov/presidential-actions/2025/05/regulatory-relief-to-promote-domestic-production-of-critical-medicines/.

[12] The White House, "Fact Sheet: President Donald J. Trump Announces Actions to Reduce Regulatory Barriers to Domestic Pharmaceutical Manufacturing" (May 5, 2025), https://www.whitehouse.gov/fact-sheets/2025/05/fact-sheet-president-donald-j-trump-announces-actions-to-reduce-regulatory-barriers-to-domestic-pharmaceutical-manufacturing/.

[13] Executive Order No. 14212 (Feb. 13, 2025), https://www.whitehouse.gov/presidential-actions/2025/02/establishing-the-presidents-make-america-healthy-again-commission/.

[14] Id.

[15] Office of the Attorney General, "Total Elimination of Cartels and Transnational Criminal Organizations" (Feb. 5, 2025), https://www.justice.gov/ag/media/1388546/dl.