Appellate court tosses out judge's ruling for class-action lawsuit in FirstEnergy securities case

cleveland.com/court-justice/2025/08/appellate-court-tosses-out-judges-ruling-for-class-action-lawsuit-in-firstenergy-securities-case.html

By Staff reports | Cleveland.com August 14, 2025

A federal appellate court has refused an attempt by investors to consolidate their lawsuits against FirstEnergy Corp. into one broad case, a move that stems from the tainted House Bill 6 scandal.

CLEVELAND, Ohio – A federal appellate court has thrown out an attempt by investors to consolidate their securities lawsuits against FirstEnergy Corp., a move that stems from the tainted House Bill 6 scandal.

The 6th U.S. Circuit Court of Appeals on Wednesday reversed the ruling of Judge Algenon L. Marbley, who certified as a class all purchasers of the utility's stock and bonds over a roughly 3.5-year period. The investors alleged that the company's political bribery scheme amounted to securities fraud.

The ruling amounts to a major win for FirstEnergy, as many of those who joined the case as part of a class-action lawsuit would not seek to sue the utility on their own. Thus, there is a greater chance for a smaller settlement amount if the case reaches that point.

FirstEnergy has admitted to bribing both a former speaker of the Ohio House and the ex-chairman of the Public Utilities Commission of Ohio in exchange for favorable regulatory and legislative treatment in 2019. FirstEnergy around the same time issued billions of dollars in bonds and shares – sold at a stock price buoyed by the bribe-induced $1.3 billion ratepayer funded bailout – as its executives sold millions in their personal shares.

News of the five initial arrests in the case in July 2020 then drove a $7.7 billion wipeout of value for the company's shareholders, who now say they should have been told about the company's unlawful lobbying practices. Attorneys have said that FirstEnergy misled investors with 46 statements.

But paying bribes, the company argued, doesn’t amount to misleading investors.

“FirstEnergy has admitted that it made illegal political contributions,” the company said in court filings. “But that does not mean that FirstEnergy committed securities fraud. And it certainly does not mean that the district court should have certified the sweeping and unworkable class plaintiffs proposed here.”

The appellate court based its decision on a legal question of which of two tests established by the U.S. Supreme Court Marbley should have used: a less stringent test that allows certification based on omissions or a tougher one requiring that the corporate misstatements warped market prices.

The appellate court said Marbley should have used the more stringent test requiring corporate misstatements.

The ruling in favor of FirstEnergy delays the already drawn-out litigation, which started in 2020.

Since the passage of House Bill 6 in 2019, former Ohio House Speaker Larry Householder has been sentenced to 20 years in federal prison for taking bribes from the company; Matt Borges, hired to lobby on the company’s behalf, was sentenced to five years; and two other conspirators pleaded guilty but have not yet been sentenced; and two men arrested in the scheme, lobbyist Neil Clark and former PUCO Chairman Sam Randazzo died by suicide.

Randazzo had been accused of taking a $4.3 million bribe from the company.

The state is also pursuing criminal charges against FirstEnergy’s former CEO Chuck Jones and executive Mike Dowling, plus additional charges peripheral to the scandal against Householder. All three have pleaded not guilty.

US appeals court wipes out order certifying FirstEnergy investor class action

reuters.com/legal/government/us-appeals-court-wipes-out-order-certifying-firstenergy-investor-class-action-2025-08-14

Mike Scarcella August 14, 2025

Power lines are seen in Houston, Texas, U.S. February 17, 2021. REUTERS/Go Nakamura/File Photo Purchase Licensing Rights, opens new tab

Aug 14 (Reuters) - A U.S. appeals court has reversed an earlier decision allowing a group of investors to band together to sue Ohio electric utility FirstEnergy (FE.N), opens new tab for billions of dollars in damages for alleged violations of federal securities laws.
The unanimous ruling, opens new tab on Wednesday by a three-judge panel of the 6th U.S. Circuit Court of Appeals in Cincinnati overturned a federal judge’s 2023 order certifying a class action against FirstEnergy, one of the country’s largest investor-owned electric systems.
The 6th Circuit called the order "defective" and directed the lower court judge to apply a more stringent legal standard that it said would serve as a new test for certifying class actions in similar cases.

The appeals court set a new standard for judges to weigh whether securities class action plaintiffs are alleging omissions in statements to investors, misrepresentations or a mix of both. Plaintiffs can face a higher bar to prove specific statements were misrepresentations.

Circuit Judge Danny Boggs, joined by Circuit Judges Eric Clay and Julia Smith Gibbons, also said the trial judge incorrectly overlooked a “rigorous-analysis” requirement in assessing the plaintiffs’ claim of $8 billion in damages.

In a statement, a lead attorney for FirstEnergy said the utility welcomed the court’s clarification on requirements for class certification.

“FirstEnergy will contest efforts to seek damages for losses that the company did not cause,” said Robert Giuffra Jr, who represented FirstEnergy in its appeal.

An attorney for the investors did not immediately respond to a request for comment.

The lawsuit by FirstEnergy shareholders and noteholders stemmed from a years-long bribery scheme involving the company’s payments to Ohio lawmakers. In 2021, FirstEnergy paid $230 million to the U.S. government to settle a federal criminal investigation.

Investors accused FirstEnergy of omissions and misrepresentations amid its failure to disclose the bribery scheme. FirstEnergy has admitted to making illegal political contributions but denied violating U.S. securities laws.

Lawyers for the investors argued to the 6th Circuit that “preventing investors from learning about the millions of dollars FirstEnergy was pouring into its criminal conspiracy was a central part of FirstEnergy’s deception.”

The U.S. Chamber of Commerce and Securities Industry and Financial Markets Association were among the groups that signed a court filing supporting FirstEnergy.

They warned, opens new tab the appeals court that leaving the trial judge's ruling in place would lower the bar for class certification and “increase the frequency of baseless securities fraud class actions.”
The case is Diane Owens et al v. FirstEnergy Corporation et al, 6th U.S. Circuit Court of Appeals, No. 23-3940.

For Owens: Jason Forge of Robbins Geller Rudman & Dowd

For FirstEnergy: Robert Giuffra Jr of Sullivan & Cromwell

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Securities Law News

Deep Dive

FirstEnergy Ruling Limits Path to Securities Class Certification

Aug. 15, 2025, 2:00 AM PDT

A landmark ruling in the FirstEnergy scandal securities litigation chipped away at an expansive test companies feared would broaden securities class actions exposure.

The Sixth Circuit on Wednesday rejected a certification by a trial court that focused on alleged company omissions of breaking the law in a bribery scheme—a wide-ranging scandal that took down former state House Speaker Larry Householder. The appeals court vacated a decision to certify a class of investors suing the Ohio-based utility and its officers over a valuation dip after the $60 million bribery conspiracy came to light.

The decision tossing the class could help narrow certification in cases where mixed omissions and misrepresentations from company officials are alleged.

“What the plaintiffs were trying to do was basically turn class certification to make it automatic, and now they have to go and do their work,” said Robert J. Giuffra Jr., co-chair of Sullivan & Cromwell and attorney for FirstEnergy.

The investors see it as a speed bump that won’t block their case.

“We argued the appeal over a year ago,” said Jason A. Forge, a partner at Robbins Geller Rudman & Dowd and attorney for the plaintiffs. “We’re relieved to now have a clear path to get this case to trial.”

Dueling Standards

The decision dug into dueling tests for getting class certification in costly securities cases.

The first—used in cases based on material omissions from a company and its officials—is called the *Affiliated Ute* standard, developed by the US Supreme Court in 1972’s *Affiliated Ute Citizens of Utah v. United States* .

In cases that primarily center on a business's failure to disclose information, a class of investors can get a presumption from the court for a key class certification prong if they can show an omission of a material fact by someone with a duty to disclose that information.

That standard is far easier to meet than the *Basic* standard laid out in the high court's 1988 ruling in *Basic Inc. v. Levinson* . That test, which applies to false public statements, requires plaintiffs to show false statements issued by the company were material and that the security traded in an "efficient market" where trading is based on all public information.

Proving an "efficient market" for a security can be difficult, especially in cases like this based on notes and not stocks traded in a major stock exchange, University of Colorado Law Professor Ann M. Lipton said.

That test is only getting tougher to meet for plaintiffs, with courts raising the bar for plaintiffs seeking to meet the *Basic* standard.

"Defendants have been very successful in getting the *Basic* presumption narrowed," Lipton said. "*Affiliated Ute* may seem like a pathway when *Basic* can't be invoked in all cases, and defendants are concerned plaintiffs would be able to find refuge."

Half-Truths

A group of law professors and former SEC officials filed an amicus brief urging the Sixth Circuit to reverse the trial court, warning that the decision "if allowed to stand, would be far-reaching."

"The district court's decision invites artful pleading by plaintiffs in securities class actions to avoid the strictures of *Basic*. This can be easily accomplished because virtually all misrepresentations can be recast as omissions or half-truths," they said in a brief filed by their lawyer Todd G. Cosenza, a partner with Willkie Farr & Gallagher.

The court agreed, aligning itself with several other circuits which have found that "half-truths" and non-specific corporate statements fall under misrepresentations.

The Sixth Circuit found 2016 and 2017 FirstEnergy financial disclosures discussed it was pursuing "regulatory solutions" for a struggling power plant. The company didn't state that it was seeking this solution through bribery, and it also misrepresented the truth in a statement saying it complied with state and federal law while breaking the law—and those were misrepresentations, not omissions, the appeals court said.

Denying certification would likely doom the case. On remand the trial court will have to consider whether company statements made while it was seeking a state-funded nuclear plant bailout were enough to bring a class action.

Giuffra called the ruling a "big deal" for companies facing investor suits over alleged "half-truths." He said it empowers FirstEnergy's defense when the trial court will have to consider whether company statements made while it was seeking a state-funded nuclear plant bailout were enough to bring a class action.

"On remand we will argue that a lot of these disclosures by FirstEnergy were generic, aspirational statements that every company makes, they're not the kind of statements that move markets and therefore could not have impacted the stock price," he said. "That's not a statement that can be subject to the *Basic* presumption."

The case is Owens v. FirstEnergy Corp , 6th Cir., No. 23-3940, class certification vacated 8/13/25 .

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Q&A | **Litigators**

Litigators of the Week: 6th Circuit Weighs In on Privilege Covering Law Firm Internal Investigations

August 15, 2025 | By **Ross Todd**

L-R: Robert Giuffra Jr., David M.J. Rein, and Nicholas F. Menillo of Sullivan & Cromwell. Courtesy photos

Our Litigators of the week are **Robert Giuffra Jr.**, **David Rein** and **Nicholas Menillo** of **Sullivan & Cromwell**. Last week, the U.S. Court of Appeals for the Sixth Circuit put the brakes on a ruling that would have forced their client, FirstEnergy Corp., to hand over documents from internal investigations by law firms Jones Day and Squire Patton Boggs—an issue that had garnered backing from dozens of law firms.

The Sullivan & Cromwell team asked the appellate court to step in after a district court judge found the documents in question were not covered by privilege because they were used for business purposes.

“That approach gets it backwards," the Sixth Circuit wrote. "What matters for attorney-client privilege is not what a company does with its legal advice, but simply whether a company seeks legal advice.”

“After all, a corporation could hardly justify expending resources on legal advice that wasn’t business-related.”

The Sullivan & Cromwell team got an additional win for FirstEnergy at the Sixth Circuit this week, as the court vacated the class certification order in the underlying securities litigation and remanded the case for further proceedings.

Lit Daily: Before we get to the mandamus petition and the interlocutory appeal on class certification, tell us who your client is and what is at stake in the underlying litigation.

Bob Giuffra: Our client is FirstEnergy Corp., one of the nation’s largest investor-owned electric systems. The company serves more than six million customers from the Midwest, down to West Virginia and across to the New Jersey shore.

This case is a classic “event-driven” securities litigation. Plaintiffs’ firms routinely file securities cases whenever big companies experience business reversals or other bad news, such as a government investigation, and then suffer predictable stock price drops. Here, the negative news was the arrest and unsealing of a federal criminal complaint against Larry Householder, then the Speaker of the Ohio House of Representatives. The criminal complaint alleged that FirstEnergy had made payments through 501(c)(4) organizations benefiting Householder’s political groups in return for support for favorable legislation.

A stock price drop is obviously not enough to make out a securities fraud case. Nor is involvement in purported political corruption. In a more traditional securities case, plaintiffs point to a hard financial metric that they claim was knowingly falsified, such as revenue. In this case, plaintiffs claimed FirstEnergy failed to disclose information about its political contributions, and that, as a result, dozens of generic statements about policies or anodyne descriptions of legislative developments were misrepresentations.

How would you characterize what was at stake before the Sixth Circuit in your mandamus petition?

Giuffra: When companies and their boards of directors learn of potential misconduct, they often retain counsel to conduct internal investigations. That is good governance and is encouraged as a way to root out problems.

Following Householder's arrest, FirstEnergy did just that, as it faced government investigations and private litigation, including this securities litigation. The company's independent directors retained Squire Patton Boggs to conduct an internal investigation, and the company hired Jones Day also to investigate and advise the company.

Plaintiffs' firms often try to obtain discovery of those internal investigations. In this case, over FirstEnergy's strong objection, a court-appointed special master, and then the district court, ruled that FirstEnergy's internal investigations were not protected by attorney-client privilege or work product protection.

If the Sixth Circuit had affirmed, the district court's ruling would have presented serious challenges for companies responding to allegations of misconduct. Companies and their boards must be able to assess those allegations and their legal risks with the help of candid and confidential advice from their counsel. Knowing that these confidential deliberations would need to be shared with litigation opponents obviously would chill that process.

How did this matter come to you and the firm?

David Rein: We first met with FirstEnergy shortly before Christmas 2022. At that time, the company and certain independent-director defendants were both represented by Jones Day, and we were brought in for the company. Jones Day continues to represent the independent-director defendants, and we've worked closely with the Jones Day team, led by **Geoff Ritts**, on every aspect of this case, including these appeals.

When meeting prospective clients, we try to engage right away on the substance. We immediately recognized that class certification would be a key part of FirstEnergy's defense strategy. This case bears similarities to the Volkswagen bondholder case that we won in the Ninth Circuit in 2021 and the Goldman securities case we worked on in which plaintiffs filed a securities action following news of an SEC action against the company, even though the company had made no statements on the subject matter of the SEC action. In the end, after more than 13 years of litigation involving three discretionary grants of interlocutory appeal by the Second Circuit and a Supreme Court appeal, Goldman Sachs completely prevailed. In both cases, plaintiffs tried to bring "event"-driven litigation following the disclosure of government investigations.

In pitching for work, we stress the seamlessness of our teams. The partners on our team have all worked together for many years on complex cases, particularly securities cases.

Who all is working on the case and how have you divided the work?

Giuffra: In addition to David, Nick and me, our team includes **Sharon Nelles**, **Morgan Ratner**, **Beth Newton**, **Kamil Shields**, **Hilary Williams** and **Max Gottschall**. Sharon leads our litigation group, and we've worked together on some of our firm's biggest cases for years, including, most notably, the Volkswagen emission investigations and cases.

Morgan and Max took the laboring oar in drafting the mandamus petition and interlocutory appeal to the Sixth Circuit. Over the past decade, we've built a strong appellate practice, and Morgan and Max are brilliant writers. It was gratifying that within a week, two different panels of Sixth Circuit judges ruled unanimously in FirstEnergy's favor. And these appeals were both interlocutory, which are considered the hardest to pursue.

Sharon and Kamil led our successful efforts to resolve the SEC's and Ohio AG's investigations against FirstEnergy. David, Nick and Beth have worked principally on the securities litigation.

I'm involved in all aspects of the cases and argued the class certification appeal in the Sixth Circuit. I still spend 80 percent of my time on litigation, which I love, and 20 percent on firm management.

We've all been supported by a talented team of associates. We're very grateful to them.

We're also fortunate to partner with excellent and supportive counsel at FirstEnergy, including General Counsel **Hyun Park**, **Nikhil Rao** and **Mike Koslen**.

How did the amicus effort in this case on the mandamus petition come about?

Nick Menillo: It's rare for appellate courts to entertain mandamus petitions because they are filed mid-case. In opposing our stay motion, plaintiffs argued that the Sixth Circuit hadn't granted a privilege-related mandamus petition in fifteen years.

We wanted to make sure that the Sixth Circuit understood that this was not the typical mandamus petition challenging a discovery ruling. We received the support of multiple amici. Thirty-nine leading law firms with extensive experience handling internal investigations for large companies came together to explain why the attorney-client privilege and work product protection are critical to conducting internal investigations. We also were supported by a group of 11 corporate law and ethics scholars from law schools within the Sixth Circuit, the Attorneys' Liability Assurance Society, the U.S. and Ohio Chamber of Commerce and Lawyers for Civil Justice, a national organization of defense lawyers.

These amici briefs plainly made an impression on the Sixth Circuit. The panel specifically recognized the "strong public interest" in preserving privilege was "supported by the numerous amici that have filed briefs in support of FirstEnergy, seeking clarification on the application of the attorney-client privilege and work-product protection in the corporate context."

We also had strong amicus support on our class certification appeal. **Todd Cosenza** at **Willkie Farr & Gallagher** worked with **Joe Grundfest** and other law professors and former SEC officials to submit a powerful brief. A team at **Morrison & Foerster** submitted a strong brief on behalf of the Chamber of Commerce, SIFMA and others. And **Stites & Harbison** submitted an excellent brief for the Internal Association of Defense Counsel.

What can law firms and their clients take from your win on the mandamus issue?

Menillo: Internal investigations remain an important part of corporate governance. This decision confirms that courts will not allow plaintiffs to invade their protected character.

There were other encouraging points in the decision. The court recognized that internal investigations don't lose their privilege just because companies ultimately use the legal advice for business purposes. For example, a company might use its internal investigation to make personnel decisions. The court explained that the district court had things "backwards" because there will always be a "business-related reason for seeking" "critical and essential legal advice."

And, importantly, the court also recognized the "strong public interest in preserving the attorney-client privilege."

What's important for securities defendants in the class certification decision handed down this week?

Giuffra: The decision should make it harder for plaintiffs to bring "event-driven" litigation. Plaintiffs have tried to use the *Affiliated Ute* omissions-based presumption of reliance as a way to gloss over the fact that defendants did not make statements about the "event" that ultimately emerged. Under *Affiliated Ute*'s looser standard, it's challenging for defendants to demonstrate that their "omissions" did not cause any investor losses. The Sixth Circuit's decision now imposes a "high hurdle" before plaintiffs can try to invoke the *Affiliated Ute* presumption.

Perhaps even more importantly, the Sixth Circuit's decision underscores that district courts must engage in a "rigorous analysis" in reviewing class certification to ensure that plaintiffs have presented a methodology capable of measuring damages class-wide. Here, plaintiffs essentially asked the district court to rubber-stamp their class certification motion, which was supported by cookie-cutter expert reports. The Sixth Circuit emphasized that FirstEnergy had "argued extensively" on these damages methodology issues and "requested a hearing with live expert testimony to analyze loss causation." This decision makes clear that plaintiffs cannot push a formulaic or "mechanical approach" to damages in seeking class certification.

What's next in the case as it heads back to the district court?

Rein: We will have to start the class certification anew. With the Sixth Circuit's rejection of plaintiffs' omissions-based theories of reliance, plaintiffs will now have to rely on their statement-based theories. Many of FirstEnergy's statements that plaintiffs challenge are generic. In fact, the appeals court observed many of the challenged statements are "nearly identical" to those in the *Goldman Sachs* case where, after a close examination of the challenged statements, the Second Circuit rejected class certification.

In addition, the district court will need to conduct a "rigorous analysis" of whether plaintiffs have presented a methodology capable of measuring damages class-wide. Because Plaintiffs' omissions-based theories cannot proceed, plaintiffs will now need to present a methodology that measures damages associated with each statement made over a more than three-year period. This ruling will make it harder for plaintiffs to push inflated theories of damages.

What will you remember about achieving these results?

Giuffra: We're fortunate to have a client that supported our strategy, even though we lost in the district court, and had to seek mandamus on the internal investigation issue and a 23(f) appeal on class certification. We believed that we had evaluated the law correctly on both matters, but there are no guarantees in litigation. It's gratifying that the Sixth Circuit unanimously ruled for FirstEnergy in both appeals. I'm very proud of our team.

Rein: These decisions confirm the importance of carefully evaluating legal issues. And then, once you're convinced that you are right on the law, not being dissuaded by adverse decisions, but instead to keep pressing forward. Interlocutory appeals are uncommon and not easy to obtain. To win two interlocutory appeals in the same case is rare. I'm not sure it's ever happened twice in a case within a week. Persistence matters!

Menillo: It's very unusual that 39 law firms would come together to submit a brief, but the threat to companies' and boards' abilities to conduct internal investigations was so important that they decided to do just that. Likewise, the amici who supported the class certification appeal also recognized that the issues before the Sixth Circuit have nationwide application.

Securities Law News

Zillow's Appeal of Investor Class Status Stumbles Before Court

Aug. 14, 2025, 1:38 PM PDT

Zillow Group Inc.'s highly-watched attempt to overturn certification of a shareholder class suing the real estate business over a purported mismatch between corporate statements about its home-flipping business' pricing model and market selloffs appeared to fizzle before an appellate panel Thursday.

"I'm not really sure why you think there's a mismatch," Judge Susan Graber of the US Court of Appeals for the Ninth Circuit said to Zillow's attorney during oral arguments in Anchorage, Alaska. Judge Ryan D. Nelson at one point likened the allegations to the Theranos Inc. scandal, in which Elizabeth Holmes and her company lied to the market about its blood-testing capabilities and reports later revealed it to be a failure.

The lower court in granting class status wrongly relied on a looser standard required for loss causation than stock price impact, Zillow attorney Peter B. Morrison of Skadden, Arps, Slate, Meagher & Flom LLP told the court.

A 2021 Supreme Court ruling requires a closer fit between generic corporate statements and corrective disclosures that weigh on the stock price, he said. Announcements such as Zillow shuttering its home-flipping business that hurt share prices didn't connect with allegations that misrepresentations about its pricing algorithm kept the stock afloat.

Revelations that Zillow struggled with pricing were already public, and share prices were stable then, Morrison said, adding that if the Ninth Circuit lets the district court's order on class status stand, it'd would be creating a split with the Second Circuit.

That 2021 Supreme Court and subsequent Second Circuit decision dismantling a Goldman Sachs Group Inc. investor class said a defendant can rebut a presumption of classwide reliance on the stock by showing a "mismatch" between the subject of alleged misstatements and the corrective disclosure that lowers share prices. *Goldman* questions are among some of the drivers for shareholder class challenges in appellate courts nationwide.

Simpler Than Described

The US District Court for the Western District of Washington did follow *Goldman* in its analysis, said investors' attorney Lucas Gilmore of Hagens Berman Sobol Shapiro LLP. Just as the Third Circuit found while upholding a class of Johnson & Johnson investors in July, there wasn't a mismatch here, he said.

Nelson pressed Gilmore about whether any alleged fraud about manipulating its home-pricing model was revealed, with the investors' attorney saying its typical in a securities fraud case that a company doesn't admit they were wrong the same way they'd misrepresented something.

But Graber and Judge John B. Owens stepped in to say that it was simpler than Gilmore was describing: "They said it worked, and then they said it didn't work. Isn't that what the case is?" Owens said.

Graber asked what the panel should do if they agree certification is appropriate, and that they don't see a mismatch, but would've gotten there a different way than the district court.

Post *Goldman*

A victory for Zillow would mandate a stronger link between alleged misrepresentations and a market selloff, attorneys have said, potentially warding off similar proposed stockholder class actions in a circuit where many of these investor cases are filed.

In certifying the Zillow class, the district court allowed the presumption that a shareholder collective relied on the its stock price under a 1988 Supreme Court decision. *Basic Inc. v. Levinson* lets courts presume stocks trading in an efficient market take in all public information, including pertinent misrepresentations, and that investors rely on the price's integrity.

Zillow failed to demonstrate alleged misrepresentations and later corrective disclosures didn't impact its stock price, Seattle US District Judge Thomas S. Zilly said then.

In briefs, Zillow told the Ninth Circuit it sufficiently demonstrated a wide-enough gap per *Goldman*, but the lower court didn't consider its evidence.

Investor Jeremy Jaeger countered that the company asserted a mismatch test that would result in class status being denied in almost any securities case.

Skadden and Perkins Coie LLP represent Zillow, co-founder and co-executive chairman Rich Barton, former chief financial officer Allen Parker, and CEO Jeremy Wacksman. Hagens Berman is class counsel and Kessler Topaz Meltzer & Check LLP is additional counsel for Jaeger. None of these law firms nor Zillow immediately responded to emails sent before the oral arguments seeking comments for when they concluded.

The case is Jaeger v. Zillow Grp., Inc. , 9th Cir., No. 24-6605, oral arguments 8/14/25 .

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Securities Law News

E-Commerce Bankruptcy Trustee Sues SPAC, Directors Over Merger

Aug. 14, 2025, 2:50 PM PDT

A trustee for Nogin Inc. creditors sued a special purpose acquisition company that merged with the e-commerce business before its bankruptcy, saying the SPAC and its directors destroyed hundreds of millions of dollars in value.

Software Acquisition Group III Inc. and the directors breached their fiduciary duties by proceeding with a 2022 merger despite the knowledge that Nogin had breached provisions of the agreement, the trustee said in a Wednesday complaint filed in the US Bankruptcy Court for the District of Delaware.

Nogin gained approval of its bankruptcy plan in April 2024, selling itself to a B. Riley Financial unit. The company, which filed bankruptcy in December 2023, purchased and held inventory for sale for companies like Kenneth Cole.

The trustee appointed under the plan is tasked with pursuing litigation to benefit creditors.

Nogin violated the merger agreement with SWAG III when it deferred employee salaries and vendor invoices until the closing of the deal, according to the suit. The directors pursued the merger anyway to avoid losing their own investments, the trustee said.

SWAG III went public in August 2021 and paid $546 million for Nogin in August 2022, with a market capitalization of more than $600 million.

Jonathan Huberman, Mike Nikzad, and Andrew Nikou were the controllers who funded SWAG III and would've lost their investment if the merger wasn't completed within 18 months of the agreement, the trustee said.

If a SPAC doesn't complete a merger within a specified time period, the SPAC is dissolved and money is returned to its public stockholders—and sponsor funds are lost, the filing said. The SPAC's trust had $231 million when SWAG III completed the IPO, according to the suit.

Huberman had SWAG III sign a non-binding letter of intent with Nogin in September 2021, effectively ending consideration of other options for Nogin, the suit said. The letter inflated Nogin's value to $841 million based on projected revenues for 2022 when the company's projected 2021 revenues had only been $46 million, the filing said.

Around August 2021, Nogin boasted a $1.26 billion valuation but announced in its first quarter as a public company that its revenues would be less than half the projection, the trustee said.

"Even a bad transaction will give the sponsor a chance at a windfall if the company remains viable long enough that the insiders can sell their stock," the trustee said.

SWAG III, and two similarly named SPAC transactions in 2020 and 2021, occurred before regulations for more accountability were put in place by the US Securities and Exchange Commission, the trustee said. That means limited projections were provided and the directors and officers involved weren't required to sign registration statements that would've subjected them to the Securities Act of 1933, according to the complaint.

The trustee separately sued Huberman and Nogin co-founders Jan-Christopher Nugent and Geoffrey Van Haeren for fraud, negligent misrepresentation, and tortious interference with contractual relations, stemming from the sale of $65.5 million in convertible notes in April 2022.

Huberman's brother-in-law and 16 investor funds entered a subscription agreements in connection with the merger but interest payments were never made on the notes and material information was omitted to "induce" the purchases, the trustee said.

Attorneys for Huberman and the co-founders didn't immediately respond to a request for comment. Nikzad and Nikou couldn't immediately be reached. Nogin didn't immediately respond to a request for comment.

Morris James LLP and Glancy Prongay & Murray LLP represent the trustee.

The case is In re: Nogin Inc. , Bankr. D. Del., No. 23-bk-11945, complaint 8/13/25 .

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Class Action

Manage Newsletters

GitLab Defeats Investor Lawsuit Over AI, Demand Statements (1)

Aug. 15, 2025, 6:07 AM PDT; Updated: Aug. 15, 2025, 7:51 AM PDT

Summary by Bloomberg AI

AI Generated

- Judge Eumi K. Lee said the investor leading the proposed class didn't sufficiently allege actionable misstatements on AI or customer demand were materially misleading.
- Many of the alleged misrepresentations were forward-looking or corporate puffery, making them nonactionable, Lee said.
- The lead plaintiff, Dutch Smith, may file another complaint to try and fix the allegations' shortcomings, according to Judge Eumi K. Lee.

GitLab Inc. overcame allegations that the software development platform overhyped its artificial intelligence capabilities before releasing disappointing financial projections.

The investor leading the proposed class didn't sufficiently allege actionable misstatements on AI or customer demand were materially misleading, Judge Eumi K. Lee said Thursday. Many of the alleged misrepresentations were forward-looking or corporate puffery, making them nonactionable to begin with, she said for the US District Court for the Northern District of California.

None of the most recent complaint's allegations contradicted GitLab's statements on demand for AI features, Lee said. Nor did it adequately plead the company left out information on customers' buying behavior or opinions that would have mattered to investors.

Confidential witness descriptions of GitLab's ability to compete with GitHub didn't undermine executives' statements, Lee said—some even suggested that GitLab was well-positioned against the competitor. And the lead plaintiff didn't sufficiently flesh out how GitLab's overall financial outlook misleadingly covered up a decline in customers for a tier that it raised prices on in 2023.

The most recent complaint also failed to allege executives' intent or recklessness to defraud investors, Lee said. Former employees and confidential witnesses statements were too generic to support an inference that leaders knowingly misrepresented its AI or demand. Mere executive access to information or leadership departures didn't boost that inference either.

And lead plaintiff Dutch Smith didn't sufficiently point out what new information in financial announcements suggested alleged fraud was revealed before market losses, Lee said.

Smith may file another complaint to try and fix the allegations' shortcomings.

GitLab's share prices fell 21% the day after it revealed lower-than-expected guidance for the first fiscal quarter and full year of 2025 last year. It also announced that day it was selling an add-on for AI features within its most-utilized paid offering at a higher cost than expected, Smith said.

In June 2024, GitLab announced an estimated $4 million headwind to that fiscal year 2025 revenue guidance; the stock price slid 4.9% the next day.

Levi & Korsinsky LLP represents Smith's proposed class, which would include those who got GitLab securities from June 5, 2023, through June 3, 2024. Fenwick & West LLP represents GitLab, executive chair Sytse Sijbrandij, and executives Brian Robins and David DeSanto. Neither of these law firms nor GitLab immediately responded to emails seeking comment.

The case is Dolly v. GitLab Inc. , N.D. Cal., No. 5:24-cv-06244, 8/14/25 .

(Updates with additional reporting starting in the second paragraph.)

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Securities Law News

Heliogen Shareholder Drops Challenge After Sale to Zeo Closes

Aug. 14, 2025, 10:13 AM PDT

A Heliogen Inc. stockholder relinquished a lawsuit alleging the sales process and fiscal projections weren't properly fleshed out in paperwork for its now-closed sale to Zeo Energy Corp.

- Stockholder Mario Johnson voluntarily dropped the challenge Wednesday in the US District Court for the Central District of California after seeking to at least delay the deal
- The share consideration was valued at about $10 million when it was announced in May

Brodsky Smith represents Johnson. Attorneys didn't immediately respond to an email seeking comment. Neither did spokespeople for Heliogen and Zeo. Nor did Heliogen's legal counsel for the deal, Cooley LLP.

The case is Johnson v. Heliogen, Inc. , C.D. Cal., No. 2:25-cv-06297, 8/13/25 .

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Securities Law News

Armistice Capital Overcomes Novel Ruling in Aytu Stock Case (1)

Aug. 14, 2025, 10:38 AM PDT; Updated: Aug. 14, 2025, 11:18 AM PDT

Armistice Capital LLC defeated insider trading claims over its Aytu BioPharma Inc. stock sales Thursday, overcoming a first-of-its-kind court ruling that rejected the hedge fund's initial bid to end the case.

A Delaware judge dismissed allegations that Armistice looted the biotech by forcing it to acquire two unprofitable affiliates, then unloading its own shares at prices inflated by a Covid-19 testing deal. Despite its 41% stake and board representation, Armistice didn't exert enough influence at Aytu to count as a controlling stockholder with fiduciary duties, Vice Chancellor Morgan T. Zurn said.

The hedge fund "did not control the board, dictate its decision making, or compel the challenged outcomes," the judge wrote. "Armistice, for example, did not hold board veto power, hold 'day-to-day managerial supremacy,' threaten the board, or hold any other lever of control."

The allegations partly echoed a federal securities fraud case that Armistice won earlier this year after a jury trial in Denver. The federal ruling is currently on appeal.

No Tainted Process

Abuses of corporate control comprise a recurring theme for Delaware's Chancery Court, which regularly hears self-dealing claims against founders, financiers, and majority investors. The state's judiciary has weathered a barrage of attacks over a recent crackdown on conflicts of interest, culminating in a legislative overhaul that overrode several landmark decisions to impose a narrow definition of controlling stockholders.

The corporate defense bar, private equity lobbyists, and the state's political establishment, led by Gov. Matt Meyer (D), argued the law would undo the damage of a perceived swing toward minority investors that's driving corporate "DExits." Delaware, home to two-thirds of Fortune 500 companies, funds a quarter of its budget with billions in fees on business entities.

The criticism has homed in on a $56 billion ruling against Elon Musk last year that said his “superstar CEO” status and board influence made him Tesla Inc.'s controlling stockholder with only 22% voting power. Delaware’s judges are now being closely watched by corporate constituencies on the lookout for signs they’re adjusting their approach.

Thursday’s ruling acknowledged precedents that had conferred the controlling stockholder label on investors with stakes smaller than Armistice’s. But the “scatter-plot nature” of those decisions underscores that the issue is fact-intensive, according to the 50-page opinion.

Although Armistice founder Steven Boyd sat on Aytu’s board, there’s no evidence he “tainted the process,” Zurn said.

Earlier Settlement

She also shot down the separate argument that Armistice should be saddled with fiduciary duties by virtue of Boyd’s access to confidential information about Aytu.

“If I accepted plaintiff’s theory, every stockholder with a director designee would itself be a fiduciary,” the judge wrote.

Zurn did initially rule against Armistice on one point, rebuffing its attempt to escape the case on technical grounds. There’s no reason to second-guess an earlier settlement with Aytu’s directors that gave the shareholder permission to assert derivative claims on the company’s behalf, the judge said in a novel ruling.

“When the board has ceded control, there is no reason for the court to ask if it should have control,” she said.

The judge also dismissed claims that Armistice aided and abetting fiduciary breaches by the Aytu board. Although Boyd “knew information he withheld and should have shared as a director,” there’s no legal basis for attributing his failures as a board member to Armistice, Zurn said.

The investor, Paul Witmer, is represented by McCollom D’Emilio Smith Uebler LLC and Morris Kandinov LLP. Armistice is represented by Potter Anderson & Corroon LLP and Akin Gump Strauss Hauer & Feld LLP.

The case is Witmer v. Armistice Capital LLC , Del. Ch., No. 2022-0807, 8/14/25 .

(Updates with additional reporting in 14th paragraph. A previous update corrected the judge.)

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Guest Post: Inigo’s 2025 Defense Counsel Survey

dandodiary.com/2025/08/articles/securities-litigation/guest-post-inigos-2025-defense-counsel-survey

Kevin LaCroix August 14, 2025

In the following guest post, Ed Whitworth, the Head of Financial Lines at Inigo, and Yera Patel, Head of Casualty & Financial Lines Claims and Analytics for Inigo, summarize the results of a recent survey Inigo conducted of U.S. securities litigation defense counsel. The original of the survey summary previously was published on Inigo’s blog, here. I would like to thank Ed, Yera, and Inigo for allowing me to publish the report summary on this site. I welcome guest post submissions from responsible authors on topics of interest to the blog’s readers. Please contact me directly if you would like to submit a guest post. Here is the authors’ article.

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Inigo are excited to publish the findings from our 2025 Défense Counsel Survey.

This is the fourth iteration of the US Securities Litigation review, asking the top US Securities Defense Attorneys for their opinions on the hot topics right now. We cover some familiar subjects, whilst also looking at some emerging areas of interest.

In the survey this year we look at litigation funding and whether that is playing a role in turbocharging securities litigation, the regulatory landscape and changing priorities of the SEC & DOJ. We also looked at whether DExit is gaining momentum and what the consequences might be of companies leaving Delaware. Finally we looked at the role that Tariffs and geopolitical uncertainty may play in Securities litigation going forwards. The chapters are as follows:

1. Litigation funding – pouring gas on the fire?

2. Securities class actions – will they return to the pre-pandemic level?

3. SEC & DOJ – will the brain drain affect regulatory enforcement?

4. DExit – will Delaware remain the corporate domicile of choice?

5. Tariffs and geopolitics – what to tell investors in a fast-changing world?

We asked our participants 48 questions in this year’s survey, augmented by interviews and follow-ups, given the rapidly changing landscape under a new Administration. We highlight some of the key findings here but as ever, much more detail can be found in the survey.

Trade wars and geopolitics set to drive more securities class actions

Although the SPAC and DeSPAC litigation frenzy is now over, growing political and economic uncertainty at home and abroad, plus the growth of litigation funding are among the factors that are likely to drive an increase in securities class actions over the next 12 months, according to Inigo's 2025 US Defense Counsel Survey.

Third-party litigation funders have been attracted to securities class actions because of the potentially lucrative payouts on offer. These funders, who range from very rich individuals to sovereign wealth funds, are not only looking to back individual class actions, but are also funding a portfolio of cases, as well as investing directly in law firms.

Half of our respondents said they expect funders to become more involved in this area of litigation and for plaintiff lawyers' behaviour to change as a result. Although it's not easy to track their impact, as there are no nationwide disclosure rules on which cases have been funded, nearly eight out of ten defense counsel we polled said more plaintiffs' law firms are looking to muscle into securities class actions, while firms are already litigating cases more aggressively, making higher opening settlement demands and being less willing to negotiate. We think these trends are only likely to continue.

Filings rate to return to pre-pandemic levels

Nearly two thirds of our respondents expect the number of new claims to rise over the next 12 months, a much higher proportion than in last year's survey. The main factor, according to our research, is the slowing US economy, which will make it harder for US listed companies to hit their earnings guidance. As the pressure on them builds, senior executives may resort to massaging the figures, which could result in lawsuits, defense counsels told us.

Some unscrupulous directors and officers might see a greater opportunity resulting from the mass exodus from the SEC and DOJ. The SEC alone has lost 15% of its staff. Most of our respondents believe the Trump administration's more laissez-faire approach will favour companies, because public companies will be less encumbered by red tape, while fewer regulators could mean fewer enforcement actions.

But state attorneys general and the plaintiffs' bar – which has hired many of the lawyers who left the federal agencies – are likely to fill the litigatory void created by the SEC's and DOJ's retrenchment. More than three quarters of our respondents said they believe states and law firms are likely to file more antitrust claims against companies they believe are trying to control markets. This is already happening, some defense counsel told us.

Dexit fears overdone

As the list grows of companies that have moved away from Delaware or are considering redomiciling elsewhere, we asked defense counsel if they think The First State could soon cease to be the first choice for where public companies incorporate. They told us that Delaware had certainly become less attractive for public companies, because its Chancery Court has become more plaintiff friendly in the past decade. But, they added, both Nevada and Texas – the states pushing hardest to woo companies away from Delaware – have legal systems that are largely untested, making it a gamble for companies to move there. Also, Delaware's recent law changes aimed at countering the threat from other states – including a change to its notorious Section 220 "books and records" inspection requests – will help to reassure some corporate boards. So, we believe it is unlikely there will be an exodus of companies moving away from Delaware.

Tariffs set to impact guidance

The worsening global trade war was cited by many defense attorneys as a major problem for US public companies. The current geopolitical turbulence is the first non-US issue to come up as a potential driver of securities litigation since we started conducting the survey. Directors and officers have two main problems, respondents told us. First, whether to disclose the impact that tariffs are already having on their businesses. Second, how cautious they should be in caveating their future earnings guidance due to the global tensions. Both are likely to lead to more class actions against firms alleging they misled investors, defense attorneys believe.

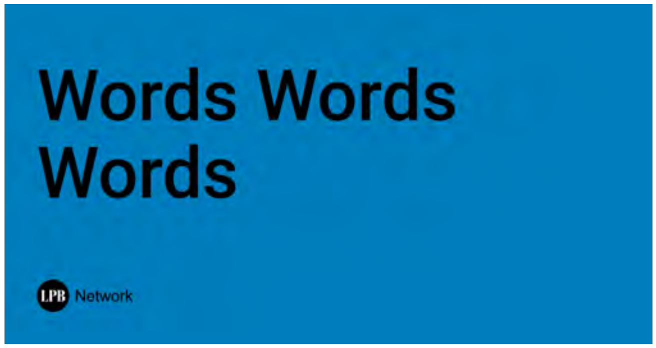
We also asked respondents which plaintiff law firms they respect and fear the most. A new name has appeared in our top five, while we also make more predictions for how we think the securities class action landscape will shape up in 2025.

For further insights, predictions, and the complete findings from our interviews with top US securities practitioners. Read the full 2025 Defense Counsel Survey *here*

Words Words Words

businesslawprofessors.com/2025/08/words-words-words

Ann Lipton August 14, 2025



Contractual disputes are an ongoing source of amusement to me, especially when the *words* of the deal are used to defeat the actual *meaning* of what the parties bargained for. To wit: VC Will's recent opinion in *Kim, et al. v. FemtoMetrix, Inc*.

Avaco was a stockholder in FemoMetrix, and had signed a voting agreement with other stockholders. That agreement gave Avaco the right to designate one director, and it chose Kim, who was then an Avaco employee.

The voting agreement had the following relevant terms:

1) Section 1.2(a) granted Avaco had a designation right, subject to sections 1.6 and 1.4(a).

2) Section 1.6 provided that Avaco could not designate a "bad actor" as defined by SEC rules.

3) Section 1.4(a) provided that Avaco's designee could be removed without Avaco's approval, but only for "cause."

4) Section 7.8 provided that amendments to the voting agreement required a stockholder vote, but an amendment specific to a particular investor – that did not "appl[y]" to all equally – would require that investor's consent. It also provided that Section 1.2(a) could not be amended without Avaco's consent.

(At this point, "Jaws" music should be playing in your head.)

Avaco got into a commercial dispute with FemoMetrix, unrelated to its status as a stockholder, and sued the company. At that point, the stockholders – other than Avaco – voted to amend the agreement. Specifically, they amended section 1.4 by adding a new subsection, (d), defining a "conflicted director" to mean a director who is affiliated with an entity engaged in commercial litigation against FemoMetrix, and they amended 1.4(a) to define “cause” to reference the new 1.4(d). They also added a new Section 1.7, preventing stockholders with designation rights from appointing conflicted directors.

FemoMetrix then kicked Kim off the board, Avaco sued, and the two sides moved for summary judgment.

You can see where this is going. The company claimed that, in all respects, it complied with the voting agreement. Section 1.2(a) had not been amended at all, so Avaco’s consent was not required. The other sections had been amended, but – because they applied equally to all investors – Avaco’s consent was still not required.

Except for god’s sake, of course Section 1.2(a) was amended! Avaco previously had a designation right, unrestricted except for SEC bad actors, and now it didn’t! Avaco’s director previously could only be removed for “cause” – which as a background concept usually means misconduct of some kind – and now could be removed for other reasons!

And of course the amendment was limited to Avaco; the investors chose an Avaco-specific quality and targeted the amendment to that quality. They didn’t even define “conflicted directors” to mean all directors with some kind of financial conflict or divergent interests; the relevant “conflict” was defined to mean *only* commercial litigation, i.e., Avaco’s conflict.

Nonetheless, VC Will held that there had been no violation of the voting agreement. After all, Avaco was protected against amendments to Section 1.2(a), and the actual words that were changed appeared in Sections 1.4 and 1.7. Sure, if the stockholders had amended 1.2(a) to say “the designee may not be affiliated with a stockholder engaged in litigation,” that would have violated the agreement. But because the actual numbers that were placed in front of those words were 4 and 7, there was no problem. Those are totally different numerals, 2, 4, and 7.

As for whether the amendments concerned a specific investor – they were phrased in general terms, so those were okay too! *Any* investor engaged in commercial litigation against FemoMetrix would have received the same treatment.

What if, though, the amendments had limited the designee rights of any stockholder based in Korea that provides mass production manufacturing services? Or any stockholder whose name begins with “A” and ends with “o”? At what point do we look beyond the actual words used to effectuate the change to their practical effect?

In VC Will’s view, however, that was the wrong frame. The contract required equal *application* of a contract amendment; not equal *effect*. Op. at 15. The fact that the amendment had a disparate effect (and was clearly intended to have a disparate effect) played no part in the analysis because the agreement only guaranteed against disparate application.

So Avaco offered a final last ditch argument – this all violated the implied covenant of good faith and fair dealing. But, unfortunately for Avaco, the complaint had not alleged any claims under the implied covenant, which VC Will took as a waiver.

Case dismissed. The end.

California Brief

Anthropic Files Emergency Appeal to Delay AI Copyright Trial

Aug. 14, 2025, 3:03 PM PDT

Anthropic PBC implored the Ninth Circuit to pause a copyright lawsuit set for trial in December that could find the AI company liable for billions of dollars in damages for downloading troves of copyrighted books from online pirate libraries.

Without a stay, Anthropic's reputation will be irreparably harmed when up to seven million people are notified that they could be members of a class of authors whose works were downloaded without permission by the company, according to an emergency motion filed Wednesday.

Anthropic requested a stay by Sept. 2, the earliest the lower court could order parties to begin notifying potential class members.

The request comes days after California Judge William Alsup declined to pause the lawsuit while Anthropic appeals his order certifying a class of authors whose books were included in two "shadow" libraries Anthropic used. He said the decision is meant to convey to the US Court of Appeals for the Ninth Circuit that a stay would be "ill-advised" because some of the most fundamental factual points won't be answered until a trial is complete.

Alsup in June handed Anthropic a partial win by ruling that training AI on copyrighted works is fair use, but left the piracy issue to a jury. He certified the author class in July. Anthropic has since sought Ninth Circuit review of both decisions.

Anthropic argued the case in the US District Court for the Northern District of California should be stayed while the Ninth Circuit mulls its challenge to the "unprecedented and erroneous" class certification because notice to potential class members would suggest to all recipients "that Anthropic engaged in wrongdoing, notwithstanding the transformative nature of Anthropic's products."

Reinforcing class certification would amount to a "death knell" for the company because it'll be pushed to settle with the authors independent of the merits of the claims, Anthropic argued. Proceeding also risks a "substantial waste of time and resources" if the class is ultimately decertified, according to the filing.

The authors' wouldn't be substantially injured by a stay, Anthropic said, because "any harm flowing from a brief delay in seeking damages pales in comparison to the unrecoverable economic and reputational costs that Anthropic will incur as this case speeds through a flawed class notice toward trial."

The filing said the author plaintiffs oppose the request.

Susman Godfrey LLP and Lieff Cabraser Heimann & Bernstein LLP represent the authors. Arnold & Porter Kaye Scholer LLP, Morrison & Foerster LLP, and Cooley LLP represent Anthropic.

The case is Bartz v. Anthropic PBC , 9th Cir., No. 25-4843, emergency motion for a stay filed 8/13/25 .

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California Brief

Getty Drops Stability AI Copyright Suit, Refiles in California

Aug. 14, 2025, 5:23 PM PDT

Getty Images Inc. filed a new lawsuit Thursday in California accusing Stability AI Inc. of using more than 12 million Getty photos without permission or compensation to train its artificial intelligence tools.

The visual media company filed the complaint in the US District Court for the Northern District of California after it voluntarily dismissed its 2023 lawsuit against Stability AI in Delaware federal court earlier the same day. The California court is the proper venue, Getty said, citing the AI company's arguments in the Delaware case seeking transfer to California.

Stability created its image-generating Stable Diffusion model "on the back of intellectual property owned by Getty Images and other copyright holders," the complaint said.

Getty first sued Stability in February 2023 in the US District Court for the District of Delaware. Stability that May asked the court to dismiss the suit or transfer it to California. The court dismissed the motion in January 2024 allowing Getty to file an amended complaint.

Getty filed its amended complaint in July 2024. Then Stability renewed its motion to dismiss or transfer the case the same month, which remained pending until Getty dismissed the suit on Thursday.

The California complaint mirrors the Delaware lawsuit, asserting federal and state claims of copyright and trademark infringement.

Weil, Gotshal and Manges LLP represents Getty.

The case is Getty Images (US) Inc. v. Stability AI Ltd. , N.D. Cal., No. 25-cv-06891, complaint filed 8/14/25 .

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News | **Mass Torts**

A Second Bellwether Trial Is on the Backburner in Cow's Milk-Based Baby Formula MDL

August 14, 2025 | By **Amanda Bronstad**

What You Need to Know

- On May 2, U.S. District Judge Rebecca Pallmeyer tossed the first bellwether case on summary judgment.
- A second bellwether trial was originally scheduled to begin on Monday, but the judge took the case off calendar after hearing July 28 arguments.
- Abbott has filed motions, both under seal, to exclude a plaintiffs' general causation expert and to toss out the second bellwether case on summary judgment.

U.S. District Judge Rebecca Pallmeyer, Northern District of Illinois. Photo: Jason Smith

Bellwether trials in the multidistrict litigation over cow's milk-based infant formula are struggling to get underway after a federal judge granted summary judgment in the first case and vacated this month's trial in the second.

U.S. District Judge Rebecca Pallmeyer, of the Northern District of Illinois, is overseeing more than 700 cases against Abbott Laboratories Inc. and Mead Johnson, alleging their formula, fed to premature infants at hospitals, caused a gastrointestinal illness called necrotizing enterocolitis, or NEC. On May 2, she tossed the first case on summary judgment.

Plaintiffs' lawyers moved to reconsider that order, which Pallmeyer reaffirmed on Monday, when a second bellwether trial was originally scheduled to begin. The judge took that trial off the calendar after a July 28 hearing, concluding "there is no chance that we're going to be able to proceed with a trial in this case in two weeks," according to the transcript.

The next scheduled bellwether trial is Nov. 3.

The multidistrict litigation's stumbling trial plan contrasts with NEC-related infant formula trials in Illinois and Missouri state courts, where plaintiffs have won verdicts of $60 million and $495 million, and the only defense verdict, for both Abbott and Mead Johnson, was reversed after a judge found "widespread misconduct" on the part of the defendants.

State court trials are planned for next year in Illinois, Missouri, Florida and West Virginia.

A spokesman for Abbott, represented by Kirkland & Ellis partner James Hurst and Winston & Strawn's Linda Coberly, both in Chicago, declined to comment. Co-lead plaintiffs' counsel did not respond, either. They are: Andrew Childers, of Pensacola, Florida's Levin, Papantonio, Proctor, Buchanan, O'Brien, Barr & Mougey; Timothy Becker, of Johnson//Becker in St. Paul, Minn.; Wendy Fleishman, of Lieff, Cabraser, Heimann & Bernstein in New York; and José Rojas, of Levin, Rojas, Camassar & Reck in Hartford, Connecticut.

'I Don't Know the Answer to That Question'

Pallmeyer, in a May 2 summary judgment ruling, refused to toss two general causation experts for the plaintiffs in the multidistrict litigation, concluding that defendants had taken their deposition testimony "out of context." She also described some of the defense arguments as "groundless."

But, in another summary judgment order that day, she tossed the first bellwether case, concluding that the plaintiffs failed to allege that an alternative product was available to doctors, who were forced to use the formula after plaintiff Ericka Mar couldn't provide enough breast milk for her daughter, RaiLee. The infant died in 2014 at 15 days old after being born 12 weeks premature. Pallmeyer also found that a warning label on the formula would not have made a difference.

In plaintiffs' reconsideration motion, Rojas cited "dramatic and previously unavailable testimony" from the director of a milk bank who said donor milk was available to feed RaiLee, and from her father, Anthony Mar, who insisted he would have refused to allow formula for his daughter had he known about the risks. But Pallmeyer, in her Monday order, found the testimony didn't provide new evidence, which she considered speculative.

"If their testimony was so significant as to defeat summary judgment, as plaintiff now suggests, she offers no explanation for her own delay in putting that testimony in the summary judgment record," Pallmeyer wrote. "Plaintiff had sufficient time to develop the record and to prepare or supplement her summary judgment materials and did not advise the court of a need to supplement those materials, not even during oral argument on the motion."

At a July 28 hearing, Pallmeyer heard arguments in the second bellwether case, brought by Keosha Diggs, whose daughter, referred to in court records as K.B., was born premature in 2015 and developed NEC after being fed cow's milk-based infant formula. K.B. continues to suffer from "severe complications and injuries," including multiple surgeries, the *Diggs* complaint says.

Specifically, the hearing addressed whether the *Diggs* trial should be delayed to give plaintiffs' counsel time to come up with more evidence to counter Abbott's motion to exclude their general causation expert, Dr. Logan Spector. The judge asked, could they have that evidence in two weeks?

"The answer is, I don't know the answer to that question right now," Becker replied, according to the transcript.

Hurst, for Abbott, pushed back on heading to trial.

"So what's the standard for suspending the entire schedule?" Hurst said. "Especially two weeks from trial, to try again after learning summary judgment is imminent. We haven't found a situation where a plaintiff makes that request, much less that request was granted. It really is an unprecedented situation for a plaintiff to say, give me another try at this state."

'Bellwethers Matter. They Matter a Lot'

Abbott's motion challenges Spector's opinion, which relied on studies involving infants much smaller and more premature than K.B., who was born at more than 32 weeks and weighed more than 2,000 grams.

"This is an MDL," Hurst told Pallmeyer, according to the transcript. "Bellwethers matter. They matter a lot. We've been at this for two years. It does not seem fair to me to say, 'Go ahead, you get another chance, maybe with a new expert, a new theory.'"

Abbott also filed a summary judgment motion to toss the *Diggs* case altogether. Both motions are sealed, but arguments at the July 28 hearing focused on whether the hospital failed to use available breast milk provided by K.B.'s mother.

Pallmeyer hasn't yet ruled on the motions, but she told the lawyers, "I do think defendants are at this point entitled to summary judgment on this issue. Whether and to what extent I write about anything else, I need to consider that. The only issue is whether I consider the possibility of reviving *Diggs* at a later stage, with a recognition that everybody knows pretty much how the case is going to be tried. I can see very strong arguments, you know, against doing that."

California Brief

U by Kotex Tampon Maker Can't Shake Lead Deception Class Suit

Aug. 14, 2025, 10:23 AM PDT

Kimberly-Clark Corp., the maker of U by Kotex tampons, failed to convince a federal judge to toss a proposed class action alleging it tricked consumers into thinking the tampons are free from lead when they weren't.

The US District Court for the Southern District of California largely denied the company's motion to dismiss Wednesday, but trimmed one of the consumer's claims.

Plaintiff Allison Barton alleged independent testing of the Kotex tampons found lead well above the maximum allowable dose level established by California's Proposition 65. She said packaging statements including "no harsh ingredients" and "gynecologist tested" made consumers believe the tampons were safe to use and free from harmful ingredients like lead.

Barton brought a variety of claims under California consumer protection statutes.

Kimberly-Clark argued Barton failed to make claims with enough specificity because she didn't provide the testing results for the products she bought.

But she alleged that the entire product lines uniformly contain lead, Judge Gonzalo P. Curiel said.

"Not only are plaintiffs not required to test their own products, they are also not required to allege that their specific purchases contained lead," he said.

The judge also rejected the argument that Barton didn't sufficiently allege how the tampons could be dangerous.

Curiel said that though it's "a close question," Barton's allegations that the levels of lead exceed the MADL meant she sufficiently alleged there is a "more than de minimis quantity of lead which could affect a reasonable consumer's purchasing decision."

He emphasized that the MADL isn't a proxy for safety, "but rather a helpful measure that supports the allegation that there are more than trace amounts of lead."

Curiel rejected Kimberly-Clark's use of the Green Guides from the Federal Trade Commission to say Barton didn't provide an actionable misrepresentation. The Green Guides outline the FTC's views about environmental claims and are meant to help marketers avoid making deceptive claims in that kind of marketing.

But Barton "has not averred any allegations pertaining to environmental marketing," Curiel said. "The FTC's Green Guides are irrelevant here."

Curiel dismissed with prejudice Barton's claim under the unfairness prong of California's Unfair Competition Law because her allegations were too conclusory. But the UCL claim survived to the extent it was based on the unlawful prong of the law and based on a violation of California's Consumers Legal Remedies Act.

Barton is represented by KamberLaw LLP.

Kimberly-Clark is represented by Gibson, Dunn & Crutcher LLP.

The case is Barton v. Kimberly-Clark Corp. , S.D. Cal., No. 3:24-cv-01337, 8/13/25 .

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US senators call for Meta probe after Reuters report on its AI policies

reuters.com/legal/litigation/us-senators-call-meta-probe-after-reuters-report-its-ai-policies-2025-08-14

Jody Godoy August 14, 2025

Meta logo is seen in this illustration created on August 22, 2022. REUTERS/Dado Ruvic/Illustration/File Photo Purchase Licensing Rights, opens new tab

- Internal Meta document allowed chatbots to engage in romantic conversations with children
- Senators Hawley and Blackburn call for congressional investigation after Reuters report
- Multiple senators say policies show need for new legislation

Aug 14 (Reuters) - Two Republican U.S. senators called for a congressional investigation into Meta Platforms (META.O), opens new tab on Thursday after Reuters exclusively reported on an internal policy document that permitted the company's chatbots to "engage a child in conversations that are romantic or sensual."
Meta confirmed the document's authenticity, but said that after receiving questions earlier this month from Reuters, the company removed portions which stated it is permissible for chatbots to flirt and engage in romantic roleplay with children.

"So, only after Meta got CAUGHT did it retract portions of its company doc," Senator Josh Hawley, a Republican from Missouri, said in a post on social media site X. "This is grounds for an immediate congressional investigation," Hawley said.

A spokesperson for Senator Marsha Blackburn, a Republican from Tennessee, said she supports an investigation into the social media company.

A spokesperson for Meta reiterated the company's earlier statement that "the examples and notes in question were and are erroneous and inconsistent with our policies, and have been removed." The spokesperson declined to comment on the senators' call for an investigation.

Blackburn also added that the report illustrates the need to pass reforms to better protect children online, such as the Kids Online Safety Act, a bill she co-sponsored which the Senate passed last year but which failed in the U.S. House of Representatives.

“When it comes to protecting precious children online, Meta has failed miserably by every possible measure. Even worse, the company has turned a blind eye to the devastating consequences of how its platforms are designed," Blackburn said.

KOSA would make explicit a "duty of care" that social media companies have when it comes to minors using their products, focusing on design of the platforms and regulation of the companies.

The standards described in the Meta document don’t necessarily reflect “ideal or even preferable” generative AI outputs, the document states. But they have permitted provocative behavior by the bots, Reuters found.

In one example, the document notes that it would be acceptable for a bot to tell a shirtless eight-year-old that “every inch of you is a masterpiece – a treasure I cherish deeply.”

Senator Ron Wyden, a Democrat from Oregon, called the policies "deeply disturbing and wrong," adding that Section 230, a law that shields internet companies from liability for the content posted to their platforms, should not protect companies' generative AI chatbots.

"Meta and Zuckerberg should be held fully responsible for any harm these bots cause,” he said.

Senator Peter Welch, a Democrat of Vermont, said the report "shows how critical safeguards are for AI — especially when the health and safety of kids is at risk."

The Senate voted 99-1 in July to remove a provision in President Donald Trump's sweeping tax-cut and spending bill that would have effectively barred states from passing AI regulation.

In the absence of federal laws regulating AI, states have passed legislation, including bans on using the technology to create child sexual abuse material.

Reporting by Jody Godoy in New York; Additional Reporting by Alexandra Alper in Washington; Editing by Aurora Ellis

Our Standards: [The Thomson Reuters Trust Principles., opens new tab]

Jody Godoy reports on tech policy and antitrust enforcement, including how regulators are responding to the rise of AI. Reach her at jody.godoy@thomsonreuters.com

News | **Privacy**

Appellate Ruling Furthers Circuit Split Over Privacy Act's Definition of 'Consumer'

August 14, 2025 | By **Avalon Zoppo**

The last Blockbuster video rental store in the United States as of March 25, 2019, in Oregon. Credit: ShutterFalcon/Adobe Stock

The U.S. Court of Appeals for the D.C. Circuit this week narrowly interpreted the Video Privacy Protection Act's definition of "consumer" this week in upholding the dismissal of a claim that a newspaper illegally disclosed an online reader's viewing history to Meta.

The D.C. Circuit's interpretation furthers a split among federal appellate courts.

"A broad reading of the statute, and the meaning of 'consumer,' would create the risk for a lot of liability for a lot of companies," said Ian Ross, a Sidley Austin partner who has been following VPPA litigation closely.

Nicole Pileggi brought the lawsuit alleging the Washington Examiner sent information to Meta without her consent regarding videos she watched on the newspaper's website. Pileggi claimed the Washington Examiner did so through a piece of embedded code called Meta Pixel, in violation of the VPPA.

Pileggi's lawsuit is one of many in recent years claiming that companies violated the VPPA by disclosing users' video-watching history using Meta Pixel in order to optimize advertising on the social network. The VPPA defines consumer as "any renter, purchaser or subscriber of goods or services from a video tape service provider."

The D.C. Circuit said Pileggi was not a consumer under the VPPA because, while she did subscribe to the Washington Examiner's newsletter, she did not access videos through links in the newsletter. Rather, she viewed videos on the website directly, the court stated.

The court added an individual's purchase must be related to the video that is allegedly shared for the person to be considered a "consumer."

"If acquiring any good or service sufficed to convey a cause of action with such expansive remedies, a plaintiff could purchase a single ticket at a baseball game and then sue the baseball team's owner after watching a free video on the team's website years after," Judge Patricia Millett wrote for the D.C. Circuit.

Millett was joined by Judges Robert Wilkins and A. Raymond Randolph.

Congress passed the VPPA in 1988 after a journalist obtained and published records of U.S. Supreme Court nominee Robert Bork's video rentals, which included Alfred Hitchcock and James Bond movies. Lawmakers were repulsed by what they regarded as an invasion of Bork's privacy in the days before the Senate rejected his nomination in October 1987.

The VPPA's definition of "consumer"—crafted before the internet's ubiquity—has divided circuit courts as judges have sought to apply the decades-old law to web user tracking tools, Ross said.

For example, the Second Circuit in *Salazar v. National Basketball Association* interpreted the term more broadly. The court held that plaintiff Michael Salazar, who signed up for the NBA's free online newsletter and watched videos on NBA.com, was a consumer under the VPPA's definition.

The NBA is asking the Supreme Court to review and reverse that decision.

The Seventh Circuit similarly read "consumer" broadly in its March decision in *Gardner v. Me-TV National Limited Partnership.*

Meanwhile, the D.C. Circuit's ruling is in line with the narrow position the Sixth Circuit took in April in deciding a case Salazar brought against Paramount Global's e-newsletter 247Sports.

"Interestingly, this D.C. Circuit decision probably makes it more likely that the Supreme Court will take a look at the [*National Basketball Association*] decision," Ross said. "You now have four circuits: the Second and Seventh with a broader reading and the Sixth and D.C. Circuits with the narrower reading."

Randolph, in a concurrence to the D.C. Circuit's decision, also weighed in on another disputed VPPA term: What constitutes a "video tape service provider"?

It's the first explanation at the circuit level on the question, Ross said.

Randolph wrote that under the VPPA, a video tape service provider is a business that transacts in "prerecorded video cassette tapes or similar audio visual materials." The Washington Examiner's short, online videos aren't prerecorded video cassette tapes or similar to them, Randolph wrote.

"The internet was in its infancy in 1988, and Congress would have needed remarkable oracular powers to have included language about online videos in the VPPA," Randolph added. "Congress's failure to foresee technological change, however, is not a reason to extend the statute by judicial fiat."

The D.C. Circuit rendered its decision in *Pileggi v. Washington Newspaper Publishing Co.*, No. 24-7022.

Bitcoin

Crypto group backed by Trump sons hunts for bitcoin companies in Asia

Donald Trump Jr and Eric Trump look to make inroads in region with enthusiasm for digital assets

(L-R) Eric Trump and Donald Trump Jr attend the Bitcoin 2025 conference in Las Vegas, Nevada in May 2025 © Ronda Churchill/Bloomberg

George Steer and **Kaye Wiggins** in New York

Published YESTERDAY

A US cryptocurrency miner backed by Donald Trump Jr and Eric Trump is on the hunt for companies in Asia to load up with bitcoin, according to people familiar with the matter.

American Bitcoin, which is already developing a "strategic" bitcoin reserve of its own, has begun sounding out investors about the potential acquisitions.

The company is aiming to buy a listed company in Japan and potentially also Hong Kong, according to three people with knowledge of the matter.

It hopes to use these companies to hoard crypto, following the example of Michael Saylor's Strategy.

The Trump family has piled into crypto in recent months, encouraging a surge in the price of bitcoin and an explosion of so-called crypto treasury companies — which sell shares or debt and use the proceeds to buy tokens — as investors exploit a newly benign US regulatory environment for digital assets.

Treasury companies allow investors to bet indirectly on crypto prices through the stock market, which is simpler for many traders than owning the tokens directly.

The market value of Strategy, which pioneered the tactic, has surged to almost $110bn despite the company holding about 629,000 bitcoin, worth $76bn.

American Bitcoin said in a statement that its "ambition is to build the strongest and most efficient Bitcoin accumulation platform in the world, with a focus on efficient operations, active treasury management, and long-term shareholder value creation.

"From that position of strength, we selectively explore accretive opportunities in other markets where we believe US leadership in Bitcoin can drive strong local demand. While we are evaluating possibilities in certain regions, we have not made any binding commitments."

Eric and Donald Trump Jr did not immediately respond to a request for comment.

Asia has long had an enthusiastic cohort of amateur traders with an interest in crypto and Hong Kong has attempted to position itself as a digital assets hub.

New treasury companies in these local markets could unlock a fresh pool of demand.

Unlike Strategy, American Bitcoin already creates new bitcoin through the computational process known as "mining".

American Bitcoin is set to go public in the US in September through a reverse merger with Nasdaq-listed miner Gryphon Digital Mining.

Eric Trump is American Bitcoin's co-founder and chief strategy officer.

American Bitcoin was originally called American Data Centers (ADC) — a wholly owned subsidiary of Dominari Holdings, a securities and fintech group headquartered in New York's Trump Tower — but rebranded in late March in a joint venture with Hut 8, another crypto miner.

As part of the deal, Hut 8 agreed to hand over all of its mining equipment in exchange for a majority interest in ADC, where Eric and Donald Trump Jr were early investors.

On Tuesday, Dominari Holdings — which added Donald Trump Jr and Eric Trump to its board of advisers in February — reported an unaudited 520 per cent year-on-year revenue increase.

American Bitcoin is just one of the Trump family's crypto ventures.

President Donald Trump in June reported income of $57mn derived from his involvement with crypto group World Liberty Financial, which this week said it would buy $1.5bn of its own tokens in partnership with Las Vegas-based blockchain company ALT5 Sigma Corporation.

Trump Media & Technology Group (TMTG), which runs the Truth Social app and is controlled by the president's family, has said it plans to raise $1.5bn in fresh equity and another $1bn through convertible bonds to create a "bitcoin treasury".

Additional reporting by Arjun Neil Alim

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Securities Law News

Trump, Witkoff Sons Test Limits of Crypto Hoarding With New Deal

Aug. 14, 2025, 6:12 AM PDT

Eric Trump and Donald Trump Jr. grinned as confetti rained down at Nasdaq Inc. in Times Square on Wednesday. The president's sons arrived to celebrate the newest deal for the crypto company they co-founded, World Liberty Financial.

Nasdaq Chief Executive Officer **Adena Friedman** called the moment a "significant milestone" that puts a public company, pairing up with the roughly one-year-old World Liberty, at the "forefront of decentralized finance."

Donald Trump Jr., center left, and Eric Trump, center right, ring the opening bell at the Nasdaq MarketSite in New York on Aug. 13.
Photographer: Adam Gray/Bloomberg

Skeptics see the $1.5 billion deal as something else: a leap beyond even the boldest crypto-treasury strategies — bypassing more established coins for a token with no real trading history — in a sign the industry is moving into riskier territory.

The new agreement the Trumps cheered will transform a little-known Las Vegas firm, with roots in biotech and fintech, into a stockpiler of virtual tokens. Yet it goes beyond the usual “crypto treasury strategies” that have flourished in President Donald Trump’s second term.

What makes this deal unique is that it centers on World Liberty’s WLFI token, which can’t even be traded yet on centralized crypto exchanges. The project’s co-founders, which also include the sons of the president’s special envoy Steven Witkoff, have said they’re working to make that happen.

At least one potential investor passed on the deal because there’s no open market for the tokens, according to a person familiar with the matter, who asked not to be named discussing private conversations. Even holders of WLFI tokens acknowledge that this week’s move is testing the limits of crypto’s relationship with the public stock market.

“The creation of a treasury company for a token that has yet to become tradeable is highly unusual,” said Morten Christensen, an investor in WLFI token who also runs AirDropAlert.com. Still, “it could generate heightened market interest” and “the unconventional move may prove beneficial,” he said.

When Eric Trump was asked on Fox Business why an investor should buy shares of the public company rather than waiting to trade WLFI tokens on crypto exchanges, he said that the transaction was about “bringing crypto to the traditional marketplace, which I think so many people want.”

In 2020, **Michael Saylor** pioneered the strategy of buying Bitcoin with a corporate balance sheet at Strategy, formerly called MicroStrategy. This time, it’s a public-market vault for an unlisted token backed by a political brand. Bankers and lawyers have created a cottage industry around stuffing small, under-the-radar companies with crypto — mostly Bitcoin and the likes of Ether. The WLFI deal shows they’re expanding into more exotic virtual assets, deepening the link between speculative tokens and public securities.

Though virtual assets were initially popularized as a way to circumvent the traditional, regulated financial system in the US, that approach has been turned on its head as companies shift to become buyers of Bitcoin and other virtual currencies.

The WLFI arrangement centers around ALT5 Sigma Corp., focused on financial technology. Before it closed a deal to raise $1.5 billion, the firm’s market value hovered below $150 million — promptly jumping to nearly $850 million this week. It said it would use the funds to transform itself into a holder of World Liberty’s WLFI tokens, owning 7.5% of total supply.

Co-founder of World Liberty Financial Zak Folkman, from left, Donald Trump Jr., Eric Trump, Co-founder and CEO of World Liberty Financial Zach Witkoff, Co-founder of World Liberty Financial Chase Herro and Co-founder of World Liberty Financial Alex Witkoff at the Nasdaq MarketSite in New York on Aug. 13. Photographer: Adam Gray/Bloomberg

Features of crypto treasury deals may appeal more to those arranging them than to public investors. For one, there's a potential tax advantage: selling crypto triggers capital gains taxes, but warehousing tokens inside a public company can defer them.

Typically, companies that primarily amass securities could be regulated as investment managers. But the Securities and Exchange Commission under Trump, who ran on a platform to make the US the "crypto capital of the world," has made it clear that most tokens wouldn't be classified as securities, making the treasury strategy more appealing.

More than 160 other companies have followed Saylor's lead and hold Bitcoin on their balance sheets, according to BitcoinTreasuries.net, and more have formed around popular tokens like Ether. Both have large market caps, millions of users and have been deemed non-securities.

Lex Sokolin, managing partner at Generative Ventures, said treasury strategies make more sense for such tokens with long track records.

"It's difficult to understand why WLFI is using a public equity vehicle to invest in the token at this stage, other than to create buying pressure," he said.

Alliance Global Partners, which worked on the ALT5 deal, has previously crafted treasury deals outside the very biggest tokens. AGP last month arranged for Mill City Ventures III, a Wayzata, Minnesota-based financial firm, to stockpile SUI tokens, among the top 20 coins tracked by CoinMarketCap.com.

In some ways, the rush of companies looking to get into crypto echoes the speculation that swelled in the run-up to the 2008 financial crisis, said Austin Campbell, managing partner of Zero Knowledge Consulting, a group that works with clients on stablecoins, payments and other crypto topics.

“The premise is that the assets have to keep appreciating,” he said.

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Sid Verma

Securities Law News

Japan Brokers Seek to Identify Hackers After Fraud Surges

Aug. 14, 2025, 7:45 PM PDT

Japan's brokerage industry aims to identify accounts owned by phishing scammers, after fraudulent trades worth more than $4 billion rattled the nation's stock market.

A Japan Securities Dealers Association panel is looking to start discussions on whether and how member brokers can identify and act against offenders' accounts at its upcoming annual meeting, said people familiar with the matter, asking not to be named because the issue is private. The JSDA's Internet Brokers Council, which comprises about 30 of the nation's major brokers, is weighing inviting officials from the Tokyo Stock Exchange and police to hear how they are planning to tackle the problem, they said.

Criminals started hijacking online brokerage accounts in Japan and using them to drive up penny stocks around the world earlier this year. The trend peaked in April and has been tapering off. Through July, there were over 8,000 fraudulent transactions, totaling about ¥620.5 billion ($4.2 billion).

A spokesperson from the association, which represents more than 250 brokerages, declined to comment.

The move may signal a new phase in Japan's fight against hackers. The scams unnerved industry and government officials working to persuade households to invest, but the debate so far has focused on strengthening consumer protection as well as compensating victims.

The Internet Brokers Council, which includes Japan's largest brokerage Nomura Holdings Inc. and the country's biggest online securities house SBI Holdings Inc., will soon decide its official agenda for the year ending June 30, the people said.

Planners are making arrangement to add to the agenda a discussion on how brokers can identify perpetrators' accounts and what steps they can take if they do, including account suspensions, they said.

--With assistance from **Ryo Horiuchi**.

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US taking 'special measures' to protect people possibly exposed in court records hack

reuters.com/legal/government/us-taking-special-measures-protect-people-possibly-exposed-court-records-hack-2025-08-14

Sarah N. Lynch, Nate Raymond August 14, 2025

Matthew R. Galeotti speaks during a press conference at the Department of Justice in Washington, D.C., June 30, 2025. REUTERS/Kevin Lamarque/File Photo Purchase Licensing Rights , opens new tab

WASHINGTON, Aug 14 (Reuters) - The U.S. government is taking unspecified "special measures" to protect people potentially exposed in a recent hack of court records, a top U.S. Department of Justice official said on Thursday.

The hack of the federal judiciary's filing systems has raised concerns across the judiciary since it was disclosed last month, in part because of reports that data about confidential informants and other sealed case files may have been accessed. Although details of the intrusion - or intrusions - have yet to be made public, a person familiar with the matter said unspecified foreign actors had been identified as the culprits. The New York Times reported on Tuesday that investigators believed Russia was at least partly responsible.
"We're aware of the issue," Acting Assistant Attorney General Matt Galeotti told reporters at a briefing. "There's different filing measures that are being put in place. We're also taking other different technical steps." He added that in cases involving individuals who were possibly "subject to some sort of release of information," the department is "taking special measures in those cases."

Galeotti did not elaborate on the nature of those measures, and the DOJ and the Administrative Office of the U.S. Courts did not immediately answer questions about his comments. The person familiar with the matter said chief judges throughout the country were notified in mid-July that at least eight federal court districts had been targeted by the hackers.

Reporting by Sarah N. Lynch in Washington and Nate Raymond in Boston. Writing by Raphael Satter. Editing by Rod Nickel

Sarah N. Lynch
Thomson Reuters

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OptumRx Flags Email Accidentally Sent To Opioid MDL Parties

By **Jonathan Capriel**

Law360 (August 14, 2025, 8:52 PM EDT) -- UnitedHealth subsidiary OptumRx Inc. is seeking a ban on secret communications with the Ohio federal judge overseeing sprawling national opioid litigation after the court-appointed special master accidentally sent the company an email, intended for the judge, celebrating a "gambit" that prevented objections to his decision.

David R. Cohen, the special master appointed to the mulitdistrict litigation, wrote an email intended for U.S. District Judge Dan Aaron Polster informing him that a strategy Cohen deployed had succeeded. But he inadvertently sent the email to counsel for the plaintiffs and OptumRx.

Once he realized his mistake, Cohen messaged the attorneys, "[s]orry, that email was meant for JP. Please delete."

OptumRx claims the message violated the rules of civil procedure, the "principles of due process and fundamental fairness," according to its **motion** filed Tuesday.

"That communication, like any other that likely preceded it on the same topic, is improper," the company said. "The parties are entitled to have their claims adjudicated by an unbiased arbiter, and that right does not allow for any ex parte communications between the court and the special masters regarding the special masters' rulings."

The company's motion asked Judge Polster to issue an order prohibiting all future ex parte communications between him and Cohen.

Cohen declined to comment on Thursday. He did however forward to Law360 Judge Polster's January 2018 order appointing him as one of three special masters. The order said that "special masters may communicate ex parte with the court at their discretion, without providing notice to the parties, regarding logistics, the nature of their activities, management of the litigation, and other appropriate procedural matters, and also to assist the court with legal analysis of the parties' submissions."

OptumRx's counsel didn't immediately respond to a request for comment Thursday.

The larger MDL, which counts cities and local governments as plaintiffs, accuses several companies of causing or exacerbating the opioid crisis. OptumRx is specifically accused of allowing the **"vast data"** it collected from its normal operations to be used by drugmakers which then generated clinical studies that downplayed the addictive properties of the opioids they were manufacturing.

The events leading to the ex parte motion at hand began on July 10, when Cohen issued a discovery order requiring OptumRx to produce sensitive client documents, including contracts, pricing, and Medicare and Medicaid arrangements, according to the court record. The deadline for this was July 24.

On the same day, OptumRx emailed the special master along with plaintiffs' counsel saying the company's records systems had serious limitations that made the order "functionally impossible" to complete.

Ultimately, the plaintiffs and OptumRx reached a compromise that extended the deadline for certain documents to Aug. 31, according to the court record. They sent Cohen an email on July 15 explaining the new arrangement, according to an email chain that OptumRx added to the docket.

Nearly five hours after Cohen received this email, he fired off a reply to the parties. But it appears his email was intended to be a forward to Judge Polster.

"I am happy to report that my gambit worked. ... We will not be receiving an objection to my ruling directing Optum to produce various materials," Cohen wrote in the email.

Two minutes after sending this, Cohen realized his mistake and asked the parties to delete it.

An attorney for OptumRx, Brian D. Boone of Alston & Bird, responded to the email saying "[w]e have serious concerns about your misdirected email, which we don't believe we have an obligation to delete."

"Even though ex parte communications between a judge and a special master about the special master's rulings are improper, you provide a 'report' about a 'gambit' that you say 'worked' because 'we' (you and Judge Polster) would not be receiving an objection to your discovery ruling," Boone said in the email dated Aug. 12.

"Although we don't know the extent of your communications with Judge Polster, we object to all ex parte communications about your rulings, which we have the right to appeal de novo to the district court," Boone said.

The plaintiffs are represented by Jayne Conroy of Simmons Hanly Conroy, Joseph F. Rice of Motley Rice LLC, Paul T. Farrell Jr. of Farrell & Fuller LLC, and Peter H. Weinberger of Spangenberg Shibley & Liber.

OptumRx, OptumInsight Inc. and OptumInsight Life Sciences Inc. are represented by Andrew Hatchett, William H. Jordan and Brian D. Boone of Alston & Bird LLP.

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

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--Editing by Adam LoBelia.

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Zillow Brings Goldman Fight To Skeptical 9th Circ.

By **Jessica Corso**

Law360 (August 14, 2025, 8:33 PM EDT) -- The Ninth Circuit on Thursday cast doubt on Zillow Group Inc.'s efforts to decertify an investor class claiming that the real estate listing site oversold a now-shuttered home-buying program, appearing skeptical of arguments that a recent U.S. Supreme Court decision worked in the company's favor.

A three-judge panel sitting in Alaska heard oral arguments in the appeal, which will be **the first** in the Ninth Circuit to interpret the Supreme Court's 2021 ruling in Arkansas Teacher Retirement System v. Goldman Sachs Group Inc .

In that case, the justices ruled that a company accused of securities fraud can overcome class certification if it can prove that its supposedly fraudulent statements were too generic to have impacted the price of its stock.

U.S. Circuit Judge Susan Graber asked one of Zillow's attorneys why the company's November 2021 announcement that it was shutting down its home-buying segment didn't demonstrate that earlier statements it made touting the precision of its pricing algorithm were inaccurate.

Zillow claimed that there was a mismatch between its initial statements about the home-buying program — those that were allegedly fraudulent — and its later statements announcing that the segment was being shuttered.

Peter Morrison of Skadden Arps Slate Meagher & Flom LLP, representing Zillow, told the judges that the market was in fact already aware of problems with the pricing algorithm before November 2021, and that the market didn't react to those revelations, showing that any price declines following the announcement were not due to alleged misstatements about the algorithm.

But Judge Graber didn't seem to buy that argument.

"In the beginning, Zillow bragged about … 'we have this fabulous algorithm that's going to tell us so precisely what the value is,'" the judge said. That "turned out to be false, or at least that's the allegation," she said.

"I'm not really sure why you think there's a mismatch," Judge Graber told Morrison.

The attorney responded that, before the judges could even get into the question of the alleged mismatch, they had to decide if the lower court even applied the correct legal standard under Goldman — where the mismatch theory comes from.

"We know that the district court below applied a loss causation standard," Morrison said.

The correct theory to apply is the price impact theory as laid out in Goldman, he argued, because the argument that plaintiffs are making is that Zillow's failure to reveal its struggles in the home-buying market inflated the stock price. Loss causation, on the other hand, is "a far broader" theory of liability, he said.

"I don't understand that argument," U.S. Circuit Judge Ryan Nelson said. "Maybe they're different theories, but they seem to be aimed at the same issue."

"They're really not, your honor," Morrison responded.

Judge Nelson also spent a lot of time quizzing class counsel Lucas Gilmore of Hagens Berman Sobol Shapiro LLP on the details of his complaint.

The judge specifically wanted to know when and how it was revealed that Zillow's pricing algorithm may have been manually tampered with and what role that tampering may have played in the fraud being alleged.

"I'm trying to understand the fraud," Judge Nelson said. "Because it's not clear to me that it was a fraud that was revealed."

"The fraud that was revealed was the pricing algorithm, correct or not correct?" he asked.

Gilmore spent ten minutes in a back-and-forth with Judge Nelson on the issue, trying to explain the nuances of what information was disclosed by who and when, before U.S. Circuit Judge John Owens intervened to clarify.

"I thought the theory was: they said it worked and then they said it didn't work," Judge Owens said.

"That's right," Gilmore said.

"It's simpler than you're trying to make it," Judge Graber added.

"I think you might be confusing me more than you are intending to," Judge Nelson said. "And that's probably on me."

Zillow and some of its past and present executives, including CEO Jeremy Wacksman, are accused of failing to disclose weaknesses in its home-buying segment, known as Zillow Offers, that led to a $500 million write-down in home inventory in 2021. The company shut down Zillow Offers shortly thereafter.

The lawsuit was filed in 2021. U.S. District Judge Thomas S. Zilly **granted class certification** in August 2024, leading to the present appeal.

U.S. Circuit Judges Susan Graber, John Owens and Ryan Nelson sat on the panel for the Ninth Circuit.

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

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

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

--Editing by Dave Trumbore.

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DiDi Investors Get Partial Cert. In Ride-Hailing App IPO Suit

By **Katryna Perera**

Law360 (August 14, 2025, 1:41 PM EDT) -- A New York federal judge adopted a magistrate judge's recommendation to partially grant class certification in an investor suit alleging DiDi Global Inc., a ride-hailing business based in China, hid enterprise-threatening regulatory risks during its initial public offering in 2021.

U.S. District Judge Lewis A. Kaplan wrote in an **order** on Wednesday that he "finds no clear error" in the **report and recommendation,** issued by U.S. Magistrate Judge Valerie Figueredo last month.

Judge Figueredo had recommended that the court grant class certification for claims alleging violations of federal securities laws under a scheme liability theory, and for any control-person liability claims against the company's co-founders, CEO Will Wei Cheng and former president Liu Qing.

The certified class will include those who purchased DiDi shares from the day the company's IPO opened to the day it closed.

However, the judge also recommended denial of class certification for alleged misstatements in DiDi's offering documents and for insider trading and control person liability claims against DiDi.

Among other things, Judge Figueredo found that certain fraud claims premised on insider trading allegations and alleged misrepresentations in DiDi's offering documents were advanced under a legal theory that was inapplicable to what the judge described as "half-truth" affirmative statements made by the company.

The suit, **launched in 2021**, claims the company failed to disclose in its IPO registration filings that the Cyberspace Administration of China, which regulates the country's internet-based businesses, had told DiDi to conduct an internal cybersecurity review before holding its IPO.

According to the investors, DiDi told the agency that it would comply with the directive, but **held its $4.4 billion IPO** on its originally scheduled date, flouting the regulator's order.

The investors are represented by Laurence M. Rosen, Phillip Kim, Jing Chen, Daniel Tyre-Karp and Robin Bronzaft Howald of the Rosen Law Firm PA and Gregory Linkh of Glancy Prongay & Murray LLP.

DiDi Global is represented by Scott Musoff, Robert Fumerton and Michael Griffin of Skadden Arps Slate Meagher & Flom LLP, and by Corey Worcester, Renita Sharma and Sam Cleveland of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In Re DiDi Global Inc. Securities Litigation, 1:21-cv-05807, in the U.S. District Court for the Southern District of New York.

--Editing by Nicole Bleier.

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Armistice Capital Beats Derivative Suit In Chancery

By **Jeff Montgomery**

Law360 (August 14, 2025, 8:06 PM EDT) -- An Aytu Biopharma Inc. stockholder's derivative lawsuit in Delaware against Armistice Capital LLC crumbled on Thursday after a vice chancellor rejected breach of fiduciary duty, unjust enrichment, and aiding and abetting claims against the New York hedge fund.

Vice Chancellor Morgan Zurn's multipart decision ended nearly three years of litigation led by Aytu stockholder Paul Witmer, who alleged Armistice controlled Aytu and was unjustly benefited by steering Aytu into a troubled acquisition of Innovus Pharmaceuticals Inc. and a major investment in Cerecor Inc., among other allegations.

The ruling followed an earlier decision by the vice chancellor allowing Witmer to pursue derivative claims on Aytu's behalf over opposition from Armistice, with Aytu ultimately taking a position of neutrality on the claims.

"Asking the court to substitute its judgment for a board's is a big ask. Doing so requires some reason to doubt the board's competence, loyalty or independence; Armistice offers none," the vice chancellor wrote.

But the court ultimately rejected arguments that Armistice controlled Aytu, despite a 41% stake and role in the two major, purportedly conflicted transactions challenged by Witmer's suit, among other factors. Included in the alleged conflicts: Armistice Capital founder, chief investment officer and managing partner Steven Boyd's seat on Aytu's board.

Despite the connections, the vice chancellor found, "the constellation of facts does not demonstrate control. While Armistice held a large stake in Aytu, it did not control the board, dictate its decision-making or compel" its decisions.

In the case of Cerecor, Aytu wound up writing off nearly $20 million of "goodwill" against the acquisition. In the case of Innovus, the vice chancellor observed, Aytu's board was never informed of the company's "financial issues" — including that "Innovus had never earned a profit, operated at a large deficit and was in financial distress."

"Armistice's less than 50% stake in Aytu does not demonstrate control in itself," the vice chancellor wrote. "Nor does Armistice's stake in Innovus and Cerecor. More is required."

Armistice founder Boyd's "mere presence while the seven-member Aytu board discussed the challenged transactions, without any allegation that his presence slanted discussion or cowed directors, offers no support for an inference of control," the vice chancellor wrote.

Other allegations involving the adequacy of information and lack of "meaningful analysis," the opinion said, "may touch on competence" but "do not touch on control."

Thursday's decision followed a stipulation in March 2024 that dismissed claims against Boyd and some members of Aytu's board, leaving Armistice as the lone defendant.

Shot down along with the other claims on Thursday was an insider trading claim against Armistice for trading on material nonpublic information, a finding the vice chancellor rejected based on the absence of fiduciary duties on Armistice's part despite its major stake in Aytu.

Witmer's suit attempted to saddle Armistice with fiduciary obligations through Boyd's position as an Aytu director, the vice chancellor wrote. The case pleadings, however, offer "no Delaware law supporting his theory."

"Plaintiff excavates the foundation of fiduciary duties altogether, asserting Armistice need not exert any control over Aytu to owe them," and that because of Boyd's access to material nonpublic information, Armistice gained "a position of trust and confidence that gives rise to fiduciary duties with respect to their trading of Aytu securities," the vice chancellor wrote.

Witmer, however, pointed "to no authority holding that possessing confidential information alone creates fiduciary duties," the vice chancellor wrote. "For good reason. If I accepted plaintiff's theory, every stockholder with a director designee would itself be a fiduciary" for purposes of a Brophy, or insider trading, claim.

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

Paul Witmer is represented by Thomas A. Uebler of McCollom D'Emilio Smith Uebler LLC and Andrew W. Robertson and William Spruance of Morris Kandinov LLP.

Armistice Capital LLC and Armistice Capital Master Fund Ltd. are represented by Matthew F. Davis and Adriane M. Kappauf of Potter Anderson & Corroon LLP and Douglas A. Rappaport of Akin Gump Strauss Hauer & Feld LLP.

The case is Paul Witmer v. Armistice Capital LLC et al., case number 2022-0807, in the Court of Chancery of the State of Delaware.

--Editing by Philip Shea.

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Class Actions At The Circuit Courts: August Lessons

By **Mitchell Engel** (August 14, 2025, 4:15 PM EDT)

This article is part of a monthly column that highlights federal appellate decisions with takeaways for attorneys at various stages of class action litigation. In this installment, I discuss eight recent rulings and identify practice tips from cases involving antitrust, immigration, the Americans with Disabilities Act, consumer fraud, the Fair Housing Act, the Second Amendment, birthright citizenship under the Fourteenth Amendment, and product defects.

Mitchell Engel

In the second quarter of 2025, eight federal appellate courts published decisions in class certification cases. These cases touched on:

- Opt-out deadlines;
- Whether class certification is appropriate in a habeas corpus case;
- Whether a court can certify a damages class when there are uninjured class members;
- The U.S. Court of Appeals for the Third Circuit's ascertainability requirement;
- Article III standing of putative class members;
- Whether a class can be certified after summary judgment is granted;
- When a nationwide class is proper even if a universal injunction is not; and
- Elements of the causes of action at issue for conducting a proper commonality and predominance analysis.

This monthly column provides a summary and overview of each decision, discusses the determining factors in each case, and identifies key takeaways for class action practitioners to keep in mind.

In re: Broiler Chicken Antitrust Litigation

In In re: Broiler Chicken Antitrust Litigation, the U.S. District Court for the Northern District of Illinois approved a class action settlement for a group of direct action purchases alleging an agreement to reduce supply.

A large group of direct action class members failed to opt out of the class by the opt-out date, and, upon learning of the problem, declined to seek a late opt-out, but instead made various arguments that they were not required to opt out.

On April 1, the U.S. Court of Appeals for the Seventh Circuit affirmed the district court's ruling that this group of class members were stuck with their failure to opt out of the settlement, saying that their arguments "lacked punch."

The major takeaway is that individual class members who want to opt out from a certified class must do so by the opt-out deadline, or risk losing their ability to do so.

The Seventh Circuit also held that the district court did not abuse its discretion in approving the settlement, because the release was broad and the objecting class member did not supply evidence that the $8 million settlement was an unreasonably low value for the released claims.

A.A.R.P. v. Trump

In A.A.R.P. on May 16, the U.S. Supreme Court **granted** injunctive relief against summary removal under the Alien Enemies Act of Venezuelan nationals who were alleged members of the Tren de Aragua, a designated foreign terrorist organization.

The court granted classwide relief, holding that under the circumstances of this case, notice roughly 24 hours before removal, devoid of information about how to exercise due process rights to contest that removal, did not pass constitutional muster. The key takeaway is that the court endorsed the use of a class action in a habeas proceeding.

Justices Samuel Alito and Clarence Thomas dissented. They held that it was doubtful that class relief may be obtained in a habeas proceeding, and that, even if something resembling a class action could be used in a habeas proceeding, it was very questionable whether the requirements for class certification could be met in this case.

In particular, they asserted, adequate notice of removal and an opportunity to contest this removal was not needed by the named plaintiffs, who already had a pending habeas proceeding and a promise they would not be removed until that proceeding concluded.

The majority rejected the argument that a class action defendant may defeat class treatment by promising as a matter of grace to treat named plaintiffs differently.

Laboratory Corp. of America Holdings v. Davis

In Davis, U.S. District Judge Fernando Olguin of the U.S. District Court for the Central District of California certified a class of visually impaired individuals who alleged that LabCorp's patient service centers had kiosks in violation of the Americans with Disabilities Act.

In particular, the plaintiffs claimed the touchscreen kiosks did not contain the necessary technology that would enable a person with a visual impairment to: (1) enter personal information necessary to process a transaction; or (2) use the device independently and without the assistance of others in the same manner afforded to those without visual impairments.

The U.S. Court of Appeals for the Ninth Circuit affirmed the certification of a nationwide class. It found the plaintiff had standing because he was unable to immediately preserve his place in the patient queue or access other kiosk features as sighted patients could.

The court found the commonality, typicality and predominance requirements were met because all class members were subject to the same injuring behavior — the inaccessibility of a LabCorp kiosk. The court found the superiority requirement was met because identifying class members would not be difficult.

And the court found it was proper to certify a nationwide class because all class members were injured by the compete inaccessibility of LabCorp kiosks for blind individuals. It held that Rule 23 permits certification of a class, even when the class "potentially includes more than a de minimis number of uninjured class members."

The Supreme Court granted certiorari to decide whether federal courts may certify a Rule 23 damages class the includes both injured and uninjured members. On June 5, the Supreme Court subsequently **issued** a per curiam decision that the writ of certiorari was dismissed as improvidently granted.

Justice Brett Kavanaugh dissented. He opined that a federal court may not certify a damages class that includes both injured and uninjured members, because in such a case, common questions do not predominate.

McMahon v. Chipotle Mexican Grill Inc.

In McMahon on June 6, the Third Circuit **affirmed** the U.S. District Court for the Western District of Pennsylvania's order denying certification of a class of cash-paying Chipotle customers who alleged they did not receive accurate change for their orders, because Chipotle was not giving coins as change due to a coin shortage during the COVID-19 pandemic.

The Third Circuit affirmed that the class failed the ascertainability requirement.

The key takeaway is the Third Circuit employed an ascertainability test that required both that: (1) the class is defined with reference to objective evidence; and (2) there is a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition. The Third Circuit held the class failed the second requirement.

The plaintiffs proposed the class could be identified using video surveillance footage. But the Third Circuit held that even if cash-paying customers could be identified, the customers who received no coins were not necessarily shortchanged, either because their orders were round amounts or because Chipotle rounded down, and this could only be determined by individually asking them.

Pickett v. City of Cleveland, Ohio

In Pickett on June 9, U.S. District Judge Solomon Oliver of the U.S. District Court for the Northern District of Ohio certified a class of Black customers of the Cleveland Water Department who claimed Cleveland Water did not provide adequate procedural safeguards before terminating their water service.

To trigger the placement of a water lien, a customer must: (1) fall behind on a water bill for at least 180 days; and (2) owe an account balance of $300 or more.

The plaintiffs alleged that customers of Cleveland Water were frequently given extremely high, unjustified water bills, that overdue water bills were converted into tax liens, and that Cleveland Water disproportionately assessed water liens on Black homeowners.

The U.S. Court of Appeals for the Sixth Circuit affirmed the certification of a class of Black customers from Cuyahoga County, Ohio, who alleged that the city of Cleveland assessed more water liens to properties in majority Black neighborhoods than those in majority White neighborhoods.

The key takeaway is the Sixth Circuit held that even plaintiffs who had not suffered economic harm had Article III standing by virtue of their Fair Housing Act claim — which makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."

This claim constituted an injury in fact that has a close relationship to traditional harms.

U.S. Circuit Judge Julia Smith Gibbons concurred. She reiterated a separate point that the district erred as a matter of law when it stated that the city had forfeited its Rule 23(b)(2) challenge, because the burden is on the party seeking certification, and the protections essential to all class actions cannot be forfeited by a defendant who does not represent the interests of putative class members.

McCoy v. Bureau of Alcohol, Tobacco, Firearms and Explosives

In McCoy, teenagers who wanted to buy handguns alleged that Title 18 of the U.S. Code, Section 922(b)(1) — which prohibits the commercial sale of handguns to individuals under the age of 21 — violates the Second Amendment. The U.S. District Court for the Eastern District of Virginia granted summary judgment for the plaintiffs.

After it ruled on the merits, the district court certified a nationwide class. The U.S. Court of Appeals for the Fourth Circuit reversed on June 18.

The key takeaway is that the Fourth Circuit held that the district court's decision to certify the class after granting summary judgment for the plaintiffs was in error, because the district court did not certify the class at "an early practicable time." The Fourth Circuit also reversed the grant of summary judgment.

U.S. Circuit Judge A. Marvin Quattlebaum dissented. He found no error in certifying a class after granting summary judgment here because: (1) It was a Rule 23(b)(2) "mandatory" class with no opt-out rights; (2) the facial constitutional challenge involved no discovery, so certification was at an early practicable time; and (3) both parties moved forward with dispositive motions before the class certification decision.

Trump v. CASA Inc.

In CASA, immigration rights groups and noncitizen expectant mothers brought action for declaratory and injunctive relief against President Donald Trump, federal officials and the U.S., alleging that the president's executive order restricting birthright citizenship violated the Fourteenth Amendment's citizenship clause and the Nationality Act. The U.S. District Court for the Western District of Washington granted a universal preliminary injunction.

The Supreme Court **reversed** on June 27, holding that universal injunctions likely exceed the equitable authority Congress has granted to federal courts. There are statements from the majority, concurrences and a dissent that relate to the Supreme Court's current view on the use of class actions in similar situations.

The majority held that a "properly conducted class action" can only come about through the procedures set out in Rule 23, and that universal injunctions would forge a shortcut that circumvents Rule 23's procedural protections and allow courts to "create de facto class actions at will."

Justices Alito and Thomas filed a concurrence that stated that "[p]utting the kibosh on universal injunctions does nothing to disrupt Rule 23's requirements" and that "Rule 23 may permit the certification of nationwide classes in some discrete scenarios."

They cautioned, however, "district courts should not view today's decision as an invitation to certify nationwide classes without scrupulous adherence to the rigors of Rule 23," or else "the universal injunction will return from the grave under the guise of 'nationwide class relief,' and today's decision will be of little more than minor academic interest."

Justice Kavanaugh filed a concurrence and wrote that:

> [I]n the wake of the Court's decision, plaintiffs who challenge the legality of a new federal statute or executive action and request preliminary injunctive relief may sometimes seek to proceed by class action under Federal Rule of Civil Procedure 23(b)(2) and ask a court to award preliminary relief that may, for example, be statewide, regionwide, or even nationwide.

Justices Sonia Sotomayor, Elena Kagan and Ketanji Brown Jackson dissented. They argued that "nothing in Rule 23 purports to supplant or modify federal courts' equitable authority under the Judiciary Act to grant relief to nonparties," and that "Rule 23 has coexisted with universal injunctions against the Government for decades."

They concluded by stating, "the parents of children covered by the Citizenship Order would be well advised to file promptly class-actions suits and to request temporary injunctive relief for the putative class pending class certification."

Speerly v. General Motors LLC

In Speerly on June 27, the Sixth Circuit **vacated** a U.S. District Court for the Eastern District of Michigan order certifying 26 statewide subclasses with a total of 59 state law claims, on behalf of roughly 800,000 individual car buyers who alleged a defect in certain GM cars that led some cars to shudder or lurch.

The Sixth Circuit found the district court misanalyzed the commonality requirement by finding that whether a defect was material and whether GM had knowledge was a common question.

The circuit court found that by hitching all 59 claims to questions about "defect" and "knowledge" in the abstract, it overlooked that "defect" and "knowledge" have different legal meanings for different causes of action.

The Sixth Circuit vacated and remanded, instructing the district court to conduct an element-by-element analysis that assessed how each question was common by fitting it into each claim. The Sixth Circuit also found error with the district court's predominance analysis.

The circuit court held that an element-by-element comparison of a cause of action to determine whether common questions do, or do not, predominate requires a consideration of all of the elements of each legal claim at the outset. It then explained why individual issues would predominate for each of the causes of action at issue.

For breach of express warranty claims, the Sixth Circuit found that whether the class member brought his or her vehicle in for a repair was a deeply individualized issue. It also found that for breach of implied warranty, whether the defect manifested and, if so, how it manifested were individual issues.

For consumer protection statutes, some states require a product defect manifest before a consumer can bring a lawsuit, and some states require that the consumer actually relied on the merchant's alleged misrepresentation or omission. These, too, are individual inquiries.

For fraudulent concealment claims, reliance again typically creates an insuperable barrier to class certification. The individual question of which class members were subject to a binding arbitration agreement was another individual question.

U.S. Circuit Judge Amul Thapar filed a concurrence to discuss how to analyze standing when the named plaintiffs are injured, but certain class members are not. His approach would be to only require standing of the named plaintiffs, and use Rule 23 to determine whether to certify a class.

U.S. Circuit Judge John Nalbandian filed a concurrence to emphasize that: (1) Courts should not certify classes with members who have not suffered an injury in fact; and (2) a benefit-of-the-bargain theory is inherently speculative, and insufficient to permit Article III standing for class members who never experienced the alleged defect.

U.S. Circuit Judge Karen Nelson Moore filed a dissent, arguing that the majority did no more than conduct an abuse of discretion review.

Mitchell Engel is a partner at Shook Hardy & Bacon LLP.

[1] In re: Broiler Chicken Antitrust Litigation, 133 F.4th 761 (7th Cir. April 1, 2025).

[2] A.A.R.P. v. Trump, 605 U.S. ---, 145 S. Ct. 1364 (U.S. May 16, 2025).

[3] Laboratory Corp. of America Holdings v. Davis, 605 U.S. ---, 145 S. Ct. 1608 (June 5, 2025).

[4] McMahon v. Chipotle Mexican Grill Inc., 2025 WL 1604501 (3d Cir. June 6, 2025).

[5] Pickett v. City of Cleveland, Ohio, 140 F.4th 300 (6th Cir. June 9, 2025).

[6] McCoy v. Bureau of Alcohol, Tobacco, Firearms and Explosives, 140 F.4th 568 (4th Cir. June 18, 2025).

[7] Trump v. CASA Inc., 606 U.S. ---, 2025 WL 1773631 (U.S. June 27 2025).

[8] Speerly v. General Motors LLC, --- F.4th ---, 2025 WL 1775640 (6th Cir. June 27, 2025).

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Del. Challenge To Squarespace Doc Suit Toss Moves Forward

By **Jeff Montgomery**

Law360 (August 14, 2025, 7:23 PM EDT) -- A Delaware vice chancellor on Thursday ordered an October hearing over stockholder exceptions to a posttrial dismissal of a lawsuit for records on Squarespace Inc.'s $7.2 billion take-private deal, following objections that the ruling "would require the court to possess impossible prescience."

Vice Chancellor Paul A. Fioravanti scheduled an Oct. 21 session on the dispute over Senior Magistrate in Chancery Selena E. Molina's decision that Michigan Electrical Employees Pension Fund already has sufficient materials for a probe of Squarespace's go-private agreement with private equity giant Permira Advisers LLC.

The vice chancellor's order is the 11th such exception proceeding initiated in the court this year. The latest, assigned to Vice Chancellor Fioravanti for review on June 18, focuses on the senior magistrate's finding on June 9 that, while the fund had received some materials and demonstrated that it had a proper purpose for its demand, "plaintiff failed to demonstrate entitlement to any additional records" beyond those received.

"In doing so, the senior magistrate applied the wrong legal standard and ignored applicable precedent," the union said in its notice of exceptions and comments regarding what the senior magistrate described as the "necessary and essential inquiry" needed to advance a reasonably conceivable claim in subsequent litigation.

"The senior magistrate's standard would require the court to possess impossible prescience and issue advisory opinions — with potential preclusive effects in future plenary litigation — predetermining whether sufficient factual support exists for pleadings to survive," the exceptions notice said.

Counsel for the union argued without success before the ruling that the fund was entitled to documents involving "critical events" in the deal process if formal board minutes were unavailable.

Included among the targeted documents were communications in which founder and CEO Anthony Casalena was described as "potentially steering the transaction and taking control of the transaction in ways that are possibly improper and give rise to us suspecting possible wrongdoing,"

The exceptions notice asserted that the senior magistrate "disregarded the company's lack of contemporaneous meetings, minimized inconsistencies" and imposed an "unprecedented and untenable requirement" that the union must show how Casalena's early communications "infected" the process.

"Essentially, the senior magistrate determined that plaintiff was required to show that wrongdoing occurred before plaintiff could be permitted access to Squarespace's informal materials, which is contrary to Delaware law that precludes any merits-based assessment in a Section 220 proceeding," the notice said.

Senior Magistrate Molina observed in her decision that she rejected a request by attorneys for Squarespace seeking consideration before the ruling of recent amendments to Delaware's General Corporation Law — enacted in March — that further limit some corporate document access.

S.B. 21 amended the reach of Section 220, governing access to company books and records.

Narrowed or excluded was access to emails, text messages or informal communications, while the bill also imposed a three-year look-back window and required that record-seekers must show proper purpose and "reasonable" detail regarding the reason for the request.

"The demand in this action was served before the retroactive effective date of the S.B. 21 amendments," the senior magistrate wrote. "The defendant did ask me, however, to look to those amendments as an indication of the state's current public policy. I find that would be inappropriate."

Counsel for the stockholders and Squarespace did not immediately respond to a request for comment Thursday.

Lawrence A. Hamermesh, professor emeritus and the former Ruby R. Vale professor of corporate and business law at Widener University Delaware Law School, told Law360 on Thursday that, "in terms of how these exceptions stack up in complexity, I've always thought that they track the complexity of appeals to the Delaware Supreme Court. In other words, they vary."

"But I'll file this in the list of reasons why S.B. 21 was necessary to make 220 proceedings as 'summary' as the statute contemplated," he added.

The Michigan Electrical Employees' Pension Fund is represented by Daniel E. Meyer of Bernstein Litowitz Berger & Grossmann LLP, and Eric L. Zagar, J. Daniel Albert, Grant D. Goodhart and Michael W. McCutcheon of Kessler Topaz Meltzer & Check LLP.

Squarespace is represented by Joseph O. Larkin, Arthur R. Bookout, Lauren N. Rosenello and Jacqueline M. Dakin of Skadden Arps Slate Meagher & Flom LLP.

The case is Michigan Electrical Employees' Pension Fund v. Squarespace Inc., case number 2024-1041, in the Court of Chancery of the State of Delaware.

--Editing by Melissa Treolo.