

Securities

J&J Eyes Supreme Court After Investor Suit Class Status Upheld

Oct. 8, 2025, 1:01 PM PDT

Johnson & Johnson failed to convince an appellate court to reconsider its sustaining of an investor class in a lawsuit tied to statements about the safety of its talc products.

The US Court of Appeals for the Third Circuit on Tuesday denied J&J's petition for a rehearing by the panel and the court en banc, potentially setting up a US Supreme Court bid by J&J as appellate courts around the country grapple with challenges to shareholder class status.

Three of the twelve judges—including Judge Cindy K. Chung, who'd dissented on the Third Circuit's not-precedential decision retaining the investor class—indicated that they would have granted J&J's petition for a rehearing by the court en banc.

"Johnson & Johnson made truthful and fulsome statements regarding the safety of its talc powder products, will continue to vigorously litigate cases that challenge those statements and are evaluating whether to appeal the panel's decision to the Supreme Court," said J&J Worldwide Vice President of Litigation Erik Haas in an email.

The lower court certified a class of those who purchased J&J stock from Feb. 22, 2013, through Dec. 13, 2018. But J&J argued it had successfully rebutted a presumption that shareholders relied on J&J's representations of its products when purchasing stock, invoking the Supreme Court's 2021 ruling regarding Goldman Sachs Group Inc. and a later Second Circuit decision dismantling a class of its investors.

Two of three appellate judges who heard J&J's appeal decided that unlike in Goldman's case, "there is no mismatch between the subject of the alleged misrepresentation and the content of the disclosures. Therefore, market reaction to the disclosures is capable of shedding light on the price impact of the alleged misrepresentations."

Questions Accumulate

The Supreme Court in *Goldman* said a defendant can rebut a presumption that a class of shareholders relied on the company's stock price by showing that the alleged misrepresentation didn't actually affect the stock's price in types of cases where the investors are arguing certain statements kept the share prices afloat. Defendants can rebut the presumption by demonstrating a mismatch between the purported generic misstatements and later disclosures that allegedly reveal the misrepresentations and spur selloffs.

Goldman questions have since popped up in courts around the country. The Ninth Circuit recently sustained a Zillow Group Inc. investor class after finding the real estate website failed to demonstrate such a mismatch between statements related to its home-flipping business.

Chung, in her dissent, said she would have vacated and remanded for further review in J&J's case, "since, for many of the alleged disclosures, the District Court did not assess evidence introduced by J&J showing that the disclosures did not contain newly public information and were not corrective."

Carella Byrne Cecchi Olstein Brody & Agnello PC and Robbins Geller Rudman & Dowd LLP represent the shareholder leading the case, the San Diego County Employees Retirement Association. Sidley Austin LLP represents J&J.

The case is San Diego Cty. Emp. Retirement Ass'n v. Johnson & Johnson , 3d Cir., No. 24-01409, 10/7/25 .

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2nd Circuit revives Abengoa accounting fraud suit

2025 SECDBRF 3675 • By Nicole Banas

WESTLAW Securities Enforcement & Litigation Daily Briefing • October 08, 2025

(October 08, 2025) - Investors in Abengoa SA have persuaded a federal appeals court to reinstate part of their lawsuit alleging the Spanish engineering company concealed a "massive accounting scheme" that forced it into bankruptcy.

Sherman et al. v. Abengoa SA et al., No. 22-2438, 2025 WL 2825369 (2d Cir. Oct. 6, 2025).

A panel of the 2nd U.S. Circuit Court of Appeals on Oct. 6 vacated the dismissal of claims related to Abengoa's 2013 initial public offering, saying a New York federal judge erroneously determined that they were time-barred.

The lower court also should have given more weight to statements by the investors' confidential witnesses and allegations from criminal proceedings in Spain, the panel said.

'Cash crisis' obscured

Investors sued Abengoa in the U.S. District Court for the Southern District of New York in 2015, alleging the company and former executives engaged in a widespread accounting fraud to hide its deteriorating financial condition from the public.

Abengoa allegedly used a dual bookkeeping system to hide the true costs of projects, and it engaged in deceptive accounting practices to hide losses and recognize revenues prematurely, according to the investors' third amended complaint.

News of the company's "cash crisis" emerged in August 2015, and it filed for bankruptcy protection in Spain later that year, the suit says. The accounting issues also led to criminal and civil allegations against Abengoa in Spain, the complaint says.

Investors claim that the registration statement for Abengoa's IPO of American depositary receipts in October 2013 contained false and misleading statements, in violation of Section 11 of the Securities Act of 1933, [15 U.S.C.A. § 77k](#).

Abengoa also violated the anti-fraud provision in Section 10(b) of the Securities Exchange Act of 1934, [15 U.S.C.A. § 78j\(b\)](#), the suit says.

Former Abengoa CEO Manuel Sanchez Ortega is also a defendant in the suit, along with HSBC Securities (USA) Inc. and other investment banks that underwrote the IPO.

After an initial dismissal in 2020, the District Court tossed the suit without leave to amend in 2022. [Francisco v. Abengoa SA](#), 624 F. Supp. 3d 365 (S.D.N.Y. 2022).

U.S. District Judge Edgardo Ramos ruled that the Securities Act claims were barred by the one-year statute of limitations. Disclosures made by Abengoa in November 2014 about misclassified debt provided "storm warnings" that should have triggered the investors' duty to investigate, the judge said.

He also concluded that confidential statements in the complaint from former Abengoa employees were not specific enough and that allegations taken from Spanish criminal proceedings could not be assumed to be true.

Some claims revived

Lead plaintiffs Jesse and Arlette Sherman appealed, and the 2nd Circuit reinstated the Securities Act claims against Abengoa, Ortega and the underwriters. The company's disclosures in November 2014 did not relate directly to the "core allegations" that the IPO registration statement had misrepresented the company's accounting practices, U.S. Circuit Judge Richard J. Sullivan wrote for the panel.

The true storm warning occurred Aug. 3, 2015, when Abengoa announced a massive capital increase and asset divestiture, Judge Sullivan said. The plaintiffs timely filed suit less than one year later, he added.

The panel also found that the suit sufficiently pleaded material misrepresentations in the IPO registration statement about Abengoa's accounting practices.

The District Court erred by disregarding confidential witness statements and allegations from Spanish court proceedings, both of which were detailed, nonconclusory and independently corroborated, the panel said.

The 2nd Circuit also reinstated the Exchange Act claims against Abengoa, saying the suit was "replete with allegations" that executives deliberately misrepresented the company's financial position.

However, the panel upheld the dismissal of an Exchange Act claim against Ortega, saying that allegations related to his resignation in 2015 did not raise a strong inference of deceptive intent.

Andrew S. Love of [Robbins Geller Rudman & Dowd LLP](#) and Nicholas I. Porritt of [Levi & Korsinsky LLP](#) represent the appellants.

Attorneys at [DLA Piper LLP](#) represent Abengoa. Attorneys at [Paul, Weiss, Rifkind, Wharton & Garrison LLP](#) represent the underwriters.

By Nicole Banas

Related articles

Related Articles from Westlaw Securities Enforcement & Litigation Daily Briefing:

Article: Spanish green tech firm investors update securities fraud suit [2016 SECDBRF 0510](#)

Date: August 5, 2016

Abengoa SA investors have updated allegations that the now-bankrupt Spanish renewable energy firm lied about its financial stability days before unveiling a plan to raise millions of dollars in capital.

End of Document

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[Reply brief: 2023 WL 2859500](#)

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[Abengoa's brief: 2023 WL 2570101](#)

[Appellants' opening brief: 2022 WL 17751327](#)

[Judicial profiles](#)

[Debra Ann Livingston](#), U.S. Circuit Judge, 2d Cir.

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[Andrew S. Love](#); [Robbins Geller Rudman & Dowd](#), [Nicholas I. Porritt](#) and [Adam M. Apton](#); [Levi & Korsinsky](#) for Plaintiffs-appellants

[Jeffrey D. Rotenberg](#); [Clark Smith Villazor](#), [Richard F. Hans](#) and [Marc A. Silverman](#); [DLA Piper](#) for Appellee (Abengoa)

[Kannon K. Shanmugam](#); [Paul, Weiss, Rifkind, Wharton & Garrison](#) for Appellees (Underwriters)

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Judges decide which evidence can be suppressed in FirstEnergy cases

 [beaconjournal.com/story/news/courts/2025/10/08/judges-decide-which-evidence-can-be-suppressed-in-firstenergy-cases/86565079007](https://www.beaconjournal.com/story/news/courts/2025/10/08/judges-decide-which-evidence-can-be-suppressed-in-firstenergy-cases/86565079007)

Patrick Williams

October 8, 2025



COURTS

Judges set some ground rules for evidence in HB 6 cases involving FirstEnergy Corp.

[Patrick Williams](#)

Akron Beacon Journal

Developments in Ohio House Bill 6-related court cases over the past several days reveal aspects of how the cases will be handled moving forward.

Three U.S. Sixth Circuit Court of Appeals judges ruled Oct. 3 that Akron-based [FirstEnergy](#) does not need to release the results of internal investigations that began in 2020.

And in the criminal case of former FirstEnergy executives Chuck Jones and Michael Dowling, the judge ordered Oct. 6 that certain evidence not be provided or elicited through questioning of witnesses. Prosecutors and defense attorneys agreed with the approach of

avoiding the subjects, including the indictments of a former Ohio House speaker and former top state utility regulator, according to the judge's order.

WKYC Channel 3 - Cleveland: Matt Borges, the former chairman of the Ohio Republican Party who was convicted for his role in the \$60 million bribery scheme involving FirstEnergy and House Bill 6, has been released from prison after serving less than half of his five-year sentence.

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October 9, 2025

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Oct. 9, 2025, 10:24 AM PDT

WKYC Channel 3 - Cleveland

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Matt Borges, the former chairman of the Ohio Republican Party who was convicted for his role in the \$60 million bribery scheme involving FirstEnergy and House Bill 6, has been released from prison after serving less than half of his five-year sentence.

[Former Ohio GOP Chair Matt Borges, convicted in \\$60M FirstEnergy bribery scheme, gets early release from prison](#)



Sent via Newswhip.

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Securities

Alto Neuroscience Board Sued Over Study Result, 70% Stock Drop

Oct. 8, 2025, 11:21 AM PDT

Alto Neuroscience Inc. top officers and board members overhyped its antidepressant candidate before the biopharmaceutical company released disappointing trial results and had a 70% stock drop, a shareholder lawsuit said.

Alto's initial public offering paperwork overstated the effectiveness and prospects for a major depressive disorder drug, ALTO-100. The company continued misleading shareholders about its abilities to treat MDD for almost another nine months, said the shareholder derivative complaint filed Tuesday in the US District Court for the Northern District of California.

Alto then said on Oct. 22, 2024, that ALTO-100 didn't "demonstrate a statistically significant improvement in depressive symptoms compared to placebo" in topline results from an MDD patient study. The company's stock price plummeted 70% the next day to close at \$4.36—then its steepest one-day slide since its \$16-a-share IPO, according to data compiled by Bloomberg.

Plaintiff-shareholder Charles Knipper contends current and former board members and executives hurt Alto's reputation and wallet by having it mislead investors about ALTO-100. He alleges wrongdoing from the Feb. 2, 2024, IPO through Oct. 22, 2024.

His complaint echoes an investor's proposed class action filed in July, and is the second Alto shareholder derivative action filed in this court tied to these allegations.



The company is currently studying ALTO-100 as a potential adjunctive treatment for bipolar depression, with topline data expected in 2026. Following the October 2024 announcement, Alto said in November that it didn't "currently intend to advance ALTO-100 in MDD." It's evaluating other potential therapies for major depressive disorder.

Knipper alleged breach of fiduciary duties, aiding and abetting of breaches, unjust enrichment, and waste of corporate assets by all the defendants, including CEO Amit Etkin and Chief Financial Officer Nick Smith. He alleged a Securities Exchange Act of 1934 violation by nine current and former brass who are targeted alongside Alto in the proposed securities class action.

Rigrodsky Law PA and Grabar Law Office represent Knipper.

Neither Alto nor Cooley LLP, which represents the company and leadership in the related shareholder litigation, immediately responded to emails seeking comment.

The case is Knipper v. Etkin , N.D. Cal., No. 5:25-cv-08555, complaint filed 10/7/25 .

Securities

Digimarc Leaders Hid Large-Customer Re-Up Woes, Investor Says

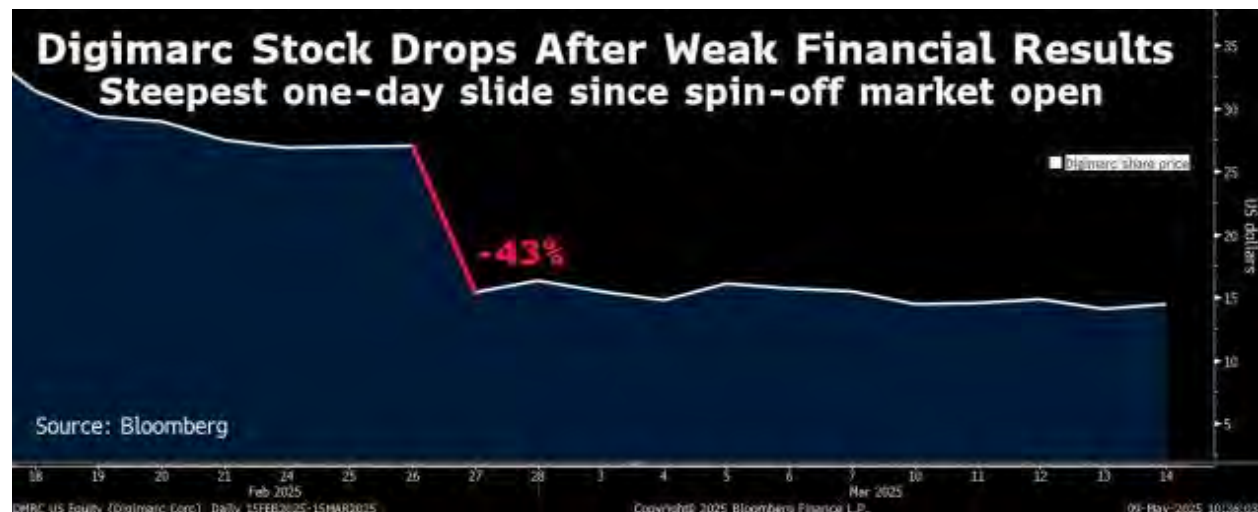
Oct. 8, 2025, 9:38 AM PDT

Digimarc Corp. directors and top executives are responsible for misrepresentations that led to a surprise revenue dip and a record 43% stock selloff, an investor alleges.

The digital watermarking company's leadership harmed the business by concealing a major customer's contract renegotiation, Lisa Chadwick says in a derivative suit filed Tuesday in the US District Court for the District of Oregon. Digimarc faces legal defense costs and potential liability in a proposed class action; the costs of improving its controls; and a loss of reputation and goodwill, Chadwick says.

The company has already overpaid to repurchase its stock at artificially inflated prices, she says.

The allegations echo those in the proposed class action in the same district, in which investors said share prices plummeted more than 43% Feb. 27, the day after Digimarc said annual recurring revenue fell to \$20 million in 2024 compared to \$22.3 million the year prior. It was the stock's steepest single-day fall since it started trading as a spinoff from a predecessor Digimarc company in October 2008, according to data compiled by Bloomberg.



Chadwick, whose derivative suit is at least the second over the issue, brings claims for securities fraud, breach of fiduciary duties, unjust enrichment, and waste of corporate assets. She seeks compensatory and punitive damages as well as internal corporate reforms.

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

Rigrodsky Law PA and the Grabar Law Office represents Chadwick.

The case is Chadwick v. McCormack , D. Or., No. 3:25-cv-01838, complaint 10/7/25 .

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Securities

Blue Bell Bid to Exit Outbreak Claims Baffles Delaware Judge (1)

Oct. 8, 2025, 10:55 AM PDT

Blue Bell Creameries frustrated a Delaware Chancery Court judge Wednesday by arguing a \$60 million settlement in 2020 over a deadly listeria outbreak released its top-level holding company from pending claims in a separate lawsuit.

The case produced a landmark Delaware Supreme Court opinion in 2019 on corporate oversight claims that's "spawned a million CLE panel discussions" but otherwise has proceeded fitfully through unusual moves by the Blue Bell Creameries USA Inc. board's special litigation committee, said Vice Chancellor Nathan A. Cook. He was considering a motion to end the lawsuit before a February trial, but he ultimately adjourned the hearing without ruling on Blue Bell's motion.

Cook asked an attorney for the board why, in the last five years, no one had brought to the court's attention that the settlement in related shareholder litigation might have effectively ended the case brought by shareholder Jack L. Marchand II—now continued by his estate.

Had he been the judge overseeing the settlement, "I'd have wanted someone to tell me, 'What you are doing is releasing and in effect settling the *Marchand* case,'" Cook said.

"If they wanted to settle a separate action—eviscerate it, moot it—then that needs to be brought to the attention of the court," he said. "It's not referenced anywhere."

The intent of the settlement "was a general release," said Srinivas Raju of Richards, Layton & Finger PA, representing ex-CEO Paul Kruse.

The board's argument that the holding company has already been released from shareholder claims developed as it began responding to the Marchand estate's revived claims in 2024, Raju said.

All the harms alleged in the *Marchand* complaint—a nationwide ice cream recall, mass layoffs, a liquidity crisis, decreased value and dilution from outside financing—describe harm to Blue Bell Creameries LP, the operating company, but not the holding company, Raju said. "The holding company doesn't make anything. It doesn't sell anything. It has no employees," he said.

The LP's release in the settlement precludes the *Marchand* claims from proceeding, Raju said. But the Marchand estate's attorney, Robert Kriner Jr. of Chemicles Schwartz Kriner & Donaldson-Smith LLP, disagreed that the settlement mooted the pending lawsuit.

"That the court would accept release of *Marchand* claims without any mention of them in the settlement, that interpretation is absurd," Kriner said.

The 2015 outbreak that killed three Blue Bell ice cream consumers resulted in federal criminal charges against Kruse, who pleaded guilty to a misdemeanor and paid a fine.

After the high court decision that lowered the hurdles for investors pursuing lack-of-oversight claims, the case eventually resumed in Chancery Court, where the board now seeks to end the long-running dispute. The board argues the lawsuit attempts to re-litigate claims covered by the settlement.

Between the high court's decision and Wednesday's hearing, after a years-long lapse in activity, the board's special litigation committee took the rare step of moving to take over the shareholder's claims and litigate them. Then, in an even more unusual move, the committee delivered the case back to the shareholder's estate to continue.

No attorneys representing the committee appeared at the hearing in Wilmington, Del. Cook invited, but did not order, submissions "if folks would like to advise me of a position or argument" from the committee on the board's motion for judgment on the pleadings. "I don't know if that impacts the outcome or not," he said.

Cook wanted to explore the briefs and the wording of the final order issued in the 2020 settlement, occasionally reading from the papers in front of him. He became frustrated when Raju verbally delved into transactional details that he said would illustrate which entity experienced dilution, but weren't included in Blue Bell's briefs.

"It would have been easier if folks had put it in writing ahead of time so I could read it and think it through," Cook said. "I have a lot of questions about the release."

Other board members are represented by Young Conaway Stargatt & Taylor LLP, Morris James LLP, Greenberg Traurig LLP, Schertler Onorato Mead & Sears LLP, R. McConnell Group PLLC, and Flood & Flood.

The case is *Marchand v. Barnhill*, Del. Ch., No. 2017-0586, oral arguments 10/8/25 .

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Securities

Robinhood Fails to Persuade Full Ninth Circuit to Take IPO Case

Oct. 8, 2025, 3:51 PM PDT

Robinhood Markets Inc. won't get the full Ninth Circuit to hear its challenge to an investor suit over the trading platform company's initial public offering, the appeals court said Wednesday.

The rejection by the US Court of Appeals for the Ninth Circuit—after a three-judge panel of the court widened a circuit split—sets the stage for a possible US Supreme Court petition if Robinhood is inclined to pursue its fight over the standards to sue over disclosures in IPO registration and prospectus documents. The case could interest the high court, attorneys have said.

Robinhood didn't immediately respond to a request for comment about the case and its next steps.

The 2-1 panel that decided to revive the investors' case divided along the same lines in voting to deny rehearing by the full court, and no judge of the full court requested a vote, the Ninth Circuit said.

The panel's majority said Aug. 29 that changes in Robinhood's financial metrics merely needed to be "material" to prompt updated disclosures in registration and prospectus documents filed before the IPO. The ruling reinstated a proposed class action alleging nondisclosure of trading trends following the meme stock craze of early 2021.

The appeals court rejected a First Circuit standard requiring intra-quarter disclosures from companies headed toward IPOs only when there's been an "extreme departure" from historical results.

An attorney for the investors at Scott & Scott Attorneys at Law LLP wasn't immediately available for comment.

The petition for rehearing en banc was submitted by Cravath, Swaine & Moore LLP and Conrad Melitzky Kane LLP, representing Robinhood and members of its leadership, and Orrick, Herrington & Sutcliffe LLP, representing underwriters.

The case is *Sodha v. Golubowski*, 9th Cir., No. 24-1036, 10/8/25.

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Class Action

Manage Newsletters

Semtech, CEO Must Battle Investor's Copper Cable Sales Suit (1)

Oct. 9, 2025, 6:07 AM PDT; Updated: Oct. 9, 2025, 9:58 AM PDT

Summary by Bloomberg AI

AI Generated



- Semtech Corp. must defend against investor allegations it overhyped its active copper cable technology's market opportunity after reports Nvidia Corp. wasn't developing a certain rack-scale configuration for computing processes.
- A judge said the company's debt position and a tight timeline of key events supported a sufficient inference of its top executive's intent or recklessness to deceive investors.
- The investor leading the case sufficiently pleaded that two of CEO Hong Q. Hou's assurances about CopperEdge net sales were false when made on a November 2024 earnings call, allowing the case to move forward, though only in part.

Semtech Corp. must defend against investor allegations it overhyped its active copper cable technology's market opportunity after reports Nvidia Corp. wasn't developing a certain rack-scale configuration for computing processes that might have utilized the semiconductor company's product.

The company's debt position after a prior acquisition coupled with a tight timeline of key events supported a sufficient inference of its top executive's intent or recklessness to deceive investors, Judge Mark C. Scarsi said. That November 2024 through February 2025 timeline included earnings call statements touting its CopperEdge technology's net sales expectations, the sudden resignation of a longtime board member, a stock offering that "promised to make Semtech millions of dollars," and a financial filing ultimately disclosing a disappointing sales outlook for those products.

The investor leading the case sufficiently pleaded two of CEO Hong Q. Hou's assurances that CopperEdge net sales would exceed a previously-announced "floor case" estimate were false when made on a November 2024 earnings call. Hou's statements purported rack architecture requiring ACC technology "was still viable, so CopperEdge's market opportunity was unchanged," the US District Court for the Central District of California judge said, allowing the case to move forward, though only in part.

That floor case of \$50 million in sales was crafted by Semtech's prior CEO, Paul Pickle, in June 2024 in response to Nvidia's March announcement of rack-scale configuration offerings, which at the time included architecture in which CopperEdge products could potentially be used, investor Luis Collazos' complaint said.

But an analyst report released in October, later corroborated by other analysts, had already said Nvidia, the leading designer of graphics processing units, was halting development of that rack-scale configuration. Three end users for Nvidia's offerings—Oracle Corp., Amazon, and Microsoft Corp.—had said that they'd use other configurations, reducing Semtech's potential market for CopperEdge and supporting the allegation that Hou's November statements were false when made, Scarsi said.

The conclusion of falsity "is further supported by the allegation that Rockell Hankin, a Semtech board member of 27 years, 18 of which he spent as chairman, abruptly resigned after the earnings call," said the order entered into the docket Wednesday.



Still, Scarsi deemed most of the complaint's alleged misstatements were not actionable, partially dismissing the lawsuit. Demand and sales projections on the November earnings call were forward-looking. And Collazos didn't identify the "maker" of statements in third-party analyst reports.

Three months later, the semiconductor supplier revealed after market hours in a Feb. 7 financial filing that it expected CopperEdge's net sales to be lower than its prior \$50 million floor-case estimate, citing unspecified rack architecture changes, and the change came from "feedback from a server rack customer."

Semtech's stock price plunged 31% to close at \$37.60 the next trading day, Feb. 10—its sharpest one-day fall since 1993, according to data compiled by Bloomberg.

Collazos' proposed class aims to include those who acquired Semtech stock from Oct. 10, 2024, through Feb. 7, 2025.

Block & Leviton LLP represents Collazos. Sidley Austin LLP represents Semtech, Hou, and its chief financial officer. Neither of these law firms nor Semtech immediately responded to messages seeking comment.

The case is *In re Semtech Corp. Sec. Litig.*, C.D. Cal., No. 2:25-cv-01474, 10/8/25 .

(Updates with additional reporting throughout.)

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Securities

Enovix Nixes Investor Claims Over Battery Factory Equipment

Oct. 8, 2025, 12:11 PM PDT

Enovix Corp. convinced a federal judge to reverse course and trim some misrepresentation allegations from a proposed class action by stockholders over the battery producer's first commercial manufacturing plant in light of new information.

Judge Susan Illston granted the Enovix's motion for partial judgment Tuesday in the US District Court for the Northern District of California, dismissing with prejudice claims linked to two statements by the company's chief executive plaintiffs cited in the lawsuit after considering contextual information the company provided.

The ruling leaves claims linked to one other statement at issue in the investors' proposed class action, which alleges top Enovix executives secretly decided to waive a requirement for equipment from China to pass factory acceptance testing, or FAT, while the company was pursuing a blank-check merger to go public in 2021.

Shipping the equipment allegedly allowed Enovix to tout manufacturing equipment was being installed at the Fremont, Calif., plant before a shareholder vote on the merger.

Illston had previously ruled investors claims sufficiently alleged the battery maker misrepresented the outsourced equipment as having passed FAT before being shipped from China.

But the judge changed course after Enovix raised points the investors omitted.

One of the shareholders' allegations citing an August 2021 statement from former CEO Harrold Rust omitted both an analyst's question and much of the context of his response, obscuring that it only concerned Enovix's proprietary equipment, Illston said.

"What has become clearer with the full context is that not every reference to 'equipment' by defendants was a reference to the" outsourced equipment, Illston said.

Rust wasn't additionally required to disclose in that moment that the equipment from China failed the FAT, she said.

And Rust's statement in September 2021 that "qualifying" was "going on quite well" wasn't referring to FAT, Illston said, as the testing he referred to would've occurred after the equipment was installed at the Fremont plant. FAT for the outsourced equipment would've been done at the vendor's facility before shipping.

Rust's assertion wasn't "misleading for failing to affirmatively state" that the outsourced equipment "had, prior to late April 2021, failed the FAT."

"We appreciate the Court's thoughtful opinion and look forward to defeating the sole remaining claim," said Emily Kapur, one of the Quinn Emanuel Urquhart & Sullivan LLP attorneys representing Enovix as well as its current and former executives and board members.

Enovix announced on Oct. 3, 2023, it was abandoning commercial production operations at the facility. The investors' suit alleges a stock drop following that announcement and other revelations about the factory's progress before then hindered share prices.

The plaintiffs are seeking certification for a class of those who obtained Enovix stock from Aug. 11, 2021, through Oct. 2, 2023

Investors' attorneys didn't immediately respond to requests for comment.

The Rosen Law Firm PA and Rolnick Kramer Sadighi LLP represent the stockholders leading the case.

The case is In Re Enovix Corp. Sec. Litig. , N.D. Cal., No. 3:23-cv-00071, order filed 10/7/25 .

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Chasing Down Old Nazis in New York Court: Suit Against Volkswagen Controlling Shareholders and Key Managers Over Massive Clean Diesel Fraud

 [nakedcapitalism.com/2025/10/chasing-down-old-nazis-in-new-york-court-suit-against-volkswagen-controlling-shareholders-and-key-managers-over-massive-clean-diesel-fraud.html](https://www.nakedcapitalism.com/2025/10/chasing-down-old-nazis-in-new-york-court-suit-against-volkswagen-controlling-shareholders-and-key-managers-over-massive-clean-diesel-fraud.html)

Yves Smith

October 1, 2025

In a bit of “sentence first, verdict afterwards,” perhaps we should start by explaining the apparent violation of Godwin’s Rule in the headline, as in starting with a mention of Nazis early on. We’re featuring the pleading below not just out of salacious interest but because it is also a vignette of what an uphill legal battle it is to bring miscreant boards and executives to account.

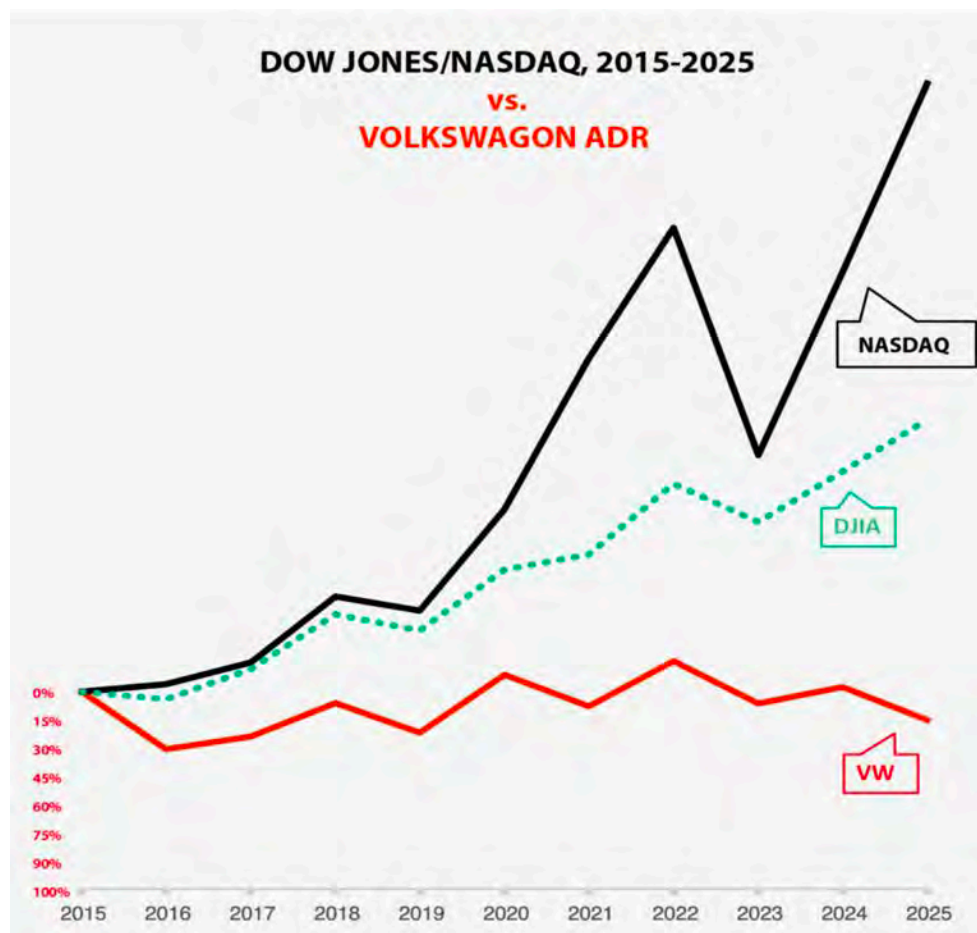
The case at issue is *Lambinet v. Pötsch*, which is a derivative suit on behalf of Volkswagen shareholders against the controlling shareholders and some of their minions over the so-called Volkswagen “clean diesel” scandal, in which Volkswagen systematically installed equipment in US diesel vehicles to show they were meeting diesel emission standards when they were in fact not. [An overview from Wikipedia](#):

The Volkswagen emissions scandal, sometimes known as Dieselgate or Emissionsgate, began in September 2015, when the United States Environmental Protection Agency (EPA) issued a notice of violation of the Clean Air Act to German automaker Volkswagen Group. The agency had found that Volkswagen had intentionally programmed turbocharged direct injection (TDI) diesel engines to activate their emissions controls only during laboratory emissions testing, which caused the vehicles’ NOx output to meet US standards during regulatory testing. However, the vehicles emitted up to 40 times more NOx in real-world driving. Volkswagen deployed this software in about 11 million cars worldwide, including 500,000 in the United States, in model years 2009 through 2015.

And much further down, from the section on legal actions in the US:

By June 2020, VW had already expended \$33.3 billion in settlements and other costs including buybacks of the excessively polluting diesel vehicles.

You can see why shareholders might be unhappy. The filing shows the damage done:



So why the invocation of Nazis, which you will see in the filing below? Isn't that a bit ad hominem for a serious case?

Wellie, it turns out the defendants tried smearing plaintiff's counsel, an indignity often suffered by contingency fee lawyers. The attorneys in this case are the core team, Michelle Lerach and, Albert Chang, no doubt with input from [the formidable if controversial former litigator Bill Lerach](#). Regular readers will know them from the Jarndyce and Jarndyce of of public pension fund litigation, the Kentucky Retirement Systems case against private equity kingpink KKR & Blackstone, and their executives.

The denigration opened the door for a response in kind:

Equally misguided is Defendants' attack on Plaintiffs' counsel and their prosecution of this case. The Controlling Shareholders are descendants of VWAG co-founders (Anton Piëch and Ferdinand Porsche) who built and ran VWAG as an armaments factory for the Third Reich, using forced laborers confined in concentration camps on the Wolfsburg property. ¶126 & n.7. Thousands died at the hands of SS guards. Perpetuating a corporate culture built on this Nazi past, the Controlling Shareholders ran VWAG "through 'a reign of terror'" and "'by fear and intimidation.'" ¶¶72, 287. This corrupt culture led to the Clean-Diesel Scheme and defrauded regulators and car-buyers. While VWAG paid tens of billions in fines and settlements, the Controlling Shareholders and other Defendants have not paid absingle penny for the harm they have caused. By this derivative action, Plaintiffs seek to hold these wayward fiduciaries to account.

Because the filing below focuses on legal/procedural issues as opposed to the merits of the case, we'll be so bold as to put on our amateur lawyer hat and attempt to pick apart the major areas of dispute. As indicated above, even if you don't fully grasp the fine points, this filing is worth a skim because it illustrates how thorny the legal arguments are when trying to make the supposed grownups in the room who were either wildly negligent or in on the con personally responsible for the bad results.

Keep in mind that what is in the trade called "motions practice," as in throwing out lots of procedural arguments, can be an effective defense strategy even if the defendants in the end lose on all of them. Delay favors the defendant. Memories of key witness fade and if the defense is really lucky, they might even die.

To get up to speed on the misconduct, go first to the Background section, which starts on PDF page 20/numbered page 6.

Below are some of the legal issues:

The use of a derivative suit. In derivative suit, shareholders step up to assert rights that normally belong to the corporation which it has failed to exercise for its, and derivatively, the shareholders' benefit. Often in this type of action (it depends on the jurisdiction, among other things), the plaintiffs have to demonstrate "demand futility" as in their either tried to get the inert executives or board to shape up and fly right, or it would be pointless even to try. The recap of the Plaintiffs' argument from the filing below:

The Complaint is replete with particularized allegations of domination and control by the Controlling Shareholders. Their voting-rights abuses are detailed in Plaintiffs' motions to strike the Nottebaum and Bopp Affidavits. VWAG's corrupt culture—present from its founding in Nazi Germany—allowed the Controlling Shareholders to orchestrate the Clean-Diesel Scheme and the subsequent cover-up. Using their voting control, they devised the purported "Settlement" to absolve themselves of liability. That tainted Settlement does not bar Plaintiffs' claims, but instead supports a finding that demand on the Board is futile.

But Demand is futile not only because the Controlling Shareholders control the Board; their misconduct—causing the "worst industrial scandal" in history (¶¶64, 94)—is egregious on its face.

Pinning the conduct of the four American subsidiaries on the parent company. This leg of the argument is key to hauling the Controlling Shareholders and key executives before the court. From the filing:

Applying the traditional, lower standard to §1315, AirTran holds that a subsidiary's business activities can be imputed to a parent to determine whether the parent is "doing business" in New York. *Id.* at 218. In finding an agency relationship between the subsidiary and the parent, AirTran considers several factors, including that the parent (1) provides the subsidiary with operating capital and insurance coverage, (2) services the subsidiary's debts, and (3) derives 70% of its annual revenues from the subsidiary's operations. *Id.* at 210. Based on these facts, the subsidiary's New York activities are imputed to the parent supporting a finding that the parent is "doing business in [New York.]" *Id.* at 220.

Under AirTran, VWAG is "doing business in this state" through its wholly owned subsidiaries, including VWGoA, VWGoAF, AudiAmerica, and PorscheAmerica. ¶¶131–136. As Plaintiffs' accounting expert explains, VWAG "a holding company ... that operates ... in large part via controlled (and often 100% owned) subsidiaries." *GalesAff.* ¶4. VWAG's subsidiaries operate as "divisions" of the "Volkswagen Group." *Id.* ¶19. The Volkswagen Group issues a single "consolidated financial statement" and "presents the assets, liabilities, income, revenue, expenses, and cash flows of these consolidated, controlled entities as a unified legal and economic entity." *Id.* ¶26. Just like the subsidiary in AirTran, the New York activities of VWAG's subsidiaries must be imputed to VWAG for purposes of §1317.

The defendants argued, citing a single Federal case, that a different standard applies. The filing below was dismissive of a Federal court interpreting state law.

Suing a German company in New York court. One of the defendants' arguments is that German law on derivative cases, and not New York law, applies. The pleading below covers at length how New York, by statute, makes companies doing business in New York subject to New York law, and so can be hauled into New York court. The legislature even added to the statute to confirm that parties outside New York could sue companies doing business in New York in the state. This is fundamental to New York's status as a commercial and financial center, that among other things, parties who operate in or through New York can avail themselves of strong securities and contract law protections.

This argument crops up in the case via the discussion of the "internal affairs doctrine". Open Casebook discusses [why this matter is often contested](#):

The "internal affairs doctrine" is a choice of law rule that applies the law of the state of incorporation to the corporation's "internal affairs."

While many in the U.S. treat the internal affairs doctrine as self-evident, other countries frequently insist on applying their corporate law to all corporations that have their headquarters in that country, or some other substantial connection to that country. Such insistence on a substantial connection is no stranger to U.S. choice of law. In fact, for most contracts, U.S. courts generally refuse to apply "[t]he law of the state chosen by the parties to govern their contractual rights and duties" if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice," see Restatement of the Law (2nd) Conflict of Laws § 187(2)(a). U.S. courts will, however, enforce any chosen state's corporate law under the internal affairs doctrine.

The plaintiffs contend:

In asserting German exclusivity and supremacy, Defendants ignore precedents precluding foreign law from divesting New York courts of jurisdiction, and they have no answer to BCL's [New York's Business Corporation Law] statutory conferrals of jurisdiction:

- Subject-matter jurisdiction exists because VWAG is a foreign corporation doing business in New York under Article 13, under which even non- residents may sue foreign corporations (§1314);
- §1317 subjects VWAG's Supervisors and Officers to §720 liability "to the same extent as directors and officers of a domestic corporation[,]" and such liability may be enforced in "the courts in this state, in the same manner as in the case of a domestic corporation;
- §720 creates a cause of action to be asserted derivatively in New York by "owner[s] of a beneficial interest," with a "savings clause" preserving all other remedies, including remedies under the GSCA;
- §720's reference to §626—New York's "gatekeeper rules"—renders GSCA §148 inapplicable; and
- The BCL (§720) and the GSCA (§§76–77, 91, 93, 111, 116–117) prohibit the same fiduciary misconduct and can be enforced in harmony, consistent with the internal-affairs doctrine as modified.

Another argument by the defendants is forum *non conveniens*. That is when defendants ask the court to dismiss the case because it can be at least as fairly pursued in another jurisdiction, and that one is more convenient for the defendants. Substantive forum *non conveniens* arguments include that more records or key witnesses or relevant experts exist in the alternate jurisdiction and the plaintiffs' case will not suffer if the matter is adjudicated there.

Even the raw assertion that Volkswagen top brass will be inconvenienced by possibly having to appear in New York is dismissed as silly, given how often they came to the state in the normal conduct of business. And it's evident that the US and New York in particular was a major nexus of the abuses, as in relevant witnesses and records are there. For instance:

The Scheme has substantial New York nexus. NYC “has always been a vital market for Volkswagen in achieving long-term U.S. growth.” ¶236. In addition to owning the hundred-million-dollar flagship store in NYC, VWAG developed nearly 100 dealerships in New York. ¶¶197, 214, 235. The Scheme targeted New York, causing over 25,000 Altered Vehicles to be sold to New Yorkers. ¶214. To that end, VWAG and its subsidiaries devised a “Defeat Device Plus” specifically to meet New York’s emissions standards.

The Defendants also tried to bolster their position by submitting expert opinions which this filing argues are improper because they reach legal conclusions, contain hearsay, and are premature at this stage of the case. They plaintiffs submitted a motion to strike in a separate filing.¹

Asserting personal jurisdiction over the plaintiffs. In layperson’s terms, the question of personal jurisdiction is whether a party had enough of a connection to the jurisdiction for a court to have authority over them in the legal matter at hand. An overview from a course outline from Lewis and Clark Law School:

In order to enter a binding judgment against a defendant, a federal court (and a state court) must have personal jurisdiction over that defendant. Stated another way, personal jurisdiction describes the authority of a court in a “forum state” (i.e., the state where the lawsuit is filed) to exercise power over a person, entity, or property and enter a lawful judgment against that person, entity, or property. This is a geographical limitation on where a lawsuit can be filed. You cannot just drag anyone or any company into court anywhere in the United States.

Again from the pleading:

There is no merit to Defendants’ contest to personal jurisdiction. Many travelled repeatedly to New York to conduct VWAG business. And the allegations of their purposeful availing of New York satisfy CPLR §302’s single-transaction requirement

The “single-transaction requirement” = a party does not have ever to have set foot in New York to be subject to the personal jurisdiction of New York courts. Merely “transacting business,” say signing a contract, and having the plaintiffs’ claims result from that business transacted, suffices.

Again, this not-all-that-long filing is a case study in the uphill battle lawyers fight in seeking to get a measure of justice against legally well-bunkered directors and officers. But the flip side is that if more cases had been filed after the financial crisis, particularly by attorneys

general, there would be more favorable rulings on key legal points that private plaintiffs could leverage. At least some attorneys are still fighting this good fight.

¹ A key section:

The Court should disregard or strike Bopp's and Nottebaum's affidavits they are procedurally improper, and because their statements are irrelevant and inadmissible. As a matter of procedure, Bopp's and Nottebaum's affidavits aim to refute the truth of Plaintiffs' allegations regarding the Families' control and domination over VWAG's Board. At the pleadings stage, Plaintiffs' allegations must be deemed as true. *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980). The Court should Bopp's and Nottebaum's submissions. See *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314, 326 (2002) (reversing a dismissal because "documentary evidence" failed to "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law").

Both affidavits contain inadmissible hearsay statements. Bopp's affidavit contains "matters" made known to her "available to [PorscheSE]" after what she claims was her "reasonable inquiry." BoppAff. ¶12. Similarly, Nottebaum's affidavit information he obtained after "consultation with Supervisory Board members named as defendants" and "matters" made known to him after what he claims was a "reasonable inquiry." NottebaumAff. ¶12.

Hearsay aside, some of these affiants' statements are irrelevant. For example, Bopp and Nottebaum claim inconvenient forum by asserting that the Supervisors or PorscheSE personnel will have to travel to New York to participate in a trial. BoppAff. ¶125; NottebaumAff. ¶121. These claims ignore the fact that, as alleged in the Complaint, Defendants regularly traveled to New York on VWAG business. Because such claims of inconvenience fall far short of Defendants' "heavy" burden of demonstrating hardship to procure an FNC dismissal,³ these claims are irrelevant.

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Zoom 100%

Securities

Velodyne, Graf-Backed SPAC Deal Suit Settles for \$4.75 Million

Oct. 8, 2025, 2:22 PM PDT

A \$4.75 million settlement has been approved to end a Delaware Chancery Court lawsuit alleging the architects of a blank-check merger between Velodyne Lidar Inc. and a special purpose acquisition company duped investors into a doomed deal.

Shareholders alleged the SPAC's directors rushed into the transaction, inflating the value of Velodyne, a company that manufactures automotive lidar devices.

Vice Chancellor Lori W. Will approved the settlement, along with a \$850,000 legal fee award for the Block & Leviton LLP attorneys representing the lead plaintiff, according to an order issued Wednesday.

The 2023 lawsuit targeted hedge fund Owl Creek Asset Management LP and other backers of Graf Industrial Corp., the SPAC that combined with Velodyne to take it public. Velodyne later merged with Ouster Inc., a rival also formed by a SPAC transaction; neither was named as a defendant.

The case was one of dozens of similar Chancery Court disputes stemming from faltering SPAC mergers. The blank-check deals give private businesses a shortcut to public markets by combining them with a shell entity.

Owl Creek was dismissed from the case in November 2023. James Graf, a serial SPAC founder, and other defendants are represented by Ross Aronstam & Moritz LLP, Wilmer Cutler Pickering Hale and Dorr LLP, and Heyman Enerio Gattuso & Hirzel LLP.

The case is *Berger v. Graf Acquisition LLC*, Del. Ch., No. 2023-0873, order 10/8/25 .

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Guest Post: The Future of Securities Litigation Defense

K [dandodiary.com/2025/10/articles/securities-litigation/guest-post-the-future-of-securities-litigation-defense](https://www.dandodiary.com/2025/10/articles/securities-litigation/guest-post-the-future-of-securities-litigation-defense)

Kevin LaCroix

October 9, 2025



By [Kevin LaCroix](#) on October 9, 2025

Posted in [Securities Litigation](#)



Doug Greene

In the following guest post, Doug Greene, Partner at the BakerHostetler law firm and Chair of the firm's Securities and Governance Litigation Team, takes a look at the growing problems with the defense of securities litigation, including skyrocketing defense costs, and proposes some solutions to these problems. A version of this article previously was published on The D&O Discourse blog. I would like to thank Doug for allowing me to publish his article as a guest post on this site. I welcome guest post submissions from responsible authors on topics of interest to this site's readers. Please contact me directly if you would like to submit a guest post. Here is Doug's article.

I. Introduction

I've seen many changes during the more than 30 years I've defended securities class actions. The types of claims have evolved. From the indiscriminate claims that led Congress to pass the Private Securities Litigation Reform Act of 1995 ("Reform Act"), to the IPO laddering claims of the late 1990s, to the corporate-scandal claims of the early 2000s, to the market-timing claims of the mid-2000s, to the stock-option backdating claims of the mid to late 2000s, to the credit-crisis claims of the late-2000s and early 2010s, to the Chinese reverse-

merger claims of the early 2010s, securities litigation trends come and go. We as a community of defense lawyers and D&O insurance specialists have capably handled these trends.

But over the past 10 years, two persistent and now-permanent trends have converged to increase the risk that defendants face: (1) claims against smaller public companies brought primarily by the so-called “emerging” plaintiffs’ firms – who have now clearly emerged – and (2) skyrocketing defense costs caused by ever-increasing billing rates and staffing practices.

We must fix this problem very soon. I believe the only way to do so is for D&O insurers and brokers – the repeat players in securities litigation on the defense side – to have greater involvement in the defense of securities litigation. Insurers and brokers need to be involved starting with selection of defense counsel – the most pivotal decision in the litigation. Since relatively few companies have faced a securities class action, the vast majority of companies need guidance to help them choose the right defense lawyer for their particular case. Insurers and brokers are best suited to help make this match. And they need to stay involved in key strategic decisions: no defense lawyer has been involved in as many securities class actions as the claims professionals who oversee securities litigation for the most prominent primary insurers and brokers. Without question, it is a strategic blunder not to involve them as colleagues in the defense of securities litigation: their strategic involvement in all questions, from defense-counsel selection to whether to take a case to trial, would vastly improve the effectiveness and efficiency of securities litigation defense.

II. Scope of Analysis

This post focuses on securities class actions brought under Section 10(b) of the Securities Exchange Act of 1934 (“1934 Act”) and Sections 11 and 12 of the Securities Act of 1933 (“1933 Act”). Although the world of securities and governance litigation involves a broader set of claims, including shareholder derivative litigation, shareholder challenges to mergers, and SEC enforcement, the business of defense lawyers and risk management of D&O insurers revolves around the state of securities class action litigation. The legal centerpiece of securities class action litigation is the Reform Act, which added various procedural and substantive requirements to the 1933 Act and 1934 Act. To ensure that all readers are working with the same terminology and concepts, following is a brief overview of the types of claims this post addresses.

A securities class action asserts that the defendants made false or misleading public statements that made the stock price higher than it should have been, and that when the alleged “truth” came out about those statements, the stock price dropped to its “true” value.

The proposed class period usually begins at the time of the first alleged false or misleading statement and ends when plaintiffs allege the “truth” was revealed.

A securities class action involves a well-established procedural course. Plaintiffs who wish to serve as the “lead plaintiff” must file a motion to be so appointed within 60 days of the first action filed. After the court appoints a lead plaintiff and lead plaintiff’s counsel, the lead plaintiff files a consolidated and amended complaint, and the defendants make a motion to dismiss the action. During the motion-to-dismiss process, all discovery is stayed.

If the court denies the motion, the case proceeds to discovery and to the class-certification process. Defendants can oppose class certification through a number of arguments, including a challenge to the efficiency of the trading of the company’s stock, under the Supreme Court’s decision in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), or the impact of the challenged statements on the market price of the stock, under the Supreme Court’s decisions in *Halliburton Co. v. Erica P. John Fund, Inc. (“Halliburton II”)*, 573 U.S. 258 (2014), and *Goldman Sachs Group Inc. v. Arkansas Teacher Retirement System*, 594 U.S. 113 (2021). If the court certifies the case as a class action, the parties complete fact and expert discovery, and defendants file a motion for summary judgment. If the court denies summary judgment in whole or part, the case proceeds to trial.

Securities class actions, if fully litigated, give defendants four opportunities for victory: (1) the motion to dismiss, (2) opposition to plaintiffs’ motion for class certification, (3) summary judgment, and (4) trial.

III. The State of Securities Class Action Defense

A. Wide Range of Cases

1. History of the plaintiffs’ bar

Securities class action litigation got its wings in the 1970s and 1980s, through the “fraud-on-the-market” presumption of reliance, which posits that individual purchasers of an efficiently traded stock rely on the integrity of the market price. This means that individual plaintiffs are not required to show that they specifically relied upon a particular statement in purchasing stock. Instead, they are presumed to rely on all public statements, including the allegedly false ones, since the market price reflects (and thus “relies” upon) all publicly available information about a company.

For the first three decades of securities class action litigation, the plaintiffs’ bar was dominated by Mel Weiss, his partner Bill Lerach, and a handful of other prominent plaintiffs’ lawyers. This oligopoly of lawyers pioneered securities class actions, initiated most securities

class actions, and shaped securities litigation law and practice.

The criminal prosecutions of Weiss and Lerach and their then-separate firms in the mid-2000s left a void in the plaintiffs' bar, and even led to speculation about the demise of securities class actions. But a remarkable thing has happened: the protégés of Weiss and Lerach as well as other senior plaintiffs' lawyers and their protégés, plus some new entrants into the plaintiffs' securities class action market, described below, have not only filled the gap, but have bolstered the bar. The plaintiffs' bar is back, and arguably better than ever.

Looking back, several things converged to cause this. The first was the stock options backdating scandal, which began with a study by University of Iowa professor Erik Lie that showed an unusually large number of stock option grants to executives at stock-price lows. Since few of the companies exposed in the scandal suffered stock-price drops, the vast majority of the dozens of options-backdating cases were filed as shareholder derivative claims, on behalf of the company, alleging breaches of fiduciary duty and proxy-statement misstatements.

At the time, the most prolific securities class action firm was Coughlin Stoia Geller Rudman & Robbins, the successor of Lerach's firm and the predecessor of leading plaintiffs' firm Robbins Geller Rudman & Dowd. If Coughlin Stoia filed a derivative suit on behalf of a company, it meant they could not sue the company in a securities class action. For this simple reason, many people did not think they would file many options backdating derivative cases.

But they did – and they filed a lot of them. Their bet paid off: they defeated motions to dismiss at a high rate and obtained settlements involving unprecedented types of corporate governance reforms and plaintiffs' attorneys' fee awards. Their large fee awards increased the fee awards of smaller plaintiffs' firms. By the time they were finished, the plaintiffs' firms that filed options backdating cases made a mint.

Then, toward the end of the options backdating scandal, the credit crisis happened and started a new wave of shareholder litigation – this time both securities class actions and shareholder derivative actions. The plaintiffs' bar had a war chest and was ready for battle. The larger plaintiffs' firms, such as Robbins Geller, Bernstein Litowitz, and Labaton, won lead-plaintiff roles in the mega securities class actions and also represented plaintiffs in large individual actions.

While that was going on, the Chinese reverse-merger scandal happened. That created a new breed of securities class action plaintiffs' firms. Historically, the Reform Act's lead-plaintiff provisions incentivized plaintiffs' firms to recruit institutional investors to serve as plaintiffs.

For the most part, institutional investors have retained the larger plaintiffs' firms, and smaller plaintiffs' firms have been left with individual investor clients who usually can't beat out institutions for the lead-plaintiff role. At the same time, securities class action economics tightened in all but the largest cases, placing a premium on experience, efficiency, and scale. As a result, larger firms filed the lion's share of the cases, and smaller plaintiffs' firms were unable to compete effectively for the lead-plaintiff role, or make much money on their litigation investments.

The China cases changed this dynamic. Smaller plaintiffs' firms, such as the Rosen Law Firm, Pomerantz, and Glancy Binkow (now Glancy Prongay), initiated the lion's share of them, as the larger firms were swamped with credit-crisis cases and likely were deterred by the relatively small damages, potentially high discovery costs, and uncertain insurance and company financial resources. Moreover, these cases fit smaller firms' capabilities well; nearly all of the cases had "lawsuit blueprints" such as auditor resignations or short-seller reports, thereby reducing the smaller firms' investigative costs and increasing their likelihood of surviving a motion to dismiss (and thus reducing the likelihood of dismissal and no recovery). The dismissal rate was indeed low, and limited insurance and company resources prompted early settlements in amounts that, while on the low side, yielded good outcomes for the smaller plaintiffs' firms.

2. The new wider world of claims

With these recoveries, smaller plaintiffs' firms built up momentum that kept them going even after the wave of China cases subsided. Since then, following almost every "lawsuit blueprint" announcement, a smaller firm has launched an "investigation" of the company, and they have initiated an increasing number of cases. Like the China cases, these cases tend to be against smaller companies. Thus, smaller plaintiffs' firms have discovered a profitable class of cases: cases against smaller companies that have suffered well-publicized problems (reducing the plaintiffs' firms' investigative costs) for which they can win the lead-plaintiff role and that they can prosecute at a sufficient profit margin.

As smaller plaintiffs' firms have gained further momentum, they have expanded the cases they initiate beyond "lawsuit blueprint" cases – and they continue to initiate and win lead-plaintiff contests primarily in cases brought by retail investors against companies with small market capitalization. Over the past 15 years, about half of all securities class actions have been against small-cap and micro-cap companies.

The securities litigation landscape now clearly consists of a combination of two different types of cases: smaller cases brought by a set of smaller plaintiffs' firms on behalf of retail investors, and larger cases pursued by the larger plaintiffs' firms on behalf of institutional

investors. This change appears to be here to stay.

B. Most securities cases are manageable, and are not bet-the-company cases

Securities class actions are often spoken of as “bet-the-company” cases, because they typically involve a loss of market capitalization in excess of the resources of the company or their directors and officers, and of their D&O insurance limits. But relatively few securities class actions involve real risk. Decades of data shows that nearly all cases are dismissed early on or settled within policy limits, with companies and their executive contributing little or nothing beyond their self-insured retention.

Securities class actions are highly winnable. The dismissal rate across all firms is about 40%. Even if a case gets past a motion to dismiss, a good litigation team can make a strong argument in opposition to class certification or position the case to win at summary judgment or trial. The smaller plaintiffs’ firms mostly operate on a volume model and could not withstand a full-blast defense by even a modest fraction of the companies they sued. Larger plaintiffs’ firms have more resources to litigate cases more aggressively but likewise are not set up to strenuously litigate more than a handful of their cases at once.

Damages claims, if subjected to economic analysis, are manageable. Traditionally, it has taken a 20% or greater stock-price drop to trigger a claim, but the smaller firms sue on smaller drops, sometimes under 10%. Investor losses, large or small, can be significantly reduced through a variety of economic-analytic tools that the Supreme Court has blessed under a series of decisions.^[1] A large stock drop can be whittled to a relatively small damages claim.

Beyond the statistics, securities class actions are not particularly complicated to defend. They follow a well-established procedural process, outlined above. The plaintiffs’ bar is relatively small and full-time securities defense lawyers know them and their playbooks. The law is relatively stable, with the Supreme Court having issued decisions on each of the key elements of the claims: falsity,^[2] scienter,^[3] reliance,^[4] and loss causation.^[5] The types of claims are well known and the ways to fight them follows familiar formats. To be sure, there are outlier cases – some are especially risky or virulent for one reason or another. But these are easy for repeat players to spot at the outset of the litigation. The wide range of other cases are straightforward.

Few executives appreciate the lack of real risk they face, because few new defendants have ever faced a securities case, and their corporate counsel often benefit from this lack of familiarity and the perception of a securities case as life-threatening for the company. It is

incumbent upon the repeat players in securities class action defense – insurers, brokers, and specialized defense counsel – to educate them and design defense strategies and economic protections that reflect the real risk they face.

C. One-Size-Fits-All D&O Policy

While the risk executives face from securities class actions is small and decreasing, the risk they face from the skyrocketing cost of defense is increasing – dramatically. Executives effectively fight with their defense counsel for their insurance proceeds. Indeed, it may well be the case that executives' main securities litigation risk is the reduction of their insurance proceeds due to increasing defense costs, and the collateral consequences, such as strategic sacrifices and corner-cutting involved in making case tasks fit within a reasonable budget. This problem is especially acute in the smaller half of all cases.

Meanwhile, the D&O insurance product has remained a one-size-fits-all product, with the same basic coverages for micro-cap and mega-cap companies alike – for example, both Coca-Cola and Jones Soda have the same D&O product. And, as a matter of contract and culture, the policy takes a hands-off approach to the defense of claims. That may make sense for the very largest cases, but it makes little or no sense for the vast majority of claims.

1. Lack of value pricing by many defense practices

Securities class action defense counsel primarily come from law firms in the AmLaw 100, and mostly the most marquee firms on that list. Over the past 20 years, these firms' profitability has increased dramatically, and securities class action defense costs have skyrocketed accordingly.

Billing rates are certainly a part of the problem, but more significant than rates is over-staffing. Many typical defense firms are structured to handle large matters with large teams. While some securities class actions require large teams, the vast majority do not. When firms that are used to large cases handle small cases, it can result in over-staffing or no-stone-left-unturned approach when the economics of the case simply can't handle it and a vigorous defense doesn't require it anyway.

Instead, the lion's share of cases requires no more than several lawyers through a motion to dismiss – a senior partner to do the architectural work, a junior partner to do the background interviews and drafting, and an associate or two to help with factual and legal research. Intensive legal research rarely is necessary; an experienced team knows the key Reform Act cases by heart, and the best motions to dismiss rely on a persuasive narrative more than a

litany of cases. Past the motion to dismiss, the team needs to expand, but staffing needs to be bespoke: each team member must have a specific and necessary role. And we have to utilize AI and skilled and relatively inexpensive document reviewers to separate wheat from chaff. It's neither necessary nor efficient for \$1,200 per hour associates to do that work – to state the obvious.

2. **One-size-fits-all D&O can result in an ill-fitting defense for most cases**

D&O insurance plays into this dynamic. While securities litigation claims have expanded to include companies of all sizes, from tiny to huge, and defense costs have skyrocketed, D&O insurance has remained a static product.

The most injurious consequence of the product's failure to evolve is its hands-off approach to defense counsel selection and strategy. This forces defendants who have never faced a securities class action to figure out who among the dozens of lawyers who descend on them is the right one for them. Yet it is impossible for them to choose wisely – few have ever faced a securities class action, and don't know who's who among defense lawyers or the real risk they face. As a result, defendants tend to default to firms who do their corporate work or to other names they know, but that often are the wrong fit for the particular case. Insurers and brokers frequently scream about the decision behind the scenes, seeing an accident coming but feeling powerless to prevent it.

The main mistake defendants make is to choose a law firm that has a billing and staffing structure that is bigger than the economics of the case can take. Although every defense firm should be able to defend a case vigorously through trial for a price that fits the particular case, most defendants, without guidance from repeat players, choose firms with billing and staffing structures that make it difficult to defend the case well through trial without charging more than the settlement value of the case.

This problem has caused bloated settlement values. After hovering around \$7 million for years, the median settlement amount has now **doubled**, to \$14 million, over the past several years. Foremost among the reasons for this drastic increase is the inability of most defense firms to defend a case through summary judgment (much less trial) for less than the median settlement without cutting corners. This means that defendants have little or no settlement leverage after losing a motion to dismiss.

Thus, the market for defense counsel is wildly inefficient. In an efficient defense-counsel market, a rational company paying for its own defense would choose a law firm that could defend a \$7 million case for an amount of money that is some fraction of this claim – even as

much as 50%, or \$3.5 million. But most defense firms are unable to accomplish this right-sized defense. Defense-counsel selection needs a guiding hand.

Imagine that a single insurer decided to take on all securities class action risk. In exchange for large premiums, it would assume the complete defense of all securities class action defendants, both defense costs and settlements and judgments.

How would that hypothetical insurer choose defense counsel? It would choose a lawyer who will do superior work for an amount that fits the economics of the case – in other words, a lawyer who provides the right value. The single insurer may well hire Dewey Cheatham & Howe to defend cases against the largest companies. Some cases need the resources that particular firms can best marshal.

But that hypothetical insurer would never – ever – hire Dewey Cheatham & Howe to defend small and medium-sized cases if the firm defended cases under their standard rates and staffing. For example, if Dewey Cheatham & Howe defended the \$7 million median-sized case under its standard approach, it would charge at least twice the settlement value to defend the case through trial. Obviously, it makes no sense to spend \$14 million to defend a \$7 million case. Instead, for small and medium-sized cases, our single-company insurer would find a lawyer who could and would agree to defend the case through trial for an amount commensurate with the value of the case.

This is how nearly all other types of litigation works. Companies and/or their insurers choose the right lawyers for the size of the case and have relationships with various lawyers that allow them to choose quality lawyers for a price that reflects good relationships and discounts for a volume of work. Excellent lawyers routinely reduce their rates and staffing, or take risks through alternative fee arrangements, in exchange for a volume of work and relationship-building. Public D&O-insured work stands alone in failing to take advantage of this purchasing advantage.

Insurers understandably don't want to alienate defense firms by whittling the number of firms that are right for small and medium-sized cases. But law firms don't have a right to do securities class action defense work, or any other type of work. And law firms routinely decide to forego certain types of work or particular cases all the time, based on whether it can do a good job given the economics. D&O insurance relieves firms of making this decision in securities cases.

D. Most Securities Cases are Not Zealously Defended

The failure to help defendants make good decisions causes a lot of problems. Beyond the obvious one – that defendants spend far more money than necessary on their lawyers – the biggest one is strategic: securities defense counsel generally don't actually defend securities litigation anymore.

In days gone by, if the court denied the motion to dismiss, defendants would oppose class certification and defend the litigation through a summary judgment motion; in other words, defendants would actually defend the case. But today, cases typically settle soon after the court denies a motion to dismiss. Because defense costs have skyrocketed, it makes no economic sense to defend securities cases past the motion to dismiss, and plaintiffs can always make the defendants and insurers a settlement offer they can't refuse.

This lop-sided economic dynamic is reflected in many defense firm budgets. Defense firms are increasingly pitching artificially low fixed fees for motions to dismiss. This is a short-sighted arrangement for everyone. Winning the motion to dismiss is at best a 50/50 proposition on average. A trick I see more and more is defense firms offering a very small budget or fixed fee for the motion to dismiss. This does not solve the defense-cost problem – indeed, it creates the equivalent of a balloon-payment mortgage in the cases that survive a motion to dismiss, as firms are basically buying an option for a large case if it isn't dismissed. And defense firms actually lose their loss-leader game because they don't get to make up their losses through bloated billing later: as discussed above, their clients and clients' insurers increasingly are choosing to spend their policy proceeds on settlements, not their lawyers.

These law-firm economics leave defendants with only one of the four possible paths to victory, the motion to dismiss, and leave unused the three other paths, class certification, summary judgment, and trial. This is wrong. Class certification offers tremendous opportunities for defendants to defeat or greatly reduce class-claim exposure and settlement value – indeed, *Halliburton II* had the potential to be revolutionary – and summary judgment was once a central strategic tool and presented a real opportunity to win.

But today, the defense bar rarely opposes the economics of class certification or moves for summary judgment. And trial isn't even a consideration. Imagine that: a lawsuit that the defendants can't even take to trial. That isn't how litigation is supposed to work.

E. Settlements Are Bloated

The only winner in this system is plaintiffs' counsel. Because they know defendants can't rationally litigate a case all the way through, settlement values are simple: they are the lowest amount plaintiffs' counsel are willing to take. As a result, settlement values have little or nothing to do with the value of the case. The litigation's merit, or lack of merit, is nearly

irrelevant. Although no one can know for sure, I believe that settlement values are 30-50% higher than they would be if defendants and their insurers were comfortable defending cases through class certification and summary judgment.

The data reflects this trend: settlement values as a percentage of damages are increasing, and are especially high in smaller cases, where the problem of defendants and insurers having to throw in the towel after losing the motion to dismiss is especially acute. High defense costs increase settlement values too, since settling for an amount less than defense costs would reveal that the lawyers billed too much, and the theoretical damages can always support a higher but still “reasonable” settlement.

Defense costs waste an especially high percentage of insurance limits in cases against small and middle-market companies. A typical defense firm cannot zealously defend a claim against such a company without threatening to exhaust its D&O insurance, or uncomfortably shrinking the margin of error. Most of these companies can’t or won’t buy more limits – and why should they, just to transfer more money to lawyers who make more than the CFO? For most of them, every penny counts – the difference between breaking even, or not; of meeting their loan covenants, or not; of meeting Wall Street expectations, or not.

Without enough insurance proceeds to defend the case past the motion to dismiss stage and still be confident they can settle later, if necessary, defendants simply settle if the court denies the motion to dismiss.

IV. Defendants Deserve a Zealous Defense

Premature settlements hurt directors and officers. Defendants want to win – they don’t want to have to tell people they settled a fraud case against them for an amount of money that suggests they did something wrong. No-admission settlements don’t erase the taint a large settlement causes. For many smaller companies, a securities class action can depress the stock price, suspend necessary financing, and kill business combinations. An early settlement for a bloated amount is not sufficient vindication to allow these companies to dispel the market’s suspicion about them.

To be sure, insurers and brokers do indeed often receive panicked pleas from defense counsel that the defendants want to settle. But, often, it is defense counsel, not their clients, who want to settle because of a lack of adequate preparation or staffing for trial, or because the cost of trial would leave no money for settlement. In my experience, the defendants would be happy to defend the litigation as long as necessary for them to prevail, if they have

enough insurance protection and a good relationship with their insurers and broker. But the cycle of premature settlement is now such a structural part of securities class action litigation that it doesn't discern or accommodate the defendants' wishes.

Sophisticated, full-time securities litigators would prefer to break this cycle as well. Securities litigation defense that doesn't involve actual litigation deprives defense lawyers of the opportunity to capitalize on their legal talent, tools, and creativity. We'd love to be able to actually litigate again. And it undercuts the economic viability of dedicated securities class action defense practices, since securities class action defense engagements are becoming smaller and smaller with early settlements.

The system is broken for everyone on the defense side – defendants, insurers, brokers, and defense counsel. It only works for the plaintiffs. We need to fix it, or securities litigation defense strategy and economics will continue to spiral downward. To stop it, defendants need help from the repeat players and experts – insurers, brokers, and full-time defense lawyers. Defendants cannot do it themselves.

V. The Interests of Insurers and Insureds are Aligned in Defense of the Case

A. D&O Insurers are Friends, Not Foes

1. Defendants want their insurer to be their partner

If I had one wish for D&O insurance, it would be to dispel the myth that directors and officers want insurers to stand aside in the defense of claims. It's just not so.

When people think about insurance, they think about insurers paying for the expense associated with a problem. They think of auto insurance or other duty-to-defend insurance, under which the insurer assumes the defense of the claim for the insureds. They don't think about insurance that requires them to go out of pocket and pay and then get paid back. Indemnity insurance thus is counterintuitive – in fact, it doesn't actually seem like "insurance" in the way most people think of it.

This is no less true for D&O claims. The priority for most companies and their directors and officers is simply the greatest protection possible, including assurances that they will not be left to pay any uncovered legal fees or settlement payments. In fact, not only do most insureds not want to be stuck paying their lawyers for short-pays, they don't even want to write any checks at all after satisfying the deductible. Instead, they prefer that the insurer take charge of the bills and pay the lawyers and vendors directly. In other words, many public companies actually want their D&O insurance to respond like duty-to-defend insurance.

This preference is especially prevalent among smaller and middle-market companies. These companies often lack in-house lawyers and other infrastructure of larger public companies. For many smaller companies, a five- or six-figure savings on their premium and/or self-insured retention could make the difference between profit and loss, and success and failure. They need a D&O product that maximizes their insurance protection and reduces their out-of-pocket cost.

But even many larger companies would welcome more insurer control of claims in exchange for some reduction in the premium or self-insured retention. I've never met a CFO who didn't want to save money on insurance. And, unfortunately for us lawyers, very few individual defendants are beholden to any particular lawyer or law firm – that type of connection typically happens at the level of in-house counsel, who unlike directors and officers, are not named as individual defendants in securities class actions.

To be sure, after a claim is filed, the insurer often gets an earful from the insureds' lawyers about the insureds' right to select whichever defense counsel they choose and their strategic freedom to spend whatever they want and settle whenever they want. But these aggressive positions are typically not the positions of the insureds themselves. Instead, these positions are driven by defense counsel, usually for self-interested reasons: to get hired, to justify excessive billing, or to settle a case for a bloated amount because the defense is compromised by mounting costs or the defense lawyer's inability to take the case to trial.

2. Poor communication causes consternation

a. Defense counsel sometimes set up the insurer as an adversary

D&O insurers are typically shut out of meaningful involvement in the defense, with most defense lawyers treating them almost like adverse parties and other defense lawyers merely humoring them. Given their extensive experience and wide perspective, why do defense counsel treat insurers this way? In my experience, the reason is that defense lawyers can benefit from a strained relationship with their insurers, so that the lawyers have maximum freedom to do whatever tasks they want, at whatever cost they want to charge.

This set-up occurs with some variation of these stock talking points with their clients:

- "This is a bet-the-company case that requires us to go all-out to defend you, so we have to pull out all the stops and do whatever is necessary, no matter what the insurer has to say."
- "The insurer may ask you to interview several defense firms before choosing your lawyers. Don't do that. They'll just want to get some inferior, cut-rate firm that will save

them money. But you'll get what you pay for – we're expensive for a reason! And don't forget that we've stood by you through thick and thin since before your IPO, back when you were a partner here. Plus, we gave you advice on your disclosures and stock sales, so we're in this thing together."

- "The business of any insurance company is to try to avoid paying on claims, so the insurer may try to curtail our level of effort and even refuse to pay for some of our work. But trust us to do what we need to do for you. You might need to make up the difference between our bills and what the insurer pays, but we can go after the insurer later to try to get them to pay you back for those amounts."
- "We'll need you to support us in these insurance disputes. You don't have to get involved directly – we can work with the insurer and broker directly if you agree. Agree? Good."

In this way, defense lawyers set the insurer up as an adversary.

But pre-claim, directors and officers don't think that way. As I look back on the scores of clients I've defended or advised on D&O insurance procurement, I can't think of any who regarded the insurer as an adversary. Just the opposite is true: they've often expressly regarded the D&O insurer as a teammate in the defense of the case. While every case involves a back-and-forth on strategic, coverage, and economic issues, these issues nearly always can be worked out with collegiality and communication.

b. Reservation of rights letters and billing guidelines and deductions create unnecessary tension

But, in two ways, insurers can inadvertently contribute to breakdowns in collegiality and communication. First, reservation of rights letters are totally normal and necessary, but they can hit defendants the wrong way without good defense counsel anticipating them and letting the defendants know they're normal. To an uncounseled defendant, a straightforward reservation of rights letter can make defendants feel their coverage is in doubt – though, as all repeat players know, a reservation of rights letter rarely ripens into a coverage denial.

Second, although billing guidelines and deductions are well-intentioned ways to try to control runaway defense costs, they backfire – often badly. Defense counsel hate them, because they restrict professional judgment, feel like accusations of dishonesty, and pit defense counsel, who must collect their bills, against their clients, who don't want to go out of pocket to pay the difference. In this way, insurers can become the bad guy to their insureds as well as the broker and defense counsel.

I do not favor insurers abandoning their scrutiny of defense counsel's work and billing, but believe billing guidelines and deductions are not the best way to do it. Instead, as detailed below, insurers should increase their scrutiny but through a system that promotes collegiality and trust with the insureds, broker, and defense counsel. In the vast majority of cases, the interests of each of these defense-side colleagues are aligned, and it's a shame that they are so often at odds.

B D&O Insurers' #1 Goal is to Win

The world of securities litigation defense in which I grew up involved collaboration with insurers in the defense of claims. As other defense lawyers' relationships with insurers have become increasingly frayed, I have spent a lot of time reflecting and discussing why I feel so strongly that insurers are friends, not foes.

First and foremost, as much as defendants, insurers want to win each case or settle for as little as possible. I sometimes hear cynical defense counsel say that insurers' interest is just to avoid spending money. In my experience, insurers simply don't want to spend more money than they need to – and, of course, the best way to do that is to win. Winning or settling for as little as possible not only reduces the cost of each case but decreases the overall severity of securities claims.

D&O insurers aren't penny-pinchers. Indeed, in my 30+ years of securities class action defense, I don't recall a single instance – not one – in which an insurer didn't approve or fully fund a project that I discussed with them in advance. They just don't like wasting money on bloated settlements or wasteful defense costs, which unfairly deprives defendants of their policy proceeds.

C. D&O Insurers and Brokers are Allies

D&O Insurers and brokers are also important teammates in the defense of claims. Because they are involved in myriad more securities cases than even the most experienced defense lawyer, they see the big picture in a unique and valuable way, albeit in a different role. They have extensive experience with securities class action mediators and plaintiffs' counsel, and they often have key strategic thoughts about how to approach settlement. Insurers can also help defense counsel pick cases to take through summary judgment or even to trial if the plaintiffs won't settle in the right range.

I have achieved superior results for many clients by working collegially with insurers and brokers – from helping shape motion-to-dismiss arguments, to learning insights about particular plaintiffs' lawyers and their latest tricks, to selecting the right mediator for a

particular case, to achieving favorable settlements that don't leave the impression of guilt. Indeed, if I were sued in a securities class action and could assemble a dream defense team, I would hire a prominent D&O insurance lawyer on the team as a strategic quarterback – on securities class action issues.

VI. Securities Defense Needs to Be Tailored for Each Case

Utilizing D&O insurers' and brokers' expertise is the key to helping us move past a one-size-fits all approach to securities class action defense. They can and should exercise more control in helping defendants choose the right lawyers for each particular case. With few exceptions, the defendants themselves have only a fraction of the experience and knowledge that insurers and brokers have. It isn't fair to ask them to make this highly consequential choice on their own. Insurers and brokers are essential to defense-counsel selection.

Insurers and brokers bring more to this strategically pivotal process than just their knowledge. They have the ability to effectively create a rational buyer of litigation services – a buyer with the ability to work with a small pool of excellent lawyers in exchange for the prospect of a greater volume of work. To be sure, many typical defense *firms* could not or would not defend small and medium sized cases for a rational price. That doesn't work an injustice on high-priced firms – they get priced out of work or decide against it all the time.

But a number of the relatively small group of full-time securities class action *lawyers*, whether from high-priced firms or high-value firms, would find a way to work with their firm management to allow them appropriate flexibility through accommodations on rates and staffing, based on the prospect of increased volume of work – just like for other types of litigation.

But how can insurers do this within a non-duty to defend model?

I see three main ways in which insurers and brokers can help with defense counsel selection.

1. D&O insurers with panels can continue to refine them. In my opinion, more control and narrow tailoring is needed. There are panel firms on each insurer's list that are right for some cases, but wrong for others. Through panels and tweaks to the policy (such as those discussed below), insurers and brokers need to help insureds find the right lawyer for each particular case.
2. Insurers can create small panels of lawyers. The panels must be small enough to give the lawyers an expectation of a sufficient volume of work to seek approval from firm management to give rate and staffing accommodations – just as lawyers do for clients or

insurers in other types of litigation. For insurers with existing larger panels, there could be tiers of panels and concessions that lawyers must give based on factors such as the company's market cap or other case characteristics.

3. Through a tweak in the defense-counsel consent provision, insurers can contractually require defendants to consult with the primary insurer on defense counsel selection before engaging defense counsel. Insurers could require insureds to conduct an interview process and even require insureds to interview one or more lawyers the primary insurer suggests. Far too often, defendants simply present insurers with their defense counsel selection, without any input from the insurers. It's never to the defendants' advantage not to get the insurers and broker's input and to forego an interview process.

Beyond the benefits of helping defendants decide on defense counsel, more active involvement by insurers and brokers is critical to being able to actually litigate securities class actions. We can put tremendous pressure on the plaintiffs' bar simply by defending the litigation, since many of them operate on a volume model and literally don't have the ability to litigate their inventory of cases. It is a shame that we let them file lawsuits that they don't have to litigate.

If we make plaintiffs litigate, we can settle for what defendants and their insurers will pay, not the lowest amount the plaintiffs' lawyers will take – we can understand the merits and settle based on a real litigation risk analysis. Imagine the reduction in severity. Frequency will begin to be reduced as well – plaintiffs' lawyers will begin to forgo filing dubious cases, and they will be forced to spend more time on litigation and less time on case origination.

This is not a pipe dream. We simply need to engage early on in a collegial way and be willing to spend \$50,000 – \$100,000 on early case assessment to identify good post-motion to dismiss litigation candidates. My vision is for defense counsel and a damages expert to do a meaningful but high-level analysis of the litigation and to meet with the insurers, broker, and one or more individual defendants to discuss the litigation and the defendants' litigation goals, and to make a strategic plan for the case. For cases that do not actually involve fraud or bet-the-company damages, we should have a plan to defend those cases through summary judgment or even trial, if necessary, if we don't win the motion to dismiss or get a settlement offer from plaintiffs' counsel that we can't refuse.

There is no real downside to more litigation if we do it under an honest and viscous budget – or even a fixed-fee or capped-fee – which eliminates the risk of runaway defense costs. For example, if defense counsel agrees to a fee cap of \$5 million through summary judgment, there would be \$7 million (until recently, the perennial median settlement value) of primary policy proceeds remaining for settlement assuming a \$10 million primary and \$2 million self-

insured retention. Of course, a good percentage of cases defended through class certification and summary judgment will be dismissed, eliminating the need to settle at all, or will be limited, reducing the settlement value. And who knows: with early case-assessment meetings among the insureds, broker, and insurer, and ongoing coordination throughout the litigation, we might even take the right cases to trial.

Larger cases, though not subject to these arrangements, would benefit as well; the small and medium-sized cases would set standards for the reasonableness of defense costs – indeed, the small, collegial panel lawyers defend some of the large cases too, and could be used to persuade other defense lawyers to be more reasonable – and would lower the settlement tide overall. The defense-cost and settlement-value reductions may well bend the loss exposure curve in securities class actions enough to begin to straighten out the economics of D&O insurance, though I'll leave that piece of the analysis to D&O insurers. What I can say is that I welcome a return to a specialized securities litigation defense bar, client-focused economics, and collegiality among insurers, brokers, and defense counsel.

VII. Conclusion

We are at a crossroads in securities class action defense. The road we're on is perilous, with defendants not getting the defense they deserve and taking greater risk than they should. And the road may well lead to a cliff. We have a chance to take a new road – one that is smoother and safer but must be built by insurers and brokers.

[1] *Goldman Sachs*, 594 U.S. 113; *Halliburton II*, 573 U.S. 258; *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005); *Basic*, 485 U.S. 224.

[2] *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S.Ct. 1318 (2015).

[3] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

[4] *Halliburton II*, 573 U.S. 258; *Basic*, 485 U.S. 224.

[5] *Dura*, 544 U.S. 336.

Forecasting Risk Without Fear: Why Courts Should Reject Risk Factor Disclosure Claims

In the current environment, companies should be commended—not penalized—for accurately anticipating future risks. Risk factor disclosures were never intended to serve as “gotcha” traps in litigation.

October 08, 2025 at 11:00 AM By **Robyn Downing**

Susan Hurd



Robyn Downing, left, and Susan Hurd, right, of Alston & Bird. Courtesy photos.

Companies frequently confront allegations from investors claiming that risk factor warnings in public filings were false or misleading. The typical investor argument is as follows: While the company publicly warned that a certain risk might adversely impact *future* performance or prospects, executives privately knew this hypothetical risk had already become a reality.

This creates a “damned if you do, damned if you don’t” dilemma for companies. Deep industry knowledge enables companies to anticipate future risks with precision—an ability that benefits investors. Yet in litigation, this foresight can be weaponized. Plaintiffs argue that because a disclosed risk later materialized, the warning must have been misleading. But the mere occurrence

of a warned-of event doesn't render the prior disclosure false under federal securities laws. Still, such claims can survive motions to dismiss, forcing companies to expend significant resources defending against a flawed theory of liability.

Companies already shoulder significant disclosure obligations regarding future risks. They are expected not only to keep pace with a rapidly evolving global landscape but also to anticipate—on a quarterly basis—what might happen, when and how it could occur, and assess the potential impact on their business. The practical realities of today's world only compound these challenges. Companies are expected to continually revise risk factors to account for a wide array of issues: tariffs, pandemics, terrorism, war, climate change, inflation, cryptocurrency, and more. Compounding this, the Securities and Exchange Commission has repeatedly amended its rules on risk factor disclosures, requiring changes in length, content, relevance, and the inclusion of summaries. All this comes on top of the need to navigate market volatility, regulatory reform, capital allocation, listing standards, and day-to-day operations.

In the current environment, companies should be commended—not penalized—for accurately anticipating future risks. Risk factor disclosures were never intended to serve as “gotcha” traps in litigation. Instead, risk factor disclosures are designed to shield companies from liability under the federal securities laws when they meaningfully address material risks. If a company identifies a risk that later materializes, that should reinforce the adequacy of its disclosure—not trigger a separate securities fraud claim. Yet the plaintiffs' bar increasingly treats such scenarios as fertile ground for litigation. It is important for courts to recognize these claims for what they are—a departure from the intended function of the disclosure rules. Encouragingly, this perspective appears to be gaining traction, as evidenced by how these issues played out in two recent cases.

Lessons Learned From *Facebook*. The Supreme Court initially granted certiorari in *Facebook v. Amalgamated Bank*, a case from the U.S. Court of Appeals for the Ninth Circuit involving investor allegations of false and misleading risk factor disclosures. Although the high court ultimately dismissed the appeal without a substantive ruling, the evolution of the arguments in the case offers meaningful insights for companies navigating disclosure obligations. The issue on appeal was whether a risk factor warning about potential third-party misappropriation of user data could be deemed misleading for not disclosing explicitly that such misappropriation had occurred in the past.

It is well established that risk factor disclosures are prospective in nature and not retrospective accounts of corporate history. Accordingly, reasonable investors do not interpret such disclosures as making any implied representations about past events. Because risk factors, by design, are forward-looking, they cannot be false or misleading because of the occurrence of events in the past, particularly where, as in *Facebook*, the past incident was already a matter of public record.

Importantly, sound forecasting necessarily draws on historical experience. Companies should be encouraged—not penalized—for continuing to warn of the potential recurrence of issues that they believe may affect future outcomes.

In seeking to present a reasonable position before the Supreme Court, both the plaintiffs’ counsel and the solicitor general made notable concessions, which may have influenced the court’s decision to dismiss the appeal. First, they acknowledged that companies should not be required to disclose past events in many circumstances, particularly when the existence of prior challenges would be apparent to investors. Second, when pressed to specify what additional disclosure would have sufficed, they indicated that a simple acknowledgment of prior occurrences—without elaborating on the details—would have been adequate. These positions undercut the notion that this appeal might have led to sweeping changes in the disclosure standards for risk factors. In the end, concerns about a dramatic expansion of liability proved unfounded.

The Pending *Adidas* Appeal. Currently pending before the Ninth Circuit is another appeal regarding claims of allegedly false and misleading risk factors: *HRSA-ILA Funds v. Adidas AG*. At issue in the case is a risk factor warning to investors that improper behavior by celebrities with whom the company partnered could have a negative spillover effect on the company’s reputation, lead to higher costs or liabilities, and disrupt business activities. The plaintiffs argued that this risk factor was false and misleading because the company purportedly knew one of its celebrity business partners had engaged in bad behavior in the past and, thus, what had been presented as a hypothetical risk had already come to fruition.

The district court embraced a practical approach in assessing and ultimately dismissing these claims. The court relied on the literal wording of the disclosure and observed that the risk factor did not state—or even imply—that no improper behavior by a celebrity partner had ever occurred. Rather, the warning assumed that was a given. Accordingly, that disclosure did not give rise to a duty to catalog every prior instance of misconduct by any one of the company’s business partners.

The court also rejected the theory that the risk factor disclosure described in hypothetical terms a risk that had already materialized. The court held that the “hypothetical” part of the warning related not to whether bad behavior would occur but rather whether there would be a potential negative spillover effect from such behavior on the company. This is a good example of where a court rejected an attempt to reverse engineer a securities fraud claim simply because the plaintiff could allege that the very thing warned of—namely, possible negative consequences to the company from business partner misconduct—had come to fruition.

Courts should recognize that risk factor disclosures are intended to inform investors of potential future risks and in no way imply culpability if those risks eventually materialize. By rejecting claims

that attempt to weaponize foresight against companies, the judiciary can reinforce the true purpose of disclosure rules and promote more meaningful investor communications.

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A Step Backward for Rule 702 at the Fourth Circuit

Aleksandra Rybicki, Stephanie Salek and Sally Levin of Hollingsworth LLP write that the court's majority in *Sommerville v. Union Carbide* relied on an outdated "weight-not-admissibility" approach to expert testimony.

October 09, 2025 at 06:30 AM By **Aleksandra Rybicki**

Stephanie Salek

Sally Levin



(l-r) Aleksandra Rybicki, Stephanie Salek, and Sally Levin of Hollingsworth LLP. Courtesy photos

A recent ruling from the United States Court of Appeals for the Fourth Circuit represents a step backward in the effort to apply amended Federal Rule of Evidence 702 properly. In [*Sommerville v. Union Carbide*](#), plaintiffs sought medical monitoring for an alleged increased risk of developing cancer allegedly resulting from their “chronic” exposure to ethylene oxide, or EtO—a chemical used to sterilize over 50% of all medical equipment—released from Union Carbide’s Charleston, West Virginia, facility. They offered Dr. Ranajit Sahu to model EtO emissions to establish the plaintiffs’ exposure. The [district court](#) correctly excluded Dr. Sahu’s testimony under Rule 702, finding his opinions were “not based upon sufficient facts or data because the inputs he uses in the air model

are speculative and are premised on assumptions that do not accurately represent the defendants' operations in South Charleston." The Fourth Circuit reversed in an opinion that contradicts the letter and purpose of the recent amendments to Rule 702, falling back on the outdated refrain that "questions regarding the factual underpinnings of the [expert's] opinions affect the weight and credibility of the witness' assessment, not its admissibility."

The Fourth Circuit's opinion reverted to what the Advisory Committee called the ["incorrect application of Rule 702"](#) that prompted the Rule's recent amendments. In December 2023, Rule 702 was amended to clarify that a proponent of expert testimony must demonstrate that it is "more likely than not" that, among other things, "the expert's opinion reflects a reliable application of the principles and methods to the facts of the case." As the [Advisory Committee Notes](#) make clear, the very purpose of the amendments was to prevent the type of analysis reflected in the Fourth Circuit's opinion.

In explaining the need for these amendments, the [Advisory Committee bemoaned](#) that "many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility," but "[t]hese rulings are an incorrect application of Rules 702 and 104(a)." Indeed, the plain language of Rule 702(b) confirms a court's duty to evaluate whether an expert's "testimony is based on sufficient facts or data." Yet the Fourth Circuit repeatedly relied on the superseded "weight-not-admissibility" crutch in contradiction to the Advisory Committee's clear guidance.

The amendments emphasize that each expert's opinion ["must stay within the bounds of what can be concluded from a reliable application"](#) of the expert's basis and methodology." It is the district court's duty to conduct this assessment, as the district court did in *Sommerville*, because "jurors may [] lack the specialized knowledge to [determine whether the conclusions of an expert go beyond](#) what the expert's basis and methodology may reliably support."

Still, the Fourth Circuit misguidedly faulted the district court for fulfilling its duty and disapproved of the court's "veiled credibility determination based on Dr. Sahu's choice of which data to input into his [emissions] model." The Fourth Circuit rejected the [district court's view](#) that a model is only as good as its underlying data and that courts must analyze underlying data to assess the expert's conclusions—in other words, to prevent "garbage in, garbage out."

For example, one point of contention for the Fourth Circuit was the district court's criticism of Dr. Sahu for making multiple assumptions when selecting data to apply to his model: He assumed the sterilization facility's emissions were solely from uncontrolled ("fugitive") sources, rather than from discrete point sources, such as stacks or pipes. He also assumed that emission rates were constant during particular periods, rather than variable, and used historical data to estimate

emissions rather than relying on available records that reflected the actual emissions at the facility. The district court appropriately found that his assumptions rendered his data unrepresentative of conditions at the facility and that he provided “little to no scientific basis for” such assumptions.

The Fourth Circuit found this analysis unavailing because Dr. Sahu provided “detailed reasons” for his assumptions, but the majority inexplicably failed to evaluate whether these reasons were sound or suitable for a jury’s ears, as its gatekeeping role would have required. As the dissenting judge correctly noted, Dr. Sahu’s assumptions regarding the data are “not problematic on [their] own”; the problem arises where such assumptions are “connected to existing data” by “nothing but Dr. Sahu’s own assertions.” Courts are tasked with ensuring that opinions based solely on an expert’s “say-so” do not reach a jury. In the absence of any scientific basis for his assumptions in selecting underlying data, the district court found Dr. Sahu’s resulting opinions unreliable in a proper exercise of its gatekeeping authority under Rule 702.

Another battleground was the district court’s valid criticism of Dr. Sahu’s reliance on meteorological data from surrounding geographic locations with varying wind patterns, when he could have used available data from the facility at issue to determine emissions dispersion characteristics. This assessment did not, as the Fourth Circuit stated, “conflate[] admissibility with [] weight.” Rather, the district court properly assessed whether Dr. Sahu’s opinions regarding Union Carbide’s facility were reliably supported by data regarding other facilities—whether the expert’s opinion properly “stay[ed] within the bounds of what can be concluded from a reliable application of the expert’s basis and methodology.” Due to the incongruence between Dr. Sahu’s opinion and the underlying data, the district court properly excluded the opinion. The majority of the Fourth Circuit panel disagreed.

The Fourth Circuit’s dissenting judge struck at the heart of the majority’s erroneous reasoning in stating that “we’ve faulted district courts for ‘abdicat[ing] [their] responsibility’ with respect to expert testimony based on the belief that ‘the question of whether an expert’s opinion had an adequate basis in fact could be handled by opposing counsel through cross examination and in jury argument.’” As the district court pinpointed, cross examination “does not ensure the *reliability* of the expert’s testimony; such testimony must still be assessed *before* it is presented to the jury.”

Here, it was the district court, not the Fourth Circuit, that was faithful to the text of the Rule’s amendments and the Advisory Committee’s directive regarding their application by assessing the sufficiency of the data underlying Dr. Sahu’s opinions, and ensuring that the conclusions born from that data reflected a “reliable application” of his methodology to the facts of the case.

Opinions like *Sommerville* that rely on the outdated “weight-not-admissibility” refrain grant experts a “get-out-of-*Daubert*-free” card and highlight the need for practitioners to emphasize the purpose of Rule 702’s amendments at every opportunity. Practitioners should focus courts’ attention on the Advisory Committee’s clear guidance on the amendments and on post-amendment case law that correctly follows this guidance to avoid rulings that fail to hold expert witnesses to their proper admissibility burden. Hopefully, the Fourth Circuit will soon be able to right its ship: its *Sommerville* opinion has been appealed for *en banc* consideration. It is incumbent upon practitioners to focus courts’ attention on proper applications of Rule 702 to keep junk science from reaching a jury.

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Bloomberg Law

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Column

Judge Who Took Axe to Lawyers' Rates Says Size (of Firm) Matters

Oct. 9, 2025, 2:00AM PDT

Welcome back to the Big Law Business column . I'm Roy Strom, and today we look at how a judge decided against paying a small law firm "Big Law" rates. Sign up for Business & Practice , a free morning newsletter from Bloomberg Law.

A case waiting for a ruling from the US Court of Appeals for the Ninth Circuit asks a controversial question: Should judges award smaller fees to lawyers working at small law firms than those working at large firms?

Let me cut to the chase: I don't think I can find a single person who would reasonably argue the answer to that question is: "Yes." (If you are that person, please let me know.) Law firm headcount is simply not a proxy for what clients are willing to pay their attorneys—just look at the myriad boutique firms founded by highly paid Big Law veterans.

I'm also not sure the judge who wrote the order, Michael Fitzgerald of the Central District of California, would agree that he presented the question so squarely.

There were plenty of caveats in Fitzgerald's order, which is the subject of the appeal. He explicitly said firm size was not the only issue at hand when he cut a law firms' fee request by more than half after the firm won an antitrust ruling.

But Fitzgerald came back to the idea that Big Law lawyers are paid more than small firm lawyers a few times. Here is perhaps the most conclusive part of his text: "it is simply unreasonable to award big law rates to a four-person firm representing mom-and-pop warehouses."

The ruling creates a "troubling incentive problem," said Eric Chaffee, a law professor at Case Western Reserve University School of Law.

"If experienced attorneys at boutique firms know they'll be paid less for fee-shifting cases involving smaller clients, they have less economic incentive to take those cases," Chaffee said. "This could leave 'mom-and-pop' clients with less access to top-tier legal talent—the opposite of what fee-shifting statutes intend."

If the Ninth Circuit writes a published opinion on the question—and there are some indications that it will—I think it's likely to reject the premise that firm size should factor into attorneys' fees awards.

Nancy Rapoport, a law professor at University of Nevada, Las Vegas, said she hadn't seen a prior case that docked lawyers' fees based on the size of their law firm, and said it sets a "dangerous precedent."

"A solo lawyer who's the best in the country at what he or she does shouldn't be penalized because he or she decided not to work at Big Law," Rapoport said.

The law firm involved is San Francisco's Gaw Poe, which is actually a five-attorney firm. Gaw Poe regularly files antitrust cases under the Robinson-Patman Act, which requires suppliers to sell products to all wholesalers at the same price. The law also allows plaintiffs' lawyers to be paid by defendants in successful cases.

Gaw Poe's founders are former lawyers at big law firms (Morrison Foerster for Mark Poe, O'Melveny and Wilson Sonsini for Randolph Gaw), and its website boasts it is "cost-effective" insofar as its partners charge comparable rates to Big Law associates. That's roughly true. Poe's hourly billing rate in the case was \$1,314. Some Big Law associates today charge more than \$1,500 an hour, while senior partners may add thousand more than that. Still, the court reduced Poe's hourly rate to just over \$1,000 an hour.

The defense argued Gaw Poe was not efficient because partners were handling associate level work—seeking a 10% haircut in its fee as a result. Fitzgerald wrote he was "somewhat persuaded" the firm was efficient: the partners did associate-level work more effectively than associates would have. But he still applied a 5% haircut to its fee for that work.

Gaw Poe's case was against Prestige Brands, which owns the maker of Clear Eyes, the eye drop product long endorsed by comedian Ben Stein, alleging it was giving Costco an illegal discount. The case won at trial, securing about \$1.2 million in tripled, collective damages for a group of plaintiffs who buy Clear Eyes. The ruling also forced the product to be sold to the plaintiffs at the same price as Costco's and required a semi-annual report of the prices companies are paying for the product. Prestige also said it stopped the discounting practices that led to the lawsuit.

Gaw Poe asked for \$7.65 million in attorneys' fees, or more than six times the damages the plaintiffs were awarded. Judges sometimes look sideways at legal fees that are larger than the amount the lawyers' clients will receive in a case.

But Fitzgerald rejected a defense argument seeking to limit Gaw Poe's fees for "limited success," noting that the amount the plaintiffs recovered was more than an offered settlement and also included injunctive relief.

The judge awarded Gaw Poe \$3.1 million in attorneys' fees, with much of his analysis focused on the fact that the firm was small.

A panel of appellate judges tried to weigh all this during a July oral argument. The Ninth Circuit doesn't write opinions on every case it decides, and the fact that it has taken more than three months to decide this case suggests they are writing something. The law firm size issue is the most likely subject.

A back-and-forth from that argument shows just how much the judges were struggling with the economics of law firms.

"I think what [Judge Fitzgerald] was thinking was not that [large law firms] were being paid by large corporations, but that they have higher overhead," Judge Kim McLane Wardlaw said.

Poe responded: "I wouldn't see how a firm's decision to rent the top floor at the US Bank building should weigh in its favor when it comes to fee awards."

Judge Anthony Johnstone weighed in: "Well, usually economies of scale would point in the other direction, right? You would expect whatever overhead a large firm has is spread over more people for their output."

Poe didn't seem to know exactly what to say to that, but he got back to his overall argument: "I don't see anywhere in the existing precedent setting rates on skill, experience, and reputation, how that would be a permissible factor."

That's probably all that needs to be said.

Worth Your Time

On North Carolina: Big Law firms are flocking to Charlotte, vying for structured finance and private credit work in the state's largest city and banking center, Tatyana Monnay reports.

On M&A: State attorneys general are preparing to challenge more M&A deals, stepping further into the role of antitrust watchdog that they say the Trump administration is abandoning, Kate Arcieri reports.

On Legal fees: JPMorgan Chase & Co. was hit with \$115 million in lawyers' bills for defending Charlie Javice, an executive convicted of defrauding the bank and sentenced to seven years in prison, Bob Van Voris and Jef Feeley report. Quinn Emanuel and Kobre & Kim were part of Javice's defense team.

That's it for this week! Thanks for reading and please send me your thoughts, critiques, and tips.

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Litigation

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Purdue Bankruptcy Plan Offers Unfair Choice, Baltimore Says (1)

Oct. 8, 2025, 11:01AM PDT; Updated: Oct. 8, 2025, 11:53AM PDT

Summary by Bloomberg AI

AI Generated



- The city of Baltimore urged a federal judge to reject Purdue Pharma LP's bankruptcy plan, saying it unlawfully discriminates against creditors that don't agree to drop litigation against the drugmaker's Sackler family owners.
- Purdue's Chapter 11 plan discriminates against non-federal government entities by putting them in the same creditor class but providing disparate treatment to those who don't release legal claims against the Sacklers.
- Baltimore officials said being forced to accept less from the company for refusing to grant the Sackler releases is a "form of illicit vote-buying" that circumvents the Supreme Court's ruling and violates the US bankruptcy code's "equal treatment rule".

The city of Baltimore urged a federal judge to reject Purdue Pharma LP's bankruptcy plan, saying it unlawfully discriminates against creditors that don't agree to drop litigation against the drugmaker's Sackler family owners.

Purdue's Chapter 11 plan discriminates against non-federal government entities by putting them in the same creditor class but providing disparate treatment to those who don't release legal claims against the Sacklers, Mayor Brandon M. Scott and the Baltimore City Council said in an objection filed Tuesday in the US Bankruptcy Court for the Southern District of New York.

"It's well past time to end the contortions and to put forward a plan that grants Purdue and its creditors the relief the Bankruptcy Code allows (a discharge for the bankrupt company and fair payment of creditors' claims from the Debtors' assets)," the city leaders said.

Purdue and the Sacklers have agreed to pay \$7.4 billion to settle litigation stemming from the production and sale of painkiller OxyContin, which has been blamed for fueling an opioid addiction and overdose crisis in the US. The Sacklers will contribute approximately \$6.5 billion in installments over the next 15 years, subject to certain reserves.

The plan came into its current form after the US Supreme Court last year blocked the company from forcing creditors to give up rights to sue third parties in a decision that has altered corporate bankruptcies across the country. As part of a renegotiated plan scheduled for bankruptcy court consideration next month, creditors can opt out of releasing claims against the Sackler family in exchange for a smaller settlement distribution.

But being forced to accept less from the company for refusing to grant the Sackler releases is a “form of illicit vote-buying” that circumvents the Supreme Court’s ruling in *Harrington v. Purdue Pharma* and violates the US bankruptcy code’s “equal treatment rule,” the Baltimore officials said.

Purdue remains confident in the legality of the plan, which the company believes will be widely supported by creditors when all votes are tallied, it said in a statement.

“The plan is the product of intense work with our creditors through a singular, shared focus on delivering as much value as possible to meaningfully address the opioid crisis,” the company said.

Purdue, which filed for bankruptcy six years ago, put forward a revised Chapter 11 plan this year that will transfer assets to a public benefit company and provide funding for opioid abatement efforts across the country.

A group of 55 US states and territories involved in the case have signed on to the deal.

Baltimore’s officials are represented by Susman Godfrey LLP. Purdue is represented by Davis Polk & Wardwell LLP.

The case is Purdue Pharma LP , Bankr. S.D.N.Y., No. 19-23649, objection filed 10/7/25 .

(Updates with Purdue statement in seventh and eighth paragraphs)

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‘A Number to Send a Message’: Attorney Behind \$966M Talc Verdict Says He Wasn’t Surprised

Danny Kraft, one of the plaintiffs’ lawyers at Dallas-based Dean Omar Branham Shirley who scored a nearly \$1 billion mesothelioma verdict on Monday against Johnson & Johnson, talked to Law.com about the case’s complex history and what he learned about the jurors.

October 08, 2025 at 04:05 PM By  **Amanda Bronstad**

What You Need to Know

- The award, which included \$950 million in punitive damages, is the largest talc verdict against Johnson & Johnson in a mesothelioma case.
- The jury’s award was for the three adult children of Mae Moore, the wife of a pastor, who died in 2021, one year after her diagnosis and months after suing Johnson & Johnson.
- The Los Angeles Superior Court jury’s verdict came days after a jury in South Carolina’s Richland County Court of Common Pleas handed Johnson & Johnson a defense verdict in a separate talc case in which Dean Omar represented a plaintiff with mesothelioma.



Danny Kraft, of counsel with Dean Omar Branham Shirley. Courtesy photo

On Monday, a Los Angeles Superior Court jury [awarded \\$966 million](#) to the adult children of an 88-year-old woman who died from mesothelioma after using Johnson & Johnson's talcum powder products. The award, which included \$950 million in punitive damages, is the largest talc verdict against Johnson & Johnson in a mesothelioma case.

A team of lawyers from Dallas-based Dean Omar Branham Shirley represented Mae Moore, the wife of a pastor, who died in 2021, one year after her diagnosis and months after suing Johnson & Johnson. Danny Kraft, who handled the month-long trial with Dean Omar colleagues Venus Burns and Lenny Sandoval, talked to Law.com about the record verdict.

This article has been edited for length and clarity.

Law.com: Were you surprised about this amount of this verdict?

Danny Kraft: Actually, I was not surprised at all. The compensatory award, the \$6 million for Mae Moore's pain and suffering, and emotional damages, is on the lower end of what I typically see in asbestos cases, particularly mesothelioma deaths. She suffered tragically, and the jury heard about tremendous pain and suffering documented by medical records. She basically suffocated and drowned, and the tumor was eating through her ribs and was invading other parts of the body.

In terms of the daughters' loss for the death of their mom, their testimony was very compelling. Four million dollars, \$3 million and \$3 million for each of the daughters' loss was not out of the range of what is normal in the mesothelioma cases.

The punitive damage award is \$950 million. It sounds large, but when you look at the goal of punitive damages to deter bad company conduct and punish a company for a pattern of egregious misconduct, for concealing, misrepresenting, lying to the public, when you consider J&J's and financial well-being, how do you punish a company for their conduct?

Law.com: Did you suggest to jurors a specific number?

Danny Kraft: I told the jury that in the hour-and-a-half closing argument, J&J makes millions of dollars. In the 30 days of the pendency of the trial, in terms of profits, J&J made \$1.15 billion. What I said to the jury was, 'I didn't know what the right answer was, but if speeding tickets are \$5, everyone would be speeding because it's not a deterrent.' That may seem large, but when you have a company the size of J&J whose conduct was as bad as it was for as long as it was, it makes sense.

You have to come up with a number to send a message to punish their conduct and deter them.

Law.com: On Friday, the first full day of deliberations, the jury handed the judge a note saying one of the jurors had planned to use his "gut instincts," writing, "It seems as though he hasn't even

really been present for the last month.” What happened after the judge got that note?

Danny Kraft: To ensure fairness to everybody, we replaced the juror with an alternate. Jurors were instructed they had to deliberate anew, and couldn’t factor anything said at that point in the deliberations.

Jurors don’t have to take notes. He was awake, he was alert, there every day and on time.

Most jurors follow the judge’s instructions when told what to do. This juror seemingly didn’t. But, thankfully, we were made aware of this by the jury and were able to eliminate any prejudice or any idea of unfairness during deliberations by replacing the jury.

[Law.com](#): What did the jury tell you after the verdict?

Danny Kraft: They indicated that Friday, they spent most of the day on the first couple questions and going over, was there asbestos in the product? Which was a big key component in the case. If asbestos was in the product, all the other decision making in the subsequent questions becomes easy.

What they told us was seeing the evidence, seeing the binders full of exhibits, reading what J&J wrote and what they were told, had solidified what they heard from the evidence that there was asbestos in the product. J&J concealed it, they hid it from regulators and consumers.

Law.com: What were the deliberations like for you?

Danny Kraft: We got a note from the jury after lunch around 2:00 or 2:15 p.m. We had a juror we had to replace because she was only able to deliberate through Friday, and we knew she was moving out of the jurisdiction. When we got the note after lunch around 2 p.m., both the parties and the court spoke and we made the agreement to substitute the two jurors, including the one the note was written about, with alternates.

They deliberated from then until about 4:30 or 4:40 p.m.

They arrived around 9:35 a.m. on Monday, and we got a note saying they had a verdict around 12:15 or 12:20 p.m. They were eventually called back around 1:15-1:20 p.m. The jury verdict was read around 1:30 p.m.

Law.com: How did Moore’s case end up going to trial?

Danny Kraft: The case went up for trial in 2021 when she was still alive. She died during the course of the trial. The case started again while J&J was in bankruptcy, then we had to wait. The family

waited a long time for their day in court to testify to a jury. The jury heard from Ms. Moore via video testimony.

I began my closing argument playing a [video clip](#) to the jury during the course of the trial, and Ms. Moore says she's not afraid of dying. She's a God-fearing, God-trusting woman. She said to the jury she didn't file this lawsuit because of money. No amount of money can give her back her life and take cancer away. She wanted this to not happen to anyone else.

Law.com: Johnson & Johnson says it plans to immediately appeal the verdict, which it called unconstitutional and based on evidence that shouldn't have been in the trial. They point to an Oct. 2 defense verdict in another talc case your firm handled in South Carolina's Richland County Court of Common Pleas, which also involved a mesothelioma plaintiff. What is your response to that?

Danny Kraft: It's the same old story, the same old song and dance, same old tune. This judge performed her role as a gatekeeper and allowed the jury to only hear relevant material, scientific evidence. The experts confirmed, documents proved over and over again, consistently, asbestos was found in their product.

I told the jury, 'During deliberations, use your common sense, follow the science, not the science fiction of lawyers created by Johnson & Johnson.'

J&J was given a jury trial of the folks of the Southern California community. This jury was diligent. They appeared every single day. They were engaged, they listened to the testimony, they told us they reviewed the evidence, and 'unconstitutional' is a slap in the face of the system. It's not based upon anything other than sour grapes on the part of J&J.

Law.com: And the South Carolina defense verdict?

Danny Kraft: Every single jury is different. The South Carolina case was an expedited case in front of a South Carolina jury. The case started on Monday and was over by Friday. The same type of evidence that was heard, the laws are slightly different, the arguments the lawyers make are different. The underlying facts of the family and who they were are different. But, ultimately, jurors view evidence differently depending on who they are and their collective experience.

As far as I'm concerned, the outlier was the South Carolina defense verdict. I'm not saying the jury did anything wrong, they just reached a different conclusion. You didn't hear us saying, 'Oh, it was unconstitutional,' and crying sour grapes.

Law.com: When's your next trial?

Danny Kraft: November, in Pennsylvania. These trials are physically, mentally and emotionally draining because of how significant, important they are. I may take a few days, spend a few days

with my family, then will get back to work.

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Aetna Strikes Class Deal Covering Patients' Spinal Surgeries

Oct. 9, 2025, 6:11AM PDT

Aetna Life Insurance Co. negotiated a classwide settlement that allows patients to receive up to \$55,000 for spinal surgeries they say the insurer wrongly categorized as experimental and thus not covered.

The proposed deal covers at least 381 people whose claims were denied, along with certain other patients who paid out-of-pocket for the surgery or will have the surgery in the future. The total value of the settlement is "difficult to quantify," but Aetna has denied more than \$7.1 million in relevant claims, according to a motion seeking preliminary settlement approval from Judge Andre Birotte Jr.

The deal, announced Wednesday in the US District Court for the Central District of California, resolves two lawsuits seeking coverage for artificial disc replacement surgery

The procedure has been approved by the Food and Drug Administration for more than 15 years as a safe and effective treatment for back pain and immobility, patients say

The parties proposed a classwide settlement in 2022 but scrapped that plan a few months later, with subsequent litigation focusing on whether the cases could be resolved on a class basis

Hernandez Laska LLP represents Aetna. Gianelli & Morris ALC represents the patients.

The case is Hendricks v. Aetna Life Ins. Co. , C.D. Cal., No. 2:19-cv-06840, settlement motion 10/8/25 .

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Bloomberg Law

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New York City Sues Social Media Giants Over Addictive Features

Oct. 8, 2025, 2:43 PM PDT

Summary by Bloomberg AI

AI Generated



- The City of New York filed a lawsuit against Meta Platforms Inc., Snap Inc., ByteDance Inc., and Google LLC, alleging they deliberately designed social media products to be addictive to adolescents.
- The complaint targets features on Instagram, Snapchat, TikTok, and YouTube, and brings claims for public nuisance and negligence, seeking damages and an injunction.
- The lawsuit alleges that the companies' features, such as endless scroll and intermittent variable rewards, are used to keep children on their platforms and have contributed to a youth mental health crisis.

Meta Platforms Inc., Snap Inc., ByteDance Inc., and Google LLC all deliberately designed social media products to be addictive to adolescents and created a youth mental health crisis that is straining city resources, according to a lawsuit filed Wednesday by the City of New York.

The complaint is the latest addition to sprawling litigation against technology companies across multiple jurisdictions and courts. The city's complaint targeted features on Instagram, Snapchat, TikTok, and YouTube.

The companies designed, marketed, and distributed their platforms to "maximize the number of children," using "algorithms that wield data as a weapon against children and fuel the addiction machine," according to the complaint filed in the US District Court for the Southern District of New York.

The lawsuit brings claims for public nuisance and negligence. New York is asking the court damages and an injunction against contributing to public nuisance.

Social media addiction lawsuits "fundamentally misunderstand how YouTube works and the allegations are simply not true," said José Castañeda, a Google Spokesperson. "YouTube is a streaming service" rather than a "social network where people go to catch up with friends."

The other defendants didn't immediately respond to requests for comment.

The city's suit is separate from multidistrict litigation encompassing thousands of similar addictiveness lawsuits from state attorneys general, school districts, and individuals against the same defendants. That MDL was assigned to Judge Yvonne Gonzalez Rogers in the US District Court for the Northern District of California.

Earlier this year Rogers denied the tech giants' bid for immediate appellate review of her decision allowing public nuisance claims to proceed.

Intermittent Variable Rewards

The NYC complaint highlights features such as endless scroll, intermittent variable rewards that are tied to user-specific data, and strategically timed notifications that are all used to keep children on the companies' platforms.

"All of these features worked together and individually to addict young users to social media and to create the youth mental health crisis" that New York City public schools and hospital systems are battling now. Intermittent variable rewards work like slot machines to keep users coming back, the complaint said. The platforms are designed to withhold and release rewards on a schedule that algorithms determine is optimal for heightening users' cravings for the platform, the lawsuit said.

These practices are "particularly effective and dangerous for adolescents given that their brains have not completely matured" and because teen brains haven't finished developing impulse control or executive function, according to the complaint.

The city also highlighted how apps like Instagram and Snapchat "exploit reciprocity" by telling users when messages are seen so teens feel obligated to respond and heightening young people's need for social comparison.

Snapchat's "snap streak," which tallies users that interact with each other every day, and the "like" features create artificial forms of feedback that "neurologically alter" perceptions of online posts, the complaint said. The filing also pinpointed many of the platforms' appearance-altering filters that underscore conventional beauty standards as contributing to widespread body image issues among adolescents.

All of these features have force the city to "expend significant resources addressing these harms and providing education and support" to students, parents, and New York City residents, the complaints said.

In addition to the Corporation Counsel of the City of New York, the city is represented by Keller Rohrback LLP.

The case is *The City of New York v. Meta Platforms Inc.*, S.D.N.Y., No. 1:25-cv-08332, complaint filed 10/8/25 .

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NYC sues social media companies over keeping kids scrolling in 'flow state'

 [courthousenews.com/nyc-sues-social-media-companies-over-keeping-kids-scrolling-in-flow-state](https://www.courthousenews.com/nyc-sues-social-media-companies-over-keeping-kids-scrolling-in-flow-state)

Nina Pullano

October 9, 2025

Pointing to a national crisis, New York said social media platforms have triggered depression, anxiety, eating disorders and other mental health conditions.

[Nina Pullano](#) / October 8, 2025

The mobile phone apps for Facebook, Instagram and WhatsApp are shown on a device in New York. (AP Photo/Richard Drew, File)

MANHATTAN (CN) — New York City accused the companies behind Facebook, Instagram, Snapchat, TikTok and YouTube of designing their social media platforms to be addictive to young users, spurring a mental health crisis that has burdened city resources, in a federal public nuisance lawsuit Wednesday.

"Borrowing heavily from the behavioral and neurobiological techniques used in slot machines and exploited by the cigarette industry, defendants deliberately embedded in their platforms an array of design features aimed at maximizing youth engagement to drive advertising revenue," the city wrote in a [327-page lawsuit](#) filed in the Southern District of New York.

The city says the companies — Meta, Snap, ByteDance and Google — knew kids and adolescents are particularly vulnerable to the addictive effects of such features and targeted them anyway to drive profits.

For example, serving users and "endless feed" keeps them scrolling in a "flow state," while "intermittent variable rewards" alter dopamine release, intensifying use. Platforms also dole out "trophies" to reward maximal usage and push notifications incessantly, encouraging repetitive account-checking by "manufacturing insecurity."

Pointing to a national crisis, New York said social media platforms have triggered depression, anxiety, eating disorders, self-harm, and suicidality among thousands of children, including youth in New York City, who fall under the plaintiff city's care.

Over one-third of kids ages 13 to 17 nationwide report using one of the defendants' platforms "almost constantly," the city claims in the lawsuit, yet more than half say they would struggle to cut back. Locally, citing 2021 numbers, the city said more than 77% of New

York City high school students reported spending an average of three or more hours per school day in front of a screen.

"Instead of feeding coins into slot machines, kids are feeding defendants' platforms with an endless supply of attention, time, and data," the city writes.

The city asked the federal court to issue an injunction against "further actions causing or contributing to the public nuisance" described in the lawsuit.

In a statement provided to Courthouse News, Google spokesperson José Castañeda said the lawsuit and others like it "fundamentally misunderstand how YouTube works" and that "the allegations are simply not true."

The remaining defendant tech companies didn't immediately return requests for comment.

A separate, nationwide lawsuit making similar claims of social media addiction is [playing out in federal court](#) in California. There, attorneys general from several dozen states are in the discovery phase in their [2023 lawsuit](#), which was [trimmed](#) earlier this year.

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Elite colleges target lawyers' funding in antitrust class certification fight

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Mike Scarcella, Sara Merken, David Thomas

October 9, 2025

People with briefcases come out of the boardroom in an office in Berlin, Germany, July 29, 2020. REUTERS/Axel Schmidt [Purchase Licensing Rights, opens new tab](#)

- Judge weighs third-party funding for class counsel in university admissions case
- 800-lawyer law firm merger unites regional players
- AI investors see promise for plaintiff-side lawyers

Oct 9 (Reuters) - (Billable Hours is Reuters' weekly report on lawyers and money. Please send tips or suggestions to D.Thomas@thomsonreuters.com, [opens new tab](#).)

Elite U.S. universities battling a high-stakes antitrust lawsuit are taking aim at one of the plaintiffs' law firms, setting up an unusual showdown over the impact of litigation funding on class action certification.

The dispute before U.S. District Judge Matthew Kennelly in Chicago centers on whether the lawyers are "adequate" under class action rules to represent more than 200,000 current and former students in the case, which claims the schools illegally favored wealthy applicants over those requiring financial aid.

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Law firm Gilbert Litigators & Counselors (GLC) in a [filing, opens new tab](#) last week said the universities cited the firm's use of third-party litigation funding to falsely accuse it of misleading the court about its financial exposure in the case.

The firm said the schools misrepresented the scope and significance of its funding arrangement in a "contrived" attempt to disqualify GLC, head off class certification and avoid liability.

"Class Counsel accurately represented that they were working on a 'contingent' basis and incurred 'substantial risk,'" the firm said. "Defendants cite no case (and Plaintiffs are aware of none) in which a court found proposed class counsel inadequate because they relied on funding (or did not disclose it) in stating they faced risk."

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GLC said its financing covered only a fraction of its legal fees, and that there was no court rule requiring disclosure of outside funding.

The universities — Cornell, University of Pennsylvania, MIT, Georgetown and Notre Dame — submitted their arguments in a filing that remains under seal.

In an order on September 19, the judge said the funding documents "are at least potentially relevant regarding the motion for class certification given the contentions that proposed class counsel misled the Court in earlier fee petitions regarding whether they were at risk."

The universities declined to comment or did not immediately respond to questions about the dispute.

The Gilbert firm and the other plaintiffs firms in the case, Berger Montague and Freedman Normand Friedland, declined to comment.

According to the plaintiffs' filing, the Gilbert firm's funding only covers 40% of its own fees and less than 16% of the total fees incurred by the firms that are seeking class certification.

"Under the funding arrangements at issue here, the firm and the funder are jointly incurring the risk of loss and delay," New York-based Gilbert and the other firms told Kennelly in the filing.

Litigation funders invest in legal disputes in exchange for a part of any settlement or judgment. Questions about funding transparency and funders' influence have come up in other lawsuits, but the issue of whether its use undermines assertions of risk by lawyers seeking to represent a class appears to be novel.

"This is a new twist," said legal expert Stephen Younger of law firm Withers, who is not involved in the litigation.

Twelve of the original defendants in the case, including Vanderbilt, Northwestern, Dartmouth and Columbia, have agreed to pay [nearly \\$320 million](#) to settle claims against them. All the defendants, including those that have settled, have denied any wrongdoing.

In a separate [filing, opens new tab](#) last month asserting they passed the adequacy test for class certification against the remaining defendants, the plaintiffs' lawyers told the court that they "achieved extraordinary results over strenuous opposition."

"Defendants have fallen far short of the standards for showing they are inadequate," the lawyers said.

-- Frost Brown Todd is combining with New Jersey-based midsize law firm Gibbons, creating what the firms called a "mid-market legal powerhouse" with about 800 lawyers across 25 offices. Partners at both firms have approved the deal, which is set to take effect in January, the firms said on Wednesday.

The combined firm will be named FBT Gibbons. Cincinnati-founded Frost Brown Todd, the larger of the two firms, generated more than \$336 million gross revenue in 2024, while Gibbons took in more than \$115 million, according to figures published by The American Lawyer.

Law firm mergers picked up through the first nine months compared to the same period last year, according to legal consultancy Fairfax Associates, which tracked 47 completed deals so far in 2025 and 43 combinations in 2024. McDermott, Will & Emery's [merger](#) with Schulte Roth & Zabel was the largest deal to take effect in the third quarter, creating a firm named McDermott Will & Schulte with about 1,750 lawyers globally.

-- Two startups that cater to plaintiff-side law firms have attracted millions of dollars from investors, as money continues to pour into legal technology companies that market artificial intelligence tools to help lawyers speed up and streamline tasks.

EvenUp, which markets its technology to personal injury lawyers, on Tuesday said it was [valued at over \\$2 billion](#) after raising \$150 million in a funding round led by Bessemer Venture Partners. Eve, which works with labor and employment and personal injury firms, last week [raised \\$103 million](#) at a \$1 billion valuation in a round led by Spark Capital.

The startups, founded in San Francisco, each said that AI is driving a "transformation" for plaintiffs' law firms. Companies that serve other sectors of the legal market, including corporate law firms and in-house legal teams, are also [drawing](#) in cash from investors, as new technology promises to reshape the industry.

Read more:

[Big Law rates for small firms? US appeals court takes up fee fight](#)

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Reporting by Mike Scarcella, Sara Merken and David Thomas

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Meta Faces Class Action Claim Over Fraudulent Ads in ‘Pump-and-Dump’ Schemes

Financial advisers allege the social media giant has violated the Lanham Act and other laws by allowing scam artists to fraudulently use their images and names to steer investors to Chinese-based securities scams.

October 08, 2025 at 06:46 PM By **Michelle Morgante**

What You Need to Know

- The suit alleges Meta is responsible for violations not covered by Section 230.
- Meta faces a similar suit by Australian billionaire Andrew Forrest.
- Meta has argued it does not review third-party content and is not a “publisher.”



John Suddeth (L) and Sara Perkins (R). Courtesy photos.

A class action complaint filed against Meta Platforms alleges the social media giant is profiting from deceptive advertisements that use the images and identities of legitimate financial advisers to steer investors to so-called “pump-and-dump” stock schemes.

A complaint filed Tuesday in the U.S. District Court for the Northern District of California says Meta violates the Lanham Act's prohibition of false endorsement, as well as state laws regarding the right of publicity, unfair competition and deceptive and unfair trade practices.

The suit is brought by plaintiffs John Suddeth and Sara Perkins, financial advisers based in southwest Florida, who say their images and names were used to promote investments in Pheton Holdings Ltd., a Chinese-based securities scam.

Suddeth and Perkins are represented by John Jasnoch of Scott and Scott in San Diego and Tom Grady of Grady Law in Naples, Florida. The attorneys did not respond to a request for comment on Wednesday.

The complaint alleges Meta has allowed deceptive ads to continue to be published on its platforms despite repeated complaints and a [June letter signed by 42 U.S. attorneys general](#) that called on the company to address the "proliferation of fraudulent investment advertisements."

As described in the letter sent to Meta CLO Jennifer Gillian Newstead, the likenesses of investment experts are used to recommend certain penny stocks, which attract investors and cause the stock prices to rise in what is known as the "pump" phase of the scheme. Fraudsters then "dump" the inflated stocks, causing the prices to plummet at the investors' expense.

The attorneys general said there have been "widespread reports of constituents losing life-changing money" after clicking on Facebook ads appearing to be connected to reputable investment management companies.

Suddeth and Perkins contend Meta's "impersonation machinery has inflicted concrete and continuing harm on plaintiffs—licensed financial professionals whose livelihoods depend on credibility, candor, and client trust."

The complaint argues Meta's liability arises from its commercial advertising and misappropriation and false endorsements that fall within intellectual property regimes not immunized by Section 230 of the Communications Act, which provides wide immunity to digital platforms regarding third-party content posted by their users.

Meta did not respond to a request for comment Wednesday. Counsel for the defense has yet to appear.

Meta faces a similar complaint by Australian billionaire Andrew Forrest, whose 2022 suit alleging misappropriation of likeness, aiding and abetting fraud, Lanham Act violations and other charges is pending before U.S. District Judge P. Casey Pitts in the Northern District of California.



Screenshots of whatsapp group chats. Images from court documents

Forrest contends his images were used in fraudulent ads for cryptocurrency that “bilked innocent Australians out of millions.”

In that case, Meta has argued it should not be treated as a publisher with a duty to control the conduct of third parties, according to court documents. Pitts noted in a June 2024 order that “Meta does not review ads before they are completed and paid for.”

Forrest pursued criminal charges against Meta in Australia, but the case was discontinued last year, with authorities citing insufficient evidence, according to news reports.

Forrest is represented by Hecker Fink, Bailey & Glaser, Derek G. Howard Law, and Singleton Schreiber. Meta is represented by Paul, Weiss, Rifkind, Wharton & Garrison and Dunn Isaacson Rhee.

The complaint by Suddeth and Perkins alleges Meta and its platforms Facebook, Instagram and WhatsApp have “systematically approved, delivered, amplified and profited from ads and related promotional content that misappropriated class members’ identities to sell fraudulent securities schemes.”

The fraudulent ads, it says, “were designed to and caused consumer confusion, diverted prospective clients, damaged goodwill, as well as exposed class members to reputational harm, regulatory inquiries, and lost business opportunities.”

The ads and group chats created by the fraudsters were designed to mimic authenticity, using high-quality photos, forged logos, fake quotes and edited video clips to suggest affiliation with reputable firms, the suit said.

“In WhatsApp, admins posed as the impersonated professionals or their ‘assistants,’ addressing (investment group) members by name, promising exclusive access to ‘institutional-grade’ research, and directing immediate purchases of targeted tickers,” it said.

Meta's actions, the suit alleges, violate its own terms and policies against impersonation, fraud and deceptive advertising.

The case was assigned Wednesday to Magistrate Judge Nathanael M. Cousins.

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Avoiding risk: AI's double-edged role in e-discovery

 [reuters.com/legal/legalindustry/avoiding-risk-ais-double-edged-role-e-discovery--pracin-2025-10-08](https://www.reuters.com/legal/legalindustry/avoiding-risk-ais-double-edged-role-e-discovery--pracin-2025-10-08)

David A. Shargel

October 8, 2025

Commentary

[Litigation](#)

[David A. Shargel](#)

October 8, 2025 7:08 AM PDT Updated October 8, 2025

Commentary Attorney Analysis from Westlaw Today, a part of Thomson Reuters.

ARCHIV: Figuren mit Computern und Smartphones vor den Worten "Artificial Intelligence AI" sind zu sehen auf dieser Aufnahme vom 19. Februar 2024. REUTERS/Dado Ruvic/Illustration/ File Photo [Purchase Licensing Rights, opens new tab](#)

October 08, 2025 - Stories of lawyers submitting AI-hallucinated caselaw to courts have become ubiquitous in 2025. Most lawyers think "that will never be me" because they know not to rely on AI for legal research. But a potentially greater risk lurks in the shadows of this rapidly evolving technology: the use of AI tools in the discovery process.

Lawyers in hot water for AI misuse

Stories of lawyers from small firms to large have become pervasive this year, and judges have repeatedly imposed sanctions when lawyers include either nonexistent or misstated caselaw in their submissions.

Punishments have ranged from admonitions to monetary fines to the more creative, such as requiring counsel to provide a copy of the sanctions order to each of their clients, opposing counsel, and presiding judges in their other cases. *Johnson v. Dunn*, No. 2:21-CV-1701-AMM, 2025 WL 2086116 (N.D. Ala. July 23, 2025). A California court recently went one step further, criticizing opposing counsel for failing to bring their adversary's AI-generated caselaw to the court's attention. *Noland v. Land of the Free, L.P.*, No. B331918, 2025 WL 2629868 (Cal. Ct. App. Sept. 12, 2025).

The promise of AI discovery tools

Using AI for legal research is only one of several pitfalls this new technology has created within the litigation process. Over the past couple of years, many service providers in the electronic discovery space have made available AI tools that carry both enormous promise

and risk.

By any measure, AI brings enormous benefits for the discovery process. If you ask litigators (and their clients) what they dislike most about the litigation process many would probably put document discovery high on the list. Document discovery is time consuming and expensive, especially with the ever-expanding scope of what might be included, such as phone data, recorded videoconferences, and now even AI prompts and outputs.

Tools are now readily available allowing practitioners not only the ability to more effectively search for relevant materials, but also the ability to automatically categorize documents, such as for responsiveness or privilege.

Just like lawyers need to proceed carefully if they choose to utilize AI-generated legal research, they must also use caution when using AI discovery tools.

In the words of former Magistrate Judge Andrew Peck, when considering the use of then-emerging computer-assisted review, technology "is not a magic, Staples–Easy–Button, solution appropriate for all cases." *Moore v. Publicis Groupe*, 287 F.R.D. 182, 189 (S.D.N.Y. 2012). Rather, "the technology exists and should be used where appropriate, but it is not a case of machine replacing humans." *Id.*

Lawyers cannot have blind faith in AI discovery tools

While AI seems to have permeated all facets of our lives, with society placing ever-increasing weight on its output, practitioners using AI discovery tools cannot do so blindly. Attorney ethical rules make that clear, including the comments to ABA Model Rule 1.1, which provide that lawyers must remain abreast of "the benefits and risks associated with relevant technology."

Model Rule 5.3 also might apply, requiring lawyers who utilize outside discovery vendors — such as those that offer AI tools — to "make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations."

This means that lawyers must take steps to understand how a given AI tool is making decisions, such as whether a document is relevant or not. Most AI discovery tools will provide a rationale for a given decision output — such as by pointing to a part of a document underpinning the determination — and lawyers must take additional human steps of confirming the AI prediction is correct.

Avoiding the risk of AI incorrectly identifying documents is especially important if a lawyer utilizes AI to find documents that are privileged. If the AI tool fails to identify documents that are, in fact, privileged, relying solely on AI could result in the inadvertent disclosure of protected materials, and risks exposing client confidences to opposing counsel or the government.

Thus, if lawyers use AI to aid document review, they must take the extra step of confirming the tool's predictions. In practice, this usually involves a human second level review of any document coded by AI, as well as manual searches to confirm that any relevant materials have not been missed.

Other pitfalls

Erroneous productions are not the only risks associated with the use of AI. Lawyers must also investigate and understand how client data will be processed and used. This includes considering whether data will be processed on remote servers located abroad, potentially implicating privacy laws such as HIPAA or GDPR.

Lawyers should also ensure that client data will not be used to train AI models. Otherwise, privileged or confidential client materials could become part of a training set, later revealed in AI outputs to unrelated users.

Use of AI tools should be transparent

If practitioners wish to utilize AI tools in the discovery process, they should be upfront and transparent about the process. In civil litigation, this means discussing AI use during initial meet and confer conferences with opposing counsel and including AI parameters within the parties' ESI protocol. In government investigations, such as in the context of a response to a subpoena, this would likely involve having an agreement with the government entity regarding AI process and procedure.

Ironing out the details of AI use beforehand, including ensuring processes are in place for a human review of AI work product, ensures a process that is transparent, minimizes pitfalls, and promotes defensibility.

In sum, using AI during the discovery process can save lawyers time and money, but taking care to avoid associated pitfalls will keep you out of the legal headlines.

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Bloomberg Law

Manage Newsletters

Exclusive

Agentic AI, the Next Big Thing, Still Unknown to Many Lawyers

Oct. 8, 2025, 9:30 AM PDT

Summary by Bloomberg AI

AI Generated



- A Bloomberg Law survey shows that few lawyers have heard of AI agents, with more than half of those surveyed saying they didn't know what AI agents were.
- Only about 5% of survey respondents said they had used AI agents in a professional setting or to perform a work task, with in-house counsel being more likely to have used the technology than law firm attorneys.
- Nearly 32% of respondents said they wouldn't trust AI agents to responsibly handle any tasks in the next year, but some said they would use the technology for tasks such as summarizing legal narratives or drafting contracts.

AI agents, representing the next generation of AI, are billed as a major emerging tool to automate routine legal tasks. But a Bloomberg Law survey shows that few lawyers have even heard of them.

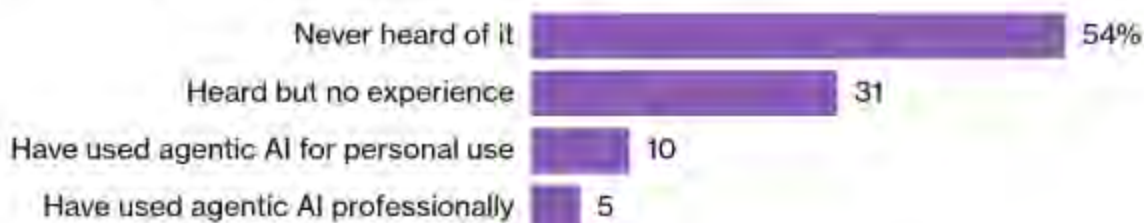
More than half of those surveyed in Bloomberg Law's State of Practice 2025 survey said that they didn't know what AI agents were, and another 31% said they knew about the technology but hadn't used it. Only about 5% said they had used AI agents "in a professional setting or to perform a work task." In-house counsel were three times more likely to have used the technology than were law firm attorneys—12% compared to 4%.

Respondents to the survey included more than 750 in-house counsel and attorneys at law firms.

AI agents are software tools that can work independently to carry out tasks assigned to them by a user. About 80% of senior executives in US companies say AI agents are being used in their companies, according to a May 2025 survey by PwC.

Attorneys Slow To Adopt Agentic AI

Most lawyers haven't used AI agents



Source: Bloomberg Law State of Practice Survey, September 2025

Bloomberg Law

Lawyers might have some catching up to do.

Asked in a follow-up question about the variety of legal tasks that AI agents could perform, nearly 32% of respondents said they wouldn't trust them to responsibly handle any tasks in the next year.

But 39% said they would use the technology to summarize legal narratives, and 32% said the agents could be used to draft contracts. Attorneys were comfortable using AI agents to work on general legal research about 32% of the time.

Trust Issues

"We are a very conservative profession by trade, and people pay us for our perspective, which we feel is very much of a human interaction," said Vikas Srinath, a partner at Prospera Law, a firm in Los Angeles. "The idea that any agent could come in with a predefined set of rules and guardrails and effectively mimic 80% to 90% of our process would inherently kind of undercut the advice that we give. That's at least the psychology I see around me, and it's a very real psychology."

Srinath, who responded to the Bloomberg Law survey, is comfortable using agentic AI for research and for supplementing the conversations with clients, he said.

Benjamin de Seingalt, corporate counsel and director of privacy and compliance at MarketVision Research, said that reports of lawyers being disciplined for citing fake cases or other AI hallucinations haven't helped.

"Even as hallucination becomes somewhat less of an issue, it's still kind of imprinted on people's minds as, like, 'You can't trust anything from AI,'" de Seingalt, another survey responder said.

There is also confusion on what exactly agentic AI is and what it can do, he said.

"People are envisioning sort of the most automated, you know, the most agentic version of an agent, if you will," he said.

Securities

Oklahoma High Court Finds Business Courts Unconstitutional (1)

Oct. 8, 2025, 1:27 PM PDT

A new law that would create Oklahoma's first business court system is unconstitutional, the state's highest court said.

The governor supported the business courts in the state's largest judicial districts, calling them "a game-changer" that would help Oklahoma compete with Delaware, Texas, and other states for large companies and investments. Two Oklahoma City lawyers sued to block the plan, saying it unconstitutionally bypassed a voter-approved judicial nominating commission and created a barrier to court access by imposing a \$1,500 filing fee.

"The Constitution does not reserve any power to the Legislature to create new courts outside of intermediate appellate courts and Municipal Courts," and therefore it lacks authority to create new business courts, Justice Noma Gurich said in an opinion supported by five of the court's nine members on Wednesday.

The legislature's power to create courts had been "intentionally limited" in 1967 as part of a court reform effort, Gurich said.

The "only accurate reading of S.B. 632 is that it instead creates business court divisions within Oklahoma County and Tulsa County District Courts," which means those judges must be elected by voters in nonpartisan elections, she said.

The legislation (S.B. 632) signed into law by Gov. Kevin Stitt (R) had been set to take effect Sept. 1, but the high court put it on hold with a 6-3 decision after hearing oral arguments July 15. It would have created dedicated business courts in Tulsa and Oklahoma City with judges appointed to eight-year terms by the governor. Candidates for the bench would have been submitted by the speaker of the Oklahoma House of Representatives, with confirmation from the Senate.

Rebutting the challenge, Stitt maintained the legislature exercised its constitutional authority "to meet the growing demand for expertise and efficiency in complex commercial litigation." Also, the judicial nominating commission only governs the selection and tenure of state supreme court justices and judges on Oklahoma's criminal appeals court, he said.

The filing fee amount is comparable to fees imposed by Nevada and Texas, he said.

"Moreover, the fee amount is proportionate to the \$500,000 case and controversy requirement and rationally related to the legislative purpose of preserving business courts' capacity for the types of cases they were created to handle," he said.

Dissenting Opinions

The governor's arguments that his appointment of business court judges wouldn't circumvent judicial elections because they're "not district judges" are "internally inconsistent," the high court's 22-page opinion said.

Chief Justice Dustin P. Rowe dissented in part from the majority opinion. Vice-Chief Justice Dana Kuehn and Justice Travis Jett each offered separate dissenting opinions. Justice M. John Kane IV didn't vote on the case.

The Legislature has authority to create new divisions within Oklahoma courts, but it's the law's provisions for selecting judges for a business court division that is unconstitutional, Rowe said.

Kuehn said the court should not have exercised original jurisdiction because the case arrived "not through the careful development of a legal record, but as an emotionally driven request unsupported by factual context."

Similarly, Jett said the petitioners "cannot demonstrate an urgent need for an early decision" justifying the high court's intervention.

Had the law taken effect, the new courts would have begun hearing cases in January.

Stitt is represented by his general counsel, Benjamin Lepak, and an attorney from the Secretary of State's Office. The suing attorneys, Joe E. White Jr. of White & Weddle P.C. and Jason Waddell, are represented by Bob Burke of Oklahoma City.

Lonnie Paxton (R), president pro tempore of the Oklahoma Senate, and Kyle Hilbert (R), speaker of the Oklahoma House, also are named as defendants. They're represented by the state Attorney General's Office.

The case is *White v. Stitt*, Okla., No. MA-123222, order 10/7/25.

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News from Bloomberg Terminal
First Brands Is Missing Some Money
 Oct. 9, 2025, 11:27AM PDT

By Matt Levine

(Bloomberg Opinion) --

First Brands

It is helpful, in investing, to be able to amortize a certain amount of *work* over a lot of *capital*. If someone offers you an opportunity to invest in a company with an expected return of 30% annualized, that is pretty good, and you might be willing to take the meeting and do some due diligence and sign the contracts and wire the money and do all the intellectual and administrative work to get that return. But if the company is a lemonade stand and your investment is capped at \$20, that 30% return will not be very exciting. What you want is an asset with a high expected return and a lot of *capacity*, one where you can invest millions of dollars, earn 30% of millions of dollars, and get a nice reward for all the work you put into understanding and making the investment.

In the stock market, this works out nicely. The biggest companies are the ones where you can most easily put capital to work; you can buy a billion dollars of Nvidia stock without too much trouble. And the biggest companies are also in some intuitive sense the *most valuable* ones, the companies that the market has decided are the best companies, the ones with the highest future earnings and growth potential, the good safe stocks, though of course the market can be wrong.

In *credit* markets, though, it is a little counterintuitive. The more debt a company has, the easier it is to buy that company's debt. The debt will be more liquid and more likely to appear in indexes. If you put the work into understanding the company, and you decide you like it, you can buy a lot of the debt and get a lot of bang for your buck. Particularly in *private* debt markets, where you buy the debt not by clicking a button on a screen but by negotiating complicated bespoke agreements directly with the company, it is a lot of work to invest in any one company, and it's nice to be able to reuse that work. If the company borrows a lot of money every three months, and they call you every time, that's easier than having to find new companies to lend to – and do new due diligence and negotiate new agreements – every three months. Big borrowers are convenient.

But the more money a company borrows, *ceteris paribus*, the *riskier* its debt is.¹ People sometimes complain about this in the context of bond index funds: Market-cap-weighted bond indexes funnel money to the borrowers who have the *most debt*, which are not necessarily the safest bond investments.

I have to say that, relative to trading stocks and bonds, trade finance seems pretty *inconvenient*. You have a bunch of, like, auto parts suppliers selling windshield wipers to a bunch of auto parts stores, and they sell the windshield wipers on credit and the stores owe them money, and they have an invoice for like \$1,000 of windshield wipers that is due in 90 days, and they come to you and say “we’ll sell you this invoice for \$975 and you’ll get \$1,000 in three months and that’s more than 10% annualized,” and you’re like “yeah that’s pretty good here’s your check,” and then some other supplier comes to you with another \$2,000 invoice, and you’re doing this all day for lots of little invoices. I mean, not literally; probably you set up a program with each supplier to discount lots of their invoices, so you don’t have to negotiate new agreements for every \$1,000 invoice. But still, lots of suppliers, lots of customers, lots of moving parts.

If some company comes to you and says “I have rolled up a bunch of auto parts suppliers and here’s a *billion dollars* of invoices to discount,” you might be like “man, that is so convenient, here’s \$975 million.” If you run a billion-dollar trade finance fund, having one counterparty sell you \$1 billion of invoices is less work than having a million counterparties sell you \$1,000 of invoices each. You can do your due diligence once, you can sign one agreement, you can put a lot of money to work. But obviously it is riskier:

1. Now you have very concentrated exposure to the one counterparty, and if things go wrong at the one counterparty your whole fund is in trouble.
2. If your one counterparty is borrowing a billion dollars then it is, uh, heavily indebted? Needs a lot of money? Could run into trouble paying all of it back? Maybe a worse credit risk than someone only borrowing \$1,000 at a time?
3. You have to think about the incentives that the counterparty faces. It comes to you and is like “here’s \$1 billion of invoices, are you in,” and you are like “ugh thank you I am sick of all these small invoices, please, yes, bring me as much as you can, I would love to put a lot of money to work and just can’t get enough invoices,” and your counterparty gets to thinking “hmm, people really want my invoices, how can I manufacture more,” and that way madness lies.

One way to tell the story of Greensill Capital, the supply-chain-finance firm that blew up in 2021, is that it was in the business of financing invoices for various companies, and that was a good business and it was able to raise lots of money and earn high returns relatively safely, but it was *too easy* to raise money and *too hard* to deploy it: Lots of investors wanted to finance invoices, and there were only so many invoices to finance. So Greensill would go to its borrowers and say “hey we could just give you large long-term unsecured loans and kind of pretend that there are invoices somewhere.” “Prospective receivables,” Greensill actually called them: It would make long-term loans secured by the borrowers’ *plans to one day find customers and sell them products and get invoices for payment*. This was a terrible idea and Greensill blew up, but it was also sort of understandable. It wanted to finance more invoices than it could get, so it started financing some imaginary invoices.

Is that part of the First Brands story? First Brands Group Inc. did go out and acquire a bunch of smaller auto parts suppliers, rolled them up into one big company, and got billions of dollars of trade financing against their sales. Now it is in bankruptcy, and there are allegations that it might have used the same collateral to take out multiple loans and that “as much as \$2.3 billion has ‘simply vanished.’” The latter allegation came in a demand for an investigation from Raistone, a trade finance platform:

The request for appointment of an independent examiner follows an Oct. 2 email exchange in which a bankruptcy lawyer for First Brands told Raistone that advisers don't know if the auto parts supplier has received an estimated \$1.9 billion. ...

"First, do we know whether FBG actually received \$1.9 billion (no matter what happened to it)?," Raistone lawyer Emanuel Grillo said in an Oct. 2 email, which was filed in bankruptcy court in support of its request for an examiner. "Second, would you tell us how much is in the segregated accounts in respect of the factored receivables as of today?"

"#1 –We don't know," First Brands restructuring lawyer Sunny Singh said in response to the questions. "#2 - \$0."

Not the answer they wanted! It is definitely not fun, as a bankruptcy lawyer representing a creditor, to receive an email like that. (It is *probably* not fun, as a lawyer representing the debtor, to *send* an email like that, but ... maybe a little fun? Like that is an objectively funny email, if it's not your money that vanished.) But also:

Raistone, the company that called for the investigation, and that had facilitated First Brands' short-term borrowing, derived 80% of its revenue from First Brands and has already cut roughly half of its employees. The O'Connor hedge fund unit owned by UBS is facing such significant losses that Cantor Fitzgerald is now trying to renegotiate the terms of its acquisition of the business.

Jefferies is facing redemption requests from investors who had money in a hedge fund arm of the bank, Point Bonita Capital, which had a quarter of one of its portfolios – some \$715 million – tied to First Brands.

Raistone, "whose founder had been one of Greensill's first employees," got 80% of its trade-finance revenue from First Brands. That Jefferies fund had a *quarter* of its portfolio in First Brands debt. There was a lot of demand for receivables, and First Brands was apparently in the business of meeting that demand. In part by doing debt-financed acquisitions:

First Brands' aggressive maneuvers allowed [owner and chief executive officer Patrick] James to build a company that had 26,000 employees on six continents and revenues of around \$5 billion in 2024, according to a presentation to investors. But the underlying business, selling replacement auto parts to the likes of AutoZone and Walmart, did not offer up tremendous growth potential once the acquisitions stopped. Between 2023 and 2024, while its revenue only rose 1.3%, the cost of servicing its debt went up 38%, the investor presentation showed. ...

"First Brands is a clear case of a company with a very aggressive founder and very bad financial disclosures that don't give you enough information as an investor," said Michael Gatto, a partner at Silver Point, a credit-focused investment firm that looked into First Brands loans but is not invested. "They were constantly making acquisitions, and that way they could mask problems because it gives the idea that the business was constantly growing."

Did it also meet the demand in part by double-pledging collateral, selling more receivables than it had? Nobody seems to know yet. But you can see why people are worried.

ETF after dark

Hey the meme-stock exchange-traded fund is back:

Roundhill Investments ... revives a pandemic-era trope – the MEME ETF.

The original fund was shuttered in 2023 when it looked as if the craze it was born in had blown over. It hadn't. Now the New York-based firm is resurrecting the Meme Stock ETF on Wednesday. ...

"In some ways, 'meme' is still perceived as a dirty word. Many still scoff at what the retail community does on various forums. But that's an entirely antiquated view," said Dave Mazza, Roundhill's chief executive officer. "What didn't fade is the influence of retail in today's equity market."

The original version passively tracked a meme-stock index, but the new one is actively managed and zeros in on a tighter basket of roughly two dozen stocks that exhibit what Roundhill views as meme-like characteristics, such as extreme price volatility. Its top holdings from the get-go include Opendoor Technologies Inc., Plug Power Inc. and Applied Digital Corp.

Cool cool cool. "The Roundhill Meme Stock ETF ('MEME') is the only ETF in the world to offer targeted exposure to meme stocks," its website says, though I suspect several leveraged Strategy ETFs would disagree.

Intuitively, you might expect a meme-stock exchange-traded fund to trade above its net asset value. You know: It's a meme thing. The point of a meme stock is that it trades above its fundamental value because of retail enthusiasm. If you plop 21 meme stocks together in a fund with the ticker MEME, surely that should spark some retail enthusiasm. "No," you object, "the retail enthusiasm might push the 21 underlying meme stocks up above their fundamental values, but the ETF, which is just a transparent collection of those stocks, will not attract any *additional* retail enthusiasm and so will trade in line with the prices of the underlying stocks," but, why? The whole hypothesis here is that retail traders like memes and don't care about fundamental value. If they see a meme-stock ETF called MEME they might get excited to buy it, without worrying too much about what's in it or whether it is trading at a premium.

But that's not how ETFs work. The reason that ETFs normally trade in line with their net asset values is not "people won't buy them for more than NAV"; people will do all sorts of things. The reason that ETFs normally trade in line with their NAV is *arbitrage*. If the net asset value of an ETF is \$10, that means that an arbitrageur can deliver \$10 worth of underlying stocks to the ETF issuer and get back one share of the ETF.² If the ETF is trading at \$12, arbitrageurs will buy the underlying assets for \$10, deliver them to the ETF, get back shares, sell them for \$12, and make \$2 per share. They will do this as long as anybody wants to buy the ETF for \$12, or \$11, or \$10.10, pushing down the price of the ETF (and pushing up the prices of the underlying stocks³) until the ETF trades at close to net asset value.

And so if you go to your brokerage account and send in an order to buy 100 shares of MEME at the market price, you are going to get those shares of MEME at something very close to their net asset value. The person selling you those shares will be an electronic market maker, and the market maker can effectively source those shares from either (1) the market for MEME shares or (2) the market for the underlying assets. If the underlying assets are cheaper than the MEME shares, the market maker will buy them and turn them into MEME shares for you, so you should never have to pay much more than NAV to buy the MEME shares.

Even if you want to! Even if you are like "I would buy shares of this meme-stock ETF at whatever price you want to charge me, I love meme stocks so much, just give me the shares," the market maker *still* isn't going to charge you much more than net asset value. Irrational retail demand is a nice little source of profits for the market maker, but market making is a competitive business and no one's going to get away with charging you \$11 per share.

Here's a chart of MEME's first day of trading yesterday:



Just by eyeballing it you get the basic idea. From 9:30 a.m. to 4 p.m., MEME traded at kind of normal prices, in line with its net asset value. It closed at \$9.82 per share, a premium of 0.2% to its NAV of \$9.80 per share. After 4 p.m. it went nuts. It hit a high of \$16.80 per share at 5:41 p.m. It also traded quite rich before the open this morning, trading as high as \$13.30 per share at 8 a.m. And then, at 9:30 a.m. today, regular trading began and MEME went back to normal. It opened the regular trading session at \$9.92 per share and traded in a range between \$9.72 and \$9.97 for the rest of the morning.

What happened? Intuitively it seems like the explanation has the form "retail investors got excited to buy the MEME ETF, so they did. During regular market hours, they bought the MEME ETF from market makers, and arbitrage relationships kept its price in line with its net asset value. At 4 o'clock, the market makers went home and the price of the MEME ETF went crazy: Lots of retail investors wanted to buy it, they didn't care about the price, and nobody was bothering to arbitrage it to keep the price in line with net asset value. So it traded at a huge premium to NAV overnight. And then at 9:30 this morning, the market makers came back to the office and started trading the MEME ETF at NAV again, so everything went back to normal."

That is not quite a correct explanation: Big electronic market makers are *aware* that the stock market continues trading (in extended sessions) after the 4 p.m. close, and starts trading again in the morning before the 9:30 a.m. open. They keep their computers on, they buy and sell stocks, they arbitrage ETFs. Not *every* stock goes crazy after 4 p.m. Yesterday was MEME's first day back on the market, and it's still extremely small; its website says it only has about \$250,000 of assets so far. It might just be too small and new for professionals to bother trading after 4 p.m., but if it gets traction and assets then its after-hours trading will settle down.

Still the general story does seem to be that, between 9:30 a.m. and 4 p.m., US stock markets are relatively normal and there are powerful arbitrage forces making prices – at least *ETF* prices – reflect economic reality. After 4 p.m. the grownups go home and retail trading can get weird.

Bed Bath blockers

Elsewhere in memes, here is the story of Bed Bath & Beyond Inc. ⁴:

1. Early in 2023, Bed Bath was *essentially* bankrupt – it had a ton of debt and no real hope of repaying it – but it had not yet filed for bankruptcy.
2. But it “checked the two boxes needed to become a meme-stock: (i) a troubled financial situation and (ii) nostalgia value,” as its bankruptcy lawyers later put it, so it could sell some stock.
3. Did it ever. It started January 2023 with about 117 million shares outstanding; by the time it filed for bankruptcy in April, it had 739 million. So about 85% of the shares outstanding at the end were issued in 2023, as Bed Bath was sliding into bankruptcy.
4. These stock sales transferred several hundred million dollars pretty directly from the retail shareholders who bought the stock to the creditors who got what was left of Bed Bath in bankruptcy. (Ultimately the brand was sold in bankruptcy to Overstock.com, which changed its name to Beyond Inc. and now uses the Bed Bath name.)
5. This always struck me as wild: Almost all of Bed Bath's shares were sold in its death throes, to retail investors, with no real hope of making money. As I once put it: “Bed Bath was kind of like ‘hey everyone, we went bust, sorry, but our lenders are such nice people and they could really use a break, we’re gonna pass the hat and it would be great if you could throw in a few hundred million dollars to make them feel better.’ And the retail shareholders did!”
6. Roughly half of those stock sales were in at-the-market offerings directly to retail shareholders.
7. The other half, though, were done in a strange structured transaction with Hudson Bay Capital Management. Loosely speaking, Hudson Bay paid Bed Bath \$360 million, in several installments, for a total of 311 million shares of Bed Bath stock. But Hudson Bay did not *hold* that stock: The point of the trade was that Hudson Bay would (1) get a slug of stock at a discount to market prices, (2) sell it to retail investors at a profit and (3) go back for another slug of stock. Bed Bath's stock was sliding dramatically during the course of this trade – the stock fell from \$5.86 per share the day the trade was announced to \$0.59 the day it wrapped up – in part because Bed Bath was heading to bankruptcy but in larger part because *Hudson Bay was selling hundreds of millions of shares as fast as it could*, pushing the price down. Hudson Bay was not going to *take stock price risk* on this deal; it wasn't buying a big block of stock at a fixed price hoping to resell it. It was buying tiny blocks of stock at a discount to market prices, selling them quick, and then coming back for more at ever-lower prices.
8. Technically the way this worked was that Hudson Bay bought convertible preferred stock with a floating conversion price: Hudson Bay could convert every \$1,000 slug of preferred stock into (more than) \$1,000 worth of common stock at market prices, so it could constantly turn each \$1,000 of its investment into stock it could sell for more than \$1,000. (It also got warrants to buy more convertible preferred stock, because it didn't put in all the money up front.)
9. This was very lucrative: I once estimated that Hudson Bay made about \$84 million on its \$360 million commitment, and the Bed Bath bankruptcy estate later estimated that the number might be \$310 million. In any case, Hudson Bay did well, while the retail shareholders lost 100% of the money they put in.

There is an oddity in that quick summary. If you take it literally, you might think something like the following. “Hudson Bay got 311 million new shares at a time when Bed Bath only had 117 million shares outstanding. So Hudson Bay was *by far* Bed Bath's majority shareholder in early 2023, with 311 million out of 428 million shares, or about 73%. US securities laws have rules about ‘short-swing profits,’ designed to prevent insider trading by affiliates. In particular, Section 16 of the Securities Exchange Act says that a 10% shareholder who buys stock and then sells it within six months has to ‘disgorge’ any profits from the trade to the corporation. Here, Hudson Bay was a 73% shareholder and spent months buying stock from the company and immediately turning around and selling it at a profit. The total profit was tens or hundreds of millions of dollars. Shouldn't it have to disgorge those profits to the company?”

Bed Bath's bankruptcy estate – the creditors who took it over in bankruptcy and got back less than they were owed – had that thought, and sued, claiming that Hudson Bay had made \$310 million and should have to hand the money over to the creditors. We talked about the lawsuit last year. I was skeptical, but I wrote that “the main point here is that if you are a bankrupt company and you've got a shot at clawing back \$300 million to hand over to your creditors, you have to give it a try.” Bed Bath gave it a try.

Last week it lost: On Tuesday, a federal judge dismissed the complaint against Hudson Bay. Here is the opinion. The basic idea is that, while Hudson Bay's deal with Bed Bath did in some sense entitle it to 311 million out of 428 million shares – it owned convertible preferred stock convertible into a majority of Bed Bath's common shares – it was not entitled to all of those shares *at the same time*. The deal included a “Section 16 blocker” saying that Hudson Bay was not allowed to own more than 9.99% of Bed Bath's common stock, keeping it under the Section 16 threshold: If it was at the 9.99% cap, it couldn't convert any more preferred stock into common. Of course, this was not a practical problem, because Hudson Bay never wanted to own the common stock for more than an instant: It would convert some preferred into common, sell it immediately, get down to 0% ownership, and then convert some more. It would never *actually* own anything close to 10% of Bed Bath's stock.

Bed Bath's creditors took the view that this doesn't matter: Hudson Bay owned convertible preferred that could eventually be converted into 73% of the common stock, so it was a "beneficial owner" of 73% of the common stock, so it was a Section 16 insider and should have to give up its profits. Hudson Bay took the view that, no, the preferred never *could* be converted into 73% of the common stock, so it wasn't an insider. As a former corporate equity derivatives structurer myself, I was sympathetic to Hudson Bay's view, not so much because it's right but because it is market standard. A lot of deals include Section 16 blockers so that intermediaries can deal in a company's stock without becoming insiders restricted from trading, and if those blockers didn't work then a lot of financings would get harder. But they work:

In sum, BBBY's allegations do not amount to a plausible claim for relief on the theory that the blocker provisions were illusory or a sham. Thus, Plaintiff does not plausibly allege that Defendants beneficially owned the common stock underlying the Derivative Securities they held such that Defendants were over 10% beneficial owners of outstanding BBBY common stock while executing conversions and sales of the stock within a six-month period.

Hudson Bay gets to keep its money.

Twitter severance

I wrote yesterday about one model for public-company mergers and acquisitions, in which the target company is sold by its shareholders and bought by a buyer, with the company's management acting as a broker for the deal. In this model, the managers are incentivized to get the deal done – if they get the deal done, they get big change-of-control payments – and they have reasons to inflate the company's value to the buyer, and deflate its value to the shareholders, to make sure a deal happens and they get paid.

In a footnote, I added:

This is not the only model – often the managers *want* to keep doing their day jobs, don't want to be acquired, and have to be paid to even consider a deal – but it is sometimes a useful one.

Probably that's the *more* standard model of public-company M&A: Not "managers are constantly going around trying to sell their companies to get paid, even if that means selling shareholders out cheap," but rather "managers really want to keep their jobs and try to avoid being acquired, even if an acquisition would be good for shareholders." On that more standard model, the change-of-control and severance payments and accelerated stock vesting that managers get when a deal closes are necessary *protections* for shareholders: If the managers didn't get a big payout for getting a deal done, they'd never get deals done.

I once wrote that "few CEOs have ever deserved their severance package more than Parag Agrawal," who was the chief executive officer of Twitter Inc. when Elon Musk bought it (and then immediately fired him). Agrawal had a more-or-less pleasant job running Twitter, for which he was paid well. Musk came along with a hostile bid to buy Twitter, making clear that (1) he would make drastic changes to the product that Agrawal probably wouldn't like, (2) he would make *working* at Twitter considerably more unpleasant and (3) he'd fire Agrawal and his executive team. It seemed to me at the time, and now, that this was all basically rotten for Agrawal personally, and that he wished Musk would go away. But Musk's offer was \$54.20 per share in cash, which was considerably more than Twitter was realistically worth on its own. The deal was bad for Twitter's managers, but good for shareholders.

In general, the CEO of a public company can't *just* say no to a viable, fully financed cash takeover offer at a big premium to the company's market price: Shareholders will get annoyed, and the buyer can (and Musk threatened to) go hostile and take the offer directly to the shareholders. So even if Agrawal didn't like Musk's offer personally, he had no real choice but to engage with it. He did, and Twitter quickly agreed to Musk's terms, and shareholders got a good deal. And then Musk tried to get out of it! Which was great for Agrawal! He could have gone back to running his pleasant little social media company without interference from Musk other than some mean tweets. But that would have been bad for shareholders – Twitter *definitely* wasn't worth \$54.20 on its own after the Musk escapades – so instead the management team hired lawyers, sued Musk, and forced him to close the deal. The managers salvaged many billions of dollars of value for Twitter's shareholders, at the expense of (1) their jobs and (2) quite a lot of personal unpleasantness from dealing with Musk.

Why did they do that? I have not asked them, but the two standard answers are:

1. They were public-company executives, they had fiduciary duties to shareholders, and they took those duties seriously as a matter of professional pride and honor.⁵ They did what was right for shareholders because that was what they were supposed to do.
2. Their employment contracts included big severance payments, so if they got Musk to close the deal and fire them, they'd get tens of millions of dollars as a consolation prize.

Probably both things were true, but the second thing does matter. For all of their professional pride and honor, if the upshot of forcing Musk to close the deal was that they would be fired with no pay and insulted on their way out the door, they might not have worked *quite* so hard to get him to close.

But then Musk *did* fire them with no pay, daring them to sue to enforce their severance arrangements. And they did. Yesterday Bloomberg's Jef Feeley reported that they have settled:

Elon Musk and the company formerly known as Twitter have agreed to resolve a \$128 million lawsuit filed last year by former Chief Executive Officer Parag Agrawal and three other top officials who said they were denied severance payments.

Terms of the settlement weren't disclosed in a Sept. 30 federal court filing, which pushed back deadlines in the case and the date of a scheduled hearing in San Francisco.

"The parties have reached a settlement and the settlement requires certain conditions to be met in the near term," a lawyer for the executives said in the filing.

Presumably the conditions include writing them some checks.

Elsewhere, I am sorry, but TruBridge Inc. entered into a severance agreement with its chief sales officer, whose position is being eliminated. Her name is Dawn M. Severance. "Ms. Severance's Executive Severance Agreement, dated June 20, 2023 (the 'Severance Agreement')," yes.

Things happen

Demand Surges for Private-Credit Secondaries Amid Market Volatility. Regulators Are Investigating MassMutual's Accounting Practices. Rice Benchmark Hits 10-Year Low, Easing Pressure on Food Prices. Trump's Wood Tariffs Are Coming. Vietnam Wins Emerging-Market Status From FTSE, Drawing Investor Optimism. CFA Level II Pass Rate Drops to 44%, Below the Decade Average. The Finance Nerd Who Might Be College Football's Next Great Quarterback. "They think a million dollars should solve all their financial problems, when today they really need to be thinking of \$10 million." Bosses Are Cutting Costs, Just Not the Private Jet. "Consumer research revealed that 42% of people didn't know Lay's chips are made out of real potatoes."

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1. There is some parallel to the stock-market case, like, "the companies with the most debt outstanding are the ones that the market has decided are the most creditworthy," but that's not entirely true. (Perhaps: "The companies with the most debt outstanding are the ones that the market has decided have the most capacity to have that much debt outstanding," though even that is not entirely true.)
2. This is oversimplified in a couple of ways, including that (1) only authorized participants can do creations and redemptions and (2) creations can only occur in large blocks.
3. If the ETF is large relative to the underlying assets, this effect will matter a lot. (We have talked about leveraged Strategy ETFs, which seem to matter a lot to Strategy's stock price.) If the ETF is small relative to the underlying stocks (as MEME is), it won't, and the main effect of arbitrage will be on the ETF price.
4. We have talked about this in more detail before. I discussed the Hudson Bay trade a few times when it was happening, summed up the situation when Bed Bath filed for bankruptcy, and also mentioned the Section 16 lawsuit when it was filed.
5. By the way: You don't have to think that was particularly honorable! You might think something like "it was bad for society that Elon Musk bought Twitter, so Twitter's executives should have tried to stop him, even at the expense of shareholder value." The relationship between executives' responsibility to society and their responsibility to maximize shareholder value is complicated, and honestly *I* was kind of annoyed at Twitter for selling to Musk. (I used to use Twitter!) Still maximizing shareholder value even at the cost of personal discomfort is a *kind* of honor anyway.

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Life sciences companies may turn to spin-offs to avoid sell-offs

 [reuters.com/legal/transactional/life-sciences-companies-may-turn-spin-offs-avoid-sell-offs--pracin-2025-10-09](https://www.reuters.com/legal/transactional/life-sciences-companies-may-turn-spin-offs-avoid-sell-offs--pracin-2025-10-09)

Joseph Kadlec, Douglas Gray, LuAnne Morrow

October 9, 2025

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October 09, 2025 - Big Pharma continues its hunt for innovation, and with uncertain market and regulatory conditions, some life sciences companies may be feeling the pressure to make their M&A exit or need additional funding in this tight financial market to progress their core asset to a value inflection point. However, for those not ready to jump on the M&A bandwagon just yet, not finding the right M&A transactional fit, or needing a bit more runway to hit a substantial value milestone, there are several strategic alternatives to help raise capital, reduce cash burn, and streamline operations.

Spin-off and split-off transactions are options that provide companies with flexibility, while also keeping M&A or IPO exit opportunities open. But spin-offs can be structured in a variety of ways and are not a one-size-fits-all solution. This article assumes that the life sciences company has at least two differentiated assets, a core asset it seeks to advance, such as a drug for a large unmet indication in de-risked late stage development, and non-core assets that are non-essential to the strategic objectives of the company, such as early stage IP assets with an expensive and lengthy path to approval. Which is the "core asset" may depend on stage of R&D, market interest, costs to advance, or other considerations.

Traditional spin-off transactions may offer a much needed rebrand

A traditional spin-off transaction involves the company transferring select assets and liabilities to a new company (newco) and issuing newco shares to its existing shareholders. This structure is ideal when a company has non-core assets or diverging, distinct product lines that might otherwise divert the company's focus, financial resources, or strategic direction. In the cases of life sciences companies, that could include a pharmaceutical company shifting away from rare condition treatments to focus on a mass market drug.

Offloading an asset or incompatible product line to a spin-off can eliminate competition for resources that might hold back core asset development, as well as help rebrand a product to attract new investors — particularly a product that lends itself to a single-product line investment like AI and rare diseases. Public markets often view the non-core assets as distractions and liabilities that take resources away from the primary assets because they do not align with the core business.

A second version of this strategy is for the company to sell select non-core assets to a third party. This allows the Company to use the proceeds to extend its runway and spend exclusively on the core programs.

Since IP assets are essential to spin-off success, it's important to conduct a thorough valuation of the spin-off assets, ownership, and licenses. It is also crucial to ensure the appropriate transfer of IP assets to the new entity and safeguard any components essential for the original company's ongoing operations by way of licenses back to the original company. There may be some additional hurdles to clear depending on the origins of the IP to be transferred. For example, if it was in-licensed, there may be a fee or consent needed.

In addition, a traditional spin-off requires careful consideration of whether there will be ongoing collaboration or a clean break between the two entities. Whether it involves R&D, personnel, or operational infrastructure, establishing agreements for licensing, collaboration, shared services, or transition services between the original entity and newco can ensure a seamless transition and signal to investors that the newco has the necessary infrastructure to thrive.

Partial spin-offs can keep the door open for potential upside

For companies not ready to fully divest a promising asset, a partial spin-off can offer additional flexibility. In a partial spin-off, the parent company transfers select assets and liabilities to the newco, while maintaining a partial ownership interest. The rest of newco's ownership is either offered through an IPO or made available for further third-party investment (alone or mixed with the parent's existing shareholders investing new proceeds).

By segregating a diverse pipeline in this manner, a company may be able to get investors targeting the specific indication who would not invest in the diverse IP portfolio.

This approach can allow for separation of asset classes, particularly if one has high IPO or investment potential. The company can then highlight and capitalize on the value of the asset class with greater market appeal or growth prospects to enhance investor interest. It also allows the parent company to raise capital while maintaining control, leaving the parent company the opportunity to exit later — with more potential upside. This upside is derived from any future appreciation in the value of the spun-off asset.

Some companies may also consider a simultaneous merger post-spinoff, which can facilitate an immediate exit for the parent. A simultaneous merger post-spinoff can be particularly advantageous, by allowing the parent company to capitalize on favorable market conditions, streamline the transition process, and swiftly reallocate resources to focus on core business

objectives. This also lowers the antitrust concerns as the target drug is the only asset acquired, and the rest of the pipeline is spun-off which could make HSR (Hart-Scott-Rodino) review much smoother.

Split-offs may improve capital structure

Split-offs offer life sciences companies a strategic mechanism to manage capital structure while enhancing operational focus (and developmental spend). In a split-off, shareholders exchange their shares in the parent company for shares in the newco. This allows shareholders to align their investments with their specific investment goals. For example, investors may want to focus on the high-growth drug development segment of a business, rather than the broader company. It also helps address circumstances where segments of the business require varying degrees of capital allocation. This allows the company to efficiently direct resources to the specific needs of each business segment.

Unlike a traditional spin-off, a split-off can reduce the parent company's share count, potentially giving its share valuation a boost. By narrowing the company's focus and reducing shareholders, split-offs not only streamline operations, but also improve investor confidence and market positioning.

However, split-offs have their trade-offs. With any stock swap, there is a risk of arbitrage or imbalance between the parent and newco. The newly formed entity may also necessitate substantial financial investment to ensure its viability and attractiveness to the market.

Conclusion

The choices of spin-off or split-off structures for life sciences companies hinge on strategic and operational goals, market conditions, and regulatory pressures. Each approach requires careful consideration of business objectives and investor perceptions. Companies considering implementing either a traditional spin-off, partial spin-off, or split-off transaction should also consult with their tax advisors regarding the tax implications of such transaction, which can often involve a complex tax analysis.

Chris Flanagan, a partner at Troutman Pepper Locke, contributed to this article.

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Musk's Tesla package pays him billions even if he misses 'Mars-shot' goals

 [reuters.com/legal/transactional/musks-record-tesla-package-will-pay-him-tens-billions-even-if-he-misses-most-2025-10-09](https://www.reuters.com/legal/transactional/musks-record-tesla-package-will-pay-him-tens-billions-even-if-he-misses-most-2025-10-09)

Chris Kirkham, Rachael Levy, Abhirup Roy

October 9, 2025

- Goals for autonomous driving, robotaxis and robots are vague
- Meeting Tesla's most modest goals will pay Musk more than the next 8 best-paid CEOs combined
- Goals around profits could be harder to meet

LOS ANGELES, Oct 9 (Reuters) - When Tesla directors offered Elon Musk the biggest executive pay package in corporate history in September, it reassured investors that he would have to achieve the equivalent of "Mars-shot milestones" to earn \$878 billion in Tesla stock over 10 years.

The board's proposal said Musk would have to "completely transform Tesla and society as we know it" in robotics and autonomous driving as well as stock value and profits. Conversely, Musk would get "zero" unless he meets those "incredibly ambitious" goals.

Yet Musk could reap tens of billions of dollars without meeting most of those targets, according to a Reuters analysis of his performance goals and more than a dozen experts in executive pay, company valuations, robotics and automotive trends including autonomous driving.

He could collect more than \$50 billion by hitting a handful of the board's easier goals that won't necessarily revolutionize Tesla's products or business, the Reuters review found.

Even hitting just two of the easiest targets, along with modest stock growth, would net Musk \$26 billion, more than the lifetime pay of the next eight best-paid CEOs combined, a group that includes Meta Platforms' Mark Zuckerberg, Oracle co-founder Larry Ellison, Apple's Tim Cook, and Nvidia's Jensen Huang, according to an analysis for Reuters by research firm Equilar.

Musk's vehicle sales goals are exceptionally easy to achieve, according to four automotive experts. If Musk sells 1.2 million cars a year over the next decade, on average, he earns \$8.2 billion in stock if Tesla's market value grows from \$1.4 trillion today to \$2 trillion in 2035, well under long-term market-average growth. That's a half-million fewer cars per year than Tesla sold in 2024.

On Tuesday, [Tesla unveiled lower-cost versions](#) of its best-selling Model Y SUV and Model 3 sedan to reverse falling sales.

Three other product-development goals are written in vague language that could provide Musk hefty payouts without significantly boosting profit, according to six robotics or autonomous-driving industry experts who reviewed Musk's goals for Reuters.

Tesla and Musk did not respond to requests for comment.

In a statement, a spokesperson for the Tesla board said: "The proposed pay package is actually worth zero to our CEO unless and until the shareholders see the value of the company nearly double and an operational milestone is met."

The board's pay proposal requires Musk to remain a Tesla executive for at least seven-and-a-half years to collect any stock compensation. Musk, however, would get the voting rights associated with the share awards as soon as he earns them.

Musk said last month on his social media platform X that the package is "not about 'compensation,' but about me having enough influence over Tesla to ensure safety if we build millions of robots."

In its proposal, the board said Musk is "motivated by more than just conventional forms of compensation."

Milestones set for Tesla CEO Elon Musk's compensation package

SELF DRIVING CARS, ROBOTAXIS AND ROBOTICS

Each goal grants Musk 1% of Tesla stock if he also reaches valuation milestones between \$2 trillion and \$8.5 trillion.

One goal requires 10 million subscriptions to Tesla's "Full Self-Driving" software, which can't currently drive itself without human intervention. The goal contains no requirement that Tesla make the system fully autonomous, instead requiring only an "advanced driving system."

That's a "made-up term" with no industry-standard definition, said William Widen, a University of Miami law professor specializing in autonomous driving. Autonomous-driving experts say the subscription target might be easily met by dropping the price, currently \$8,000 upfront or \$99 a month. Tesla's leading electric-vehicle rival, China's BYD, already offers a similar system for free.

"If I were Musk's personal employment lawyer, I would like these definitions," said Matthew Wansley, a professor at New York's Cardozo School of Law who focuses on autonomous driving.

Another goal requires one million robotaxis in commercial operation and specifies cars "without a human driver in the vehicle." That's a potentially more restrictive definition but four autonomous-vehicle experts said it could be interpreted to allow for humans controlling vehicles remotely or from the passenger seat – as Tesla does now in its first small-scale robotaxi test in Austin, Texas.

Elon Musk attends the opening ceremony of the new Tesla Gigafactory for electric cars in Gruenheide, Germany, March 22, 2022. Patrick Pleul/Pool via REUTERS [Purchase Licensing Rights, opens new tab](#)

Musk's employment deal also sets a target of one million robots, an apparent reference to the Optimus humanoid robots Musk has long promised. But the goal doesn't specify "humanoid" and could be interpreted broadly, two robotics-industry experts said. It defines "bot" as "any robot or other physical product with mobility using artificial intelligence."

"It's a totally vague formulation," said Christian Rokseth, an analyst with market research firm Humanoid.guide specializing in robotics and artificial intelligence. Investors, he said, are expecting a humanoid robot.

A chart showing how Elon Musk's lifetime pay dwarfs other CEOs even before his record package goes into effect

MODEST TARGETS WORTH BILLIONS

Hitting any two product goals in a decade, along with a \$2.5 trillion valuation, pays Musk \$26.4 billion in stock. Hitting three targets and a \$3 trillion valuation pays him \$54.6 billion.

That means Musk could earn these amounts without delivering driverless Teslas, the signature product he's promised for a decade.

Gene Munster, managing partner at Tesla investor Deepwater Asset Management, said that despite the loose language in his performance agreement, investors would ultimately hold him accountable for delivering transformational products.

"If people start smelling there's something goofy here, he's in trouble," Munster said.

In its pay proposal, Tesla's board declared Musk the only person capable of transforming Tesla into an artificial-intelligence juggernaut. The board added that Musk, during negotiations, raised the prospect of "prioritizing other ventures" if he and the board couldn't agree on compensation.

Corporate governance experts said the board is taking a huge risk by so explicitly staking its future on one leader. Wei Jiang, vice dean at Emory University's business school, said Tesla's board has granted Musk a "monopoly" on Tesla's top job. Good corporate governance, she said, requires embracing a "competitive and fluid market for CEOs."

THE HARD PART: PROFITS

Musk's hardest performance targets are likely those involving profit, a measure with no room for interpretation. The directors set eight profit goals between \$50 billion and \$400 billion in earnings before interest, tax, depreciation and amortization, compared to Tesla's 2024 earnings of \$16.6 billion.

Tesla's EV business, which accounts for almost all its revenue, is deteriorating with aging models facing fierce competition. Its only newer model, the Cybertruck, has flopped.

The way Musk's compensation is structured, however, allows for massive payouts without hitting any profit target. Every goal combined with a market-value increase offers the same 1% stock payout. So Musk gets the same pay for meeting the relatively easy vehicle sales and FSD-subscription goals, for instance, as he would for boosting earnings five-fold to \$80 billion.

The board's valuation goals may prove far easier than its profit targets.

Tesla's value could hit \$2 trillion, for instance, if shares grow a modest 6.4% annually over the decade following the board's Sept. 3 pay-package approval. That's slower growth than the S&P 500's 8.5% annual average over the past 30 years and less than half the Nasdaq's 13.2% average.

Seth Goldstein, a Morningstar analyst who tracks Tesla, said its valuation could easily hit \$3 trillion or more over a decade with market-average performance. He pointed out, however, that Tesla's value is already largely based on "future products that don't exist today."

For Musk to claim the biggest payouts offered by Tesla's board, Goldstein said, "we're going to start having to see real products."

Kevin Murphy, a University of Southern California finance professor and an expert witness for Tesla in defending Musk's 2018 pay package, acknowledged that the vehicle sales and \$2 trillion valuation goals aren't "much of a stretch" but simply reaching those won't appease shareholders.

Neither will the "handful of billions" for lower-rung goals matter much to Musk, who cares more about historic technological achievements, Murphy said. Shareholders, he said, have focused on the hardest goals and biggest payouts because they believe Musk – and only Musk – can hit them.

"Is it worth it?" Murphy said. "Shareholders seem to think so."

Reporting by Chris Kirkham in Los Angeles, Rachael Levy in Washington, DC and Abhirup Roy in San Francisco. Editing by Brian Thevenot and Michael Learmonth

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Regulators target Tesla Insurance amid class action over claims mishandling

DJ [dailyjournal.com/articles/387945-regulators-target-tesla-insurance-amid-class-action-over-claims-mishandling](https://www.dailyjournal.com/articles/387945-regulators-target-tesla-insurance-amid-class-action-over-claims-mishandling)

Insurance

Oct. 9, 2025

California regulators accuse Tesla Insurance of widespread claims mishandling, bolstering a pending class action. The Department of Insurance alleges systemic delays and violations that harmed policyholders, vendors and communities across the state.

California Insurance Commissioner Ricardo Lara

A state regulatory enforcement action against Tesla Insurance Company that alleges mishandling of hundreds of claims filed by California drivers will almost certainly benefit a putative class action in Los Angeles County Superior Court.

The California Department of Insurance says it noticed a marked uptick in consumer complaints against Tesla Insurance as well as violations of the Insurance Code stemming from State National Insurance Company's policies. The regulator initiated its enforcement action after repeated warnings to Tesla Insurance Company and State National Insurance Company went unheeded. Tesla Insurance Company is an agent for State National Insurance Company.

"Instead of correcting their unlawful and egregious behavior, the companies disregarded the department's serious warnings and continued their misconduct, and the number of consumer complaints and the amount of legal violations have only continued to significantly increase," reads a statement issued recently by Insurance Commissioner Ricardo Lara's office.

The agency's formal accusations and notices of order to show cause in an administrative law court read like the class complaint that Law Offices of Maro Burunsuzyan filed in Los Angeles in July. Discovery is stayed in that case pending Tesla Insurance Company's demurrer and motion to strike, which are due at the end of the month. *Carlos Magana v. Tesla Insurance Company et al.*, 25STCV20622 (L.A. Super. Ct., filed July 11, 2025).

The Department of Insurance says that Tesla Insurance Company misrepresented to claimants pertinent facts or insurance policy provisions relating to their coverage; failed to act promptly on claims, failed to adopt and implement reasonable standards for the

investigation and processing of claims; and did not make good faith efforts to settle claims equitably.

"The facts alleged . . . show that respondent 'has shown incompetency or untrustworthiness in the conduct of any business, or has by commission of a wrongful act or practice in the course of any business exposed the public or those dealing with [it] to the danger of loss,'" the notices state.

"These facts constitute grounds for the commissioner to suspend or revoke respondent's licenses and licensing rights under Insurance Code Sections 1668, subdivision (j), and 1738," the documents say.

The enforcement action is good news, according to Law Offices of Maro Burunsuzyan's case manager, Arman Yurman.

"We can only do so much through court. Their attorneys try to delay, like file a demurrer and move to strike the class aspects," Yurman said in a telephone interview.

Yurman pointed out that the Insurance Department's document is admissible in court and provides plaintiffs with valuable information that is "basically discovery" despite that stay. The lawsuit alleges breach of contract, breach of covenant of good faith and fair dealing, and violations of the Unfair Business Practices Act.

Tesla Insurance Company and State National Insurance Company are represented by Michelle R. Bernard, Margret G. Parke and Christopher R. Wagner of Gordon Rees Scully Mansukhani LLP. They did not respond to a request for comment on the Department of Insurance notice or the lawsuit. Lara's office warned they have 15 days to respond from the time the notice was filed, Oct. 3.

The parties' joint statement in the Los Angeles lawsuit says the defendants intend to demur to the third cause of action and move to strike the complaint's class action allegations.

Burunsuzyan issued a statement commending Commissioner Ricardo Lara and the California Department of Insurance.

"We have long maintained that Tesla Insurance's systemic delays and failures to comply with California's Fair Claims Settlement Practices Regulations have harmed consumers statewide. The department's recent action affirms the very issues we identified when we filed our class action," she said.

Burunsuzyan wrote to Lara in September urging him to stop Tesla Insurance and its underwriting partners from issuing new policies. In addition to the policy holders, she said that Tesla's delays hurt rental fleets, autobody, towing and storage operators as well as lien holders and employers.

Tesla's "failures are not merely consumer inconveniences; they are market-disruptive externalities that are now harming rental fleets, auto-body/towing/storage operators, lienholders/lessors, employers, and local credit channels, with cascading effects across California communities," she said.

For example, she said in the letter to Lara, stalled payments lead to extended rental periods. Direct-bill receivables age as insureds are pushed to credit, which increases collection costs and the risk of default. Backlogs block repair bays, increase storage accruals, restrict business and cause disputes over payment. Delayed total loss decisions impair collateral recovery and extend interest accruals, she continued.

Employees without transportation - particularly gig and field workers - lose work and earnings, she added.

"Carriers that chronically miss the 15/40/30-day statutory benchmarks gain an illicit cost advantage over compliant insurers by pushing liquidity and logistics onto consumers and vendors," Burunsuzyan wrote. "The complaint frames these acts as unfair competition actionable under Bus. & Prof. Code § 17200 because they offend established laws and policies while conferring an unfair competitive advantage."

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First Brands Group**First Brands creditor claims as much as \$2.3bn has 'simply vanished'**

Raistone calls for independent examiner to probe auto supplier's downfall



First Brands sells car parts such as windscreen wipers and brake components © Lance King/Getty Images

Eric Platt and **Amelia Pollard** in New York

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One of First Brands' largest creditors has alleged that as much as \$2.3bn has "simply vanished" as part of the bankrupt auto supplier's failure, calling for an independent examiner to probe its downfall.

The claim from Raistone, a technology group that helped arrange a significant portion of First Brands' off-balance sheet financing with investors, highlights the scale of losses that lenders fear they could suffer as part of the collapse.

[First Brands'](#) swift downfall has sent ripples through global credit markets, the source of trillions of dollars of debt that companies rely on to finance their operations. Investors are now closely watching the bankruptcy proceedings.

Raistone said, with up to \$2.3bn of assets "unaccounted for", the appointment of an outside examiner to lead an investigation was "critical to maximising recovery for creditors".

"The debtors should not be permitted to appoint the very parties that will investigate their own potential misconduct," wrote Richard Jacobsen, counsel for Raistone.

First Brands has appointed two independent directors to lead an investigation into its off-balance sheet financing arrangements as [part of its bankruptcy](#). Its existing management team, including chief executive officer and founder Patrick James, is still in place.

First Brands has also hired the law firm Weil, Gotshal & Manges and investment bank Lazard to shepherd it through the bankruptcy process.

The company's advisers told the court overseeing its bankruptcy that they could not account for \$1.9bn of assets meant to serve as collateral to First Brands' creditors.

"The debtors have already at a minimum admitted to accounting irregularities in this instance, but an investigation by the debtors into their own potential wrongdoing is woefully insufficient given the magnitude of potential misconduct at issue," said Jacobsen in his petition for Raistone.

First Brands declined to comment.

Erica Weisgerber, counsel for First Brands' owners and top executives, told the court this month: "We'll continue to hear allegations . . . about the company and its management. And on behalf of our clients, we want to be on the record categorically refuting those allegations."

Raistone on Wednesday noted it was owed at least \$172mn. The group, which is [part-owned by a fund](#) operated by UBS O'Connor, has been tied to investors with \$631mn of exposure to First Brands' invoices, bankruptcy filings show.

Sunny Singh, a lawyer for First Brands, said there were "zero dollars" when asked at a hearing this month where roughly \$2bn raised by First Brands through "factoring" — a type of off-balance sheet invoice financing — was held.

"It's not here. We don't have it," he said. "There's \$12mn in the bank account today. That's it. There's nothing else."

In most US bankruptcies, the judge allows the company and its advisers to direct the case, believing a debtor-driven process maximises recoveries for all stakeholders.

However, creditors often worry that in contentious cases with the spectre of potential wrongdoing, debtors may not vigorously look into past behaviour.

Bankruptcy court often becomes the venue to hash out misconduct allegations in big corporate blow-ups.

The bankruptcy case of FTX, for example, involved an examiner who probed the cryptocurrency exchange's actions before it collapsed into insolvency.

Securities

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First Brands Blindsides Wall Street in 'Black Box' Loan Fiasco

Oct. 9, 2025, 7:35 AM PDT

Summary by Bloomberg AI

AI Generated



- The auto-parts supplier First Brands imploded late last month, leaving a network of auto-parts factories and distribution centers on the hook for over \$10 billion to firms like Jefferies, UBS and Millennium.
- One of First Brands' financial partners, Raistone, has called for an independent investigation into \$2.3 billion tied to the company that it said had "simply vanished".
- The collapse of First Brands has raised questions about the risks of private financing and the lack of transparency in the industry, with investors and creditors grappling with the consequences of the company's opaque financial transactions.

In hindsight, the telltale signs of trouble were piling up: the Zoom calls where the owner kept his camera off; the angry pushback from his brother when investors asked for invoices to back up their loans; the frequent late payments to suppliers; and the whispers of large off-the-books financing arrangements.

That so few outside of First Brands had a full view of all the red flags around the auto-parts supplier before it imploded spectacularly late last month, stands as a stark example of the growing risks of money flooding into the opaque world of private financing. How it operated, where it got its money and even the people running it were largely a mystery.

By the time it all came crashing down, the company's sprawling network of auto-parts factories and distribution centers was on the hook for over \$10 billion to some of the biggest firms on Wall Street: Jefferies, UBS and Millennium, among others.

While the full extent of the damage – and what exactly went wrong – remains unclear 11 days after First Brands declared bankruptcy, the stakes were raised on Wednesday night when one of First Brands' financial partners made an emergency court filing calling for an independent investigation into \$2.3 billion tied to the company it said had "simply vanished."

In the meantime, the repercussions are rippling through the financial industry and beyond.

Raistone, the company that called for the investigation, and that had facilitated First Brands' short-term borrowing, derived 80% of its revenue from First Brands and has already [cut](#) roughly half of its employees. The O'Connor hedge fund unit owned by UBS is facing such significant losses that Cantor Fitzgerald is now trying to renegotiate the terms of its acquisition of the business.

Jefferies is facing redemption requests from investors who had money in a hedge fund arm of the bank, Point Bonita Capital, which had a quarter of one of its portfolios – some \$715 million – tied to First Brands. The situation is a particular [threat](#) to Jefferies' reputation because the bank had also helped First Brands sell a significant chunk of its long-term loans over the past decade.

These firms are hardly blameless, industry observers say. Platforms like Raistone have come under [scrutiny](#) for giving risky companies such easy access to short-term funding, and asset managers have faced [criticism](#) for sending money through these platforms with too little oversight.

"There has been so much demand for these assets that people have lost sight of doing diligence before they invest," said **Joseph Sarachek**, a bankruptcy lawyer who teaches at NYU Stern business school. "But diligence is perhaps more important than ever when the company is privately held."



First Brands owns auto parts suppliers from Anco and Trico wiper blades to Fram filters.

Photographers: George Frey; Houston Cofield/Bloomberg

This article is based on interviews with more than a dozen investors, vendors and former employees who declined to be identified because many of the details are confidential. First Brands and Raistone did not respond to requests for comment. Jefferies, UBS, Millennium and Cantor declined to comment.

During the first bankruptcy hearing, a lawyer who said she represents certain directors, officers and owners of the business, Erica Weisgerber, argued the collapse was largely caused by "macroeconomic factors and other headwinds that were outside of management's control." She denied the allegations against the company and management and said they would be addressed at the appropriate time.

'Black Box'

As more details come to light, investors are grappling with their role in a web of opaque financial transactions that suddenly fell apart once it became clear that the company's liabilities were larger than disclosed. The "black box" as creditors have called First Brands, reveals the increasingly important world of closely-held companies that have grown up as investors shifted money away from public markets and into private deals that offer only scant details to regulators, credit ratings agencies and even their own investors. The [rushed](#) bankruptcy is the latest sign that cracks may be developing in the facade of this rapidly expanding corner of the financial industry.

These risks are no longer confined to Wall Street. First Brands got hundreds of millions in short-term funds through Yieldstreet, a firm that packages exotic, alternative assets into products for individual investors. Even curious customers who dug into the Yieldstreet documents only learned that their money was going to a "global conglomerate" nicknamed Mango. Yieldstreet said it stopped funding First Brands last year, and said their customers did not lose money.

"Counterparty confidentiality is standard in our offerings, and many similarly structured offerings from other firms, and commercial borrowers often require it as a financing condition," the company said in an email.

At the center of the drama is the elusive owner and CEO of First Brands, Patrick James, who creditors have been scrambling to get a handle on in recent weeks. The few public records that mention James indicate that he grew up in Kuala Lumpur and came to the US to attend the College of Wooster in Ohio. When he took over the bar on campus, Ichabod's, the student newspaper reported that back in Malaysia he had run "his own disco service, supplying lights, music, and DJ's for the annual parties of large firms."

A lawyer for Patrick James did not respond to requests for comment. Efforts to reach James through emails and phone numbers associated with him were unsuccessful.

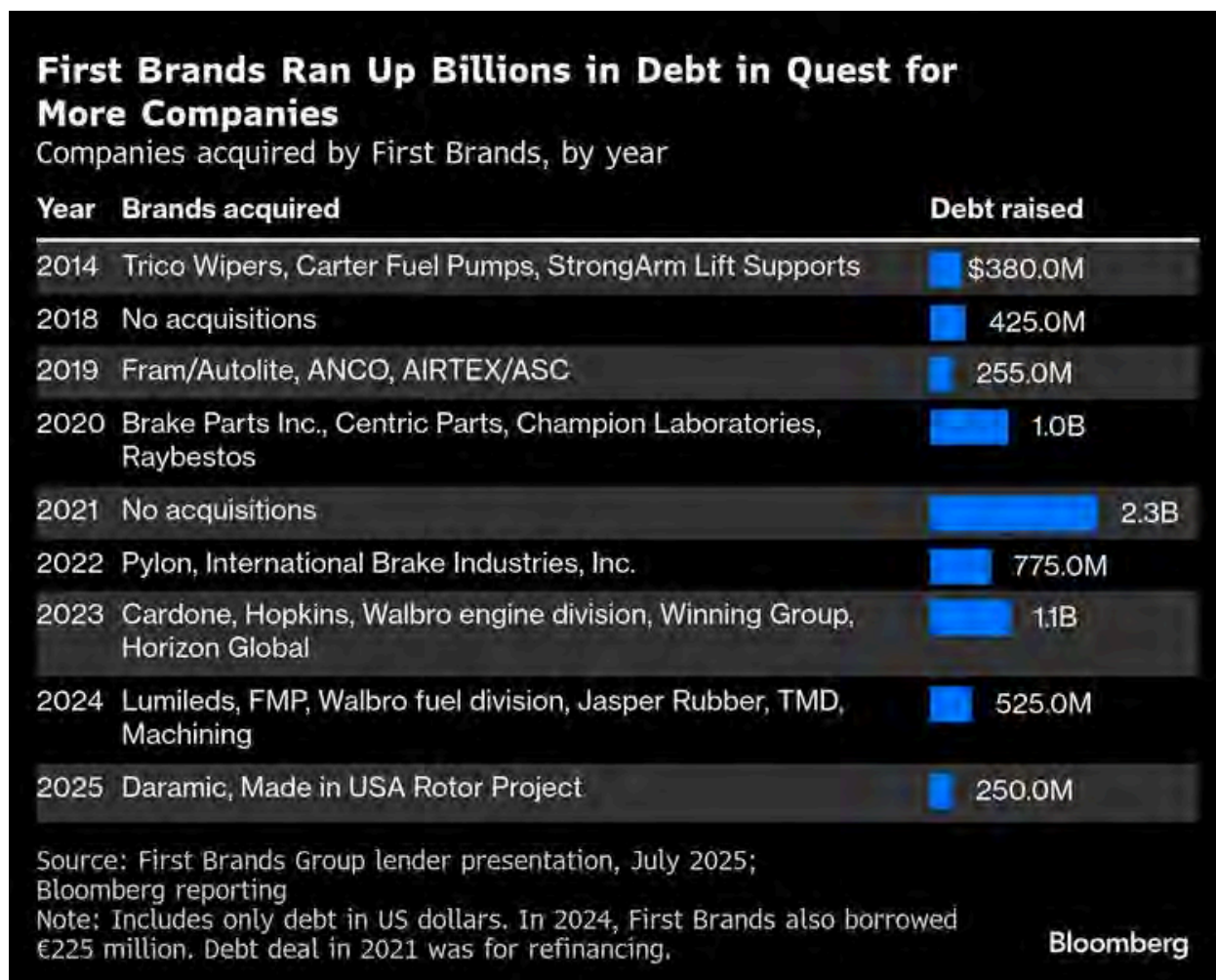
After a post-graduate stint at a mergers and acquisitions firm in Dayton, Ohio, James began buying up local manufacturing companies in the auto industry through a burgeoning network of holding companies and subsidiaries.

Elusive Owner

In 2011, a unit of Fortress Investment Group sued some of the companies and claimed that they had obscured James' controlling interest and the fact that all the companies "share employees and management, do not have separate books and records, have the same address in Solon, Ohio, and are grossly undercapitalized."

James and his businesses denied the accusations but paid to settle the case and another one alleging fraud two years earlier.

The lawsuits did not stop Wall Street from fueling James's growing ambitions. The company, which was then known as Crowne Group, began tapping the syndicated loan market in 2014 with \$380 million in loans. In 2020, it was rechristened as First Brands and borrowed more than \$1 billion to fund another run of acquisitions, eventually taking the company's long-term debt load to around \$6 billion.



Nevertheless, several investors who considered lending decided to stay away after unearthing the previous litigation or hitting up against the dearth of information about the CEO, according to the investors, who declined to be named because they weren't authorized to speak publicly.

Public records show that James had taken out mortgages for homes in suburban Cleveland and set up a foundation that gave to churches and schools in the area, but he left almost no trace of his involvement on the internet.

Lakshmi Ganapathi, the founder of Unicus Research, which conducts forensic investigations of corporate controversies, said that she looked into the First Brands situation for clients and concluded that the CEO had taken steps to obscure his online footprint and personal residence.

"It seems like he went above and beyond to hide himself and his assets," Ganapathi said. "All of this should be a huge red flag for investors."

Trade Finance

The opaqueness of First Brands' operations was amped up by its growing use of a number of short-term borrowing techniques, known broadly as trade finance, that allowed it to take out what amounted to corporate payday loans, often tied to expected shipments or inventory.

These arrangements generally did not show up on the company's balance sheet, in part because some of them were run through separate financing entities owned by James, with names like Carnaby Capital and Eagle Casting Holdings.

Trade finance is a time-honored financial practice, but it became hot on Wall Street in the wake of the financial crisis, driven in no small part by the rise of a British startup called Greensill Capital that set up a pipeline of money between big Wall Street banks and hardscrabble industrial companies. First Brands tapped these markets in part through Raistone, whose founder had been one of Greensill's first employees.

The perils of these arrangements became clear when Greensill collapsed in 2021, facing accusations that it had understated the risks of the short term lending it facilitated and obscured the nature of the underlying loans.

But First Brands was too attractive to resist for many investors, paying what amounted to an interest rate of around 30% for some of its short-term borrowing, Goldman Sachs analysts later [estimated](#) . In some cases, Raistone and its investors would buy outstanding invoices from First Brands' suppliers at a discount while obtaining a commitment from First Brands that they would be paid in full on their due date, pocketing the difference.

Point Bonita Capital, a unit of Jefferies' Leucadia Asset Management, invested hundreds of millions of dollars in the trade finance products, the company [said](#) this week. Various UBS funds, including O'Connor, held over \$500 million of exposure.

Unanswered Questions

Since the bankruptcy, an independent board committee has been investigating roughly \$2.3 billion in off-balance sheet financing and looking into competing claims to some of the company's inventory due to "irregularities" and the potential "commingling" of collateral backing its main asset-based lending facility and other inventory-backed loans.

Over the years, some potential investors asked First Brands for invoices that could validate the receivables investors were planning to buy, according to people with knowledge of those discussions who asked not to be identified because the conversations were private. Patrick James' younger brother, Ed, was the point person for many of these deals, but he rarely showed his face on Zoom calls with potential partners, and he was dismissive and impatient when investors asked for more information, the people said.

Efforts to reach Ed James through emails and phone numbers associated with him were unsuccessful.

Chad Hildebrant, a former trade finance banker, said that the high returns promised by Raistone, and the sheer volume of the deals, were enough to raise alarms when he considered the deals.

"Based on how much of that paper was going around and how high the numbers got, it seemed unsustainable," Hildebrant said. "At a certain interest rate, I no longer feel comfortable with your ability to repay me," he said.

First Brands' aggressive maneuvers allowed James to build a company that had 26,000 employees on six continents and revenues of around \$5 billion in 2024, according to a presentation to investors. But the underlying business, selling replacement auto parts to the likes of AutoZone and Walmart, did not offer up tremendous growth potential once the acquisitions stopped. Between 2023 and 2024, while its revenue only rose 1.3%, the cost of servicing its debt went up 38%, the investor presentation showed.

Behind the scenes, the company was struggling to deliver to customers or pay vendors on time for at least two years before it filed for bankruptcy, leading to additional penalty fees, according to vendors, former employees and other people familiar with the situation.

"First Brands is a clear case of a company with a very aggressive founder and very bad financial disclosures that don't give you enough information as an investor," said Michael Gatto, a partner at Silver Point, a credit-focused investment firm that looked into First Brands loans but is not invested. "They were constantly making acquisitions, and that way they could mask problems because it gives the idea that the business was constantly growing."

Court filings show that some of the first signs of serious stress showed up early this year when one of the affiliates owned by James failed to make \$200 million in monthly payments to a financing firm that had bought some of First Brands' equipment and then leased it back.

Most First Brands creditors didn't find out about these problems because they did not happen at First Brands itself, according to several investors. But the problems grew in the summer, when Jefferies went out looking for lenders willing to help refinance its \$6 billion in syndicated loans.

Failed Refinancing

While many investors in First Brands' first-lien loans quickly signed up for the refinancing, some holders of the second-lien loans stalled and asked for more information about the off-balance sheet borrowing, complaining that the company didn't use one of the big four accounting firms, according to people familiar with the negotiations.

Scott Caraher, the head of senior loans at the investment manager Nuveen [said](#) his firm submitted diligence questions for more information, which were never answered. They didn't place an order.

Jefferies put the process on hold in early August and promised a "fulsome" report on First Brands' financial status from a bigger accounting firm. In early September, lawyers for First Brands called the company's creditors during the weekend and said "they were in desperate need of capital," a lawyer representing the group, Scott Greenberg, said in bankruptcy court.

Many of the funding problems were happening at the James-owned financing affiliates and Greenberg said his clients had not seen the problems coming.

In the weeks leading up to the bankruptcy, First Brands tried to secure funding from existing creditors. This would often be a process led by a CEO, but Patrick James only showed up at one meeting, this time with his camera on, people on the calls said.

After the Chapter 11 filing, the lawyer for one creditor, Evolution Credit Partners, said that his client was repeatedly caught off guard by the information coming out of First Brands, at one point learning that some of the collateral tied to his client's loans was also pledged to different First Brands lenders.

"How in the world that possibly could happen within a sophisticated multibillion enterprise is a mystery to us and to our client," the lawyer, Vincent Indelicato, said.

--With assistance from **Jonathan Randles, Chester Dawson, Todd Gillespie, Myriam Balezou, Anthony Lin, Miguel Ambriz and Aaron Weinman.**

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Securities

First Brands' Go-To Bank Jefferies Opens Books as Fallout Builds

Oct. 8, 2025, 7:24 PM PDT

For Jefferies Financial Group Inc., the speculation around its role in the sudden demise of First Brands Group became too loud to ignore.

As First Brands' banker for more than a decade, Jefferies' name appeared frequently during the company's ascent to a conglomerate of aftermarket automotive parts. In recent weeks, though, New York-based Jefferies has come under scrutiny for its relationship with a company that collapsed into bankruptcy in spectacular fashion last month amid concerns about its reliance on supply-chain financing.

On Wednesday, Jefferies sought to clear the air, laying out in the most direct terms yet how it is — and, just as crucially, isn't — exposed to potential losses tied to First Brands.

Read More: Jefferies Fund Has \$715 Million in First Brands' Trade Debt

The pain point for Jefferies, along with other financial firms, is Point Bonita Capital. That fund has about \$715 million invested in invoices due by First Brands' customers including Walmart Inc. and AutoZone Inc., with the auto-parts supplier responsible for directing payments to Point Bonita. That's about a quarter of its \$3 billion trade finance portfolio.

Jefferies' Leucadia Asset Management has a \$113 million equity stake in Point Bonita, the bank said. And while Jefferies' potential losses tied to the saga seem likely to be manageable — Morgan Stanley analysts earlier on Wednesday put them at a maximum of nearly \$45 million — new details on the collapse keep coming to light. Later that day, a First Brands creditor alleged that as much as \$2.3 billion of trade finance assets had "simply vanished" from the auto-parts supplier.

Regardless of the final tally for Jefferies, the reputational damage could be more significant, and costly.

"The reputation risk is a big hit, because clients are potentially losing significant amounts of money," **Sean Dunlop**, an analyst at Morningstar, said in an interview, noting how Jefferies is known as a hard-charging bank that arranges debt for some of the market's riskiest borrowers. "This fallout is the ramification you see from that, from time to time."

A representative for Jefferies declined to comment.

Jefferies, once something of a banking underdog, has steadily risen to become more of a competitive force in investment banking — known for leading more aggressive deals. While it lacks some business lines that make the larger Wall Street firms multiples its size, it's ensconced in the part of global finance that's periodically one of the hottest: Helping companies tap the capital markets and prowl for deals.

The bank's relationship with First Brands started around 2014, when it stitched together a loan to its predecessor company, Crowne Group. First Brands then grew through debt-funded acquisitions of autoparts sold through retailers like Walmart and O'Reilly Auto Parts, tapping the leveraged loan market along the way.

Over the years, First Brands increased its use of trade finance — an opaque but relatively common type of financing that sits off-balance sheet and has been hit by frauds in recent years. At times, it used this to raise money that would otherwise have breached rules on the existing loans — loans that Jefferies helped arrange.

In one such instance, First Brands set up a so-called side letter agreement with Point Bonita for an additional trade financing facility, according to people familiar with the matter. The agreement enabled First Brands to raise funds at an interest rate above the limits permitted by its existing loan documents — because it instead paid the fund a “supplemental incentive fee” in addition to that rate.

While this gave First Brands access to more funds, it also increased financing costs for the company. Even though the side letter was noted in the loan documents, the arrangement still caught a few creditors by surprise, some of the people said, asking not to be identified discussing private information.

More recently in July, Jefferies was pitching investors on a roughly \$6 billion refinancing deal for First Brands. But lenders in that debt began raising concerns over the company's use of trade financing. Their concerns prompted the pause of the refinancing effort in August and the decade-long relationship suddenly appeared on less solid ground: Jefferies struggled to get information from the company, it told investors. First Brands filed for bankruptcy in late September.

Read More: Troubled Auto-Parts Firm First Brands Goes Quiet as Loans Plunge

On Wall Street, where corporate financings serve as connective tissue, the ripple effect of the fiasco quickly spread — including to a US regional lender. Part of Point Bonita's exposure to receivables owed to First Brands was pledged into a leveraged facility with Phoenix-based Western Alliance Bancorp., meaning that bank would be on the hook if those assets went bad.

Some firms have already started lining up to pull money from Point Bonita: BlackRock Inc. and a Texas public fund have requested partial redemptions in recent weeks, Bloomberg reported Wednesday. Jefferies stock tumbled on the news and closed down almost 8%.

Read More: Cantor Seeks New UBS O'Connor Deal on First Brands Exposure

The ramifications stretched further. Cantor Fitzgerald LP had agreed in May to buy the O'Connor hedge-fund unit from UBS Group AG. After court documents showed O'Connor had a claim for \$116.1 million on First Brands in supply-chain finance, Cantor is now seeking to change the terms of its purchase, Bloomberg reported. An investing team at Millennium Management also took a writedown on a First Brands bet with a loss expected to total about \$100 million.

Like many banks on Wall Street, Jefferies has seen debt deals go south before. It helped arrange a \$2 billion junk-bond offering for the owner of Saks Fifth Avenue Inc. last year to help it finance its acquisition of Neiman Marcus Group. Just five months after the debt sale, and before a single coupon was paid, Saks' debt had cratered to below 50 cents on the dollar, leaving bondholders nursing almost \$1 billion of losses and the company seeking more money to shore up its finances.

Morningstar's Dunlop said clients hit by the First Brands incident are less likely to turn to Jefferies when they need to raise capital quickly, or participate in future deals more broadly.

"I would look at it as potentially damaging the pipeline of investment banking business and asset management inflows," he said.

--With assistance from **Eliza Ronalds-Hannon**.

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Securities

Jefferies Fund Has \$715 Million in First Brands' Trade Debt (1)

Oct. 8, 2025, 8:41 AM PDT

An asset manager controlled by a unit of Jefferies Financial Group Inc. sank nearly a quarter of its \$3 billion trade finance portfolio into receivables tied to auto parts supplier First Brands Group Inc., the bank disclosed on Wednesday.

Point Bonita Capital's portfolio has about \$715 million invested in receivables due by First Brands' customers including Walmart Inc. and AutoZone Inc., with the auto-parts supplier responsible for directing payments to Point Bonita, Jefferies said in a statement. Problems with the receivables emerged on Sept. 15 as the company stopped making these payments.

Jefferies also said most of its own exposure to the now-bankrupt company came through Point Bonita, a division of the firm's Leucadia Asset Management that manages trade-finance assets on behalf of third-party investors. Leucadia has a \$113 million equity stake in that fund, according to the statement.

Additionally, Jefferies has a 50% stake in Apex Credit Partners, which held about \$48 million of loans to First Brands through collateralized loan obligations.

Analysts at Morgan Stanley estimated that Jefferies would face \$44.6 million in potential losses tied to First Brands. They noted that would be a "manageable" hit to the company's tangible shareholders' equity.

The disclosure reveals more about Jefferies' ties with First Brands, a supplier of wiper blades and oil filters that filed for bankruptcy last week after a debt refinancing was derailed by investor scrutiny. Jefferies had been marketing the refinancing for the company, and many of Wall Street's biggest names have faced losses on their exposure to First Brands.

Court documents from earlier this month showed funds under the UBS Group AG umbrella face more than half a billion dollars of exposure to the auto supplier.

Read more: UBS Funds Face \$500 Million Exposure in First Brands

It's the latest blow up in the murky world of trade finance, a sector that has been hit by numerous frauds in recent years, often leaving banks and insurers facing losses. The biggest bust in the industry came in 2021, when Greensill Capital filed for insolvency after channeling bank deposits and insurance funds into short-term loans to risky companies, ultimately contributing to the collapse of Credit Suisse Group AG.

Jefferies noted that First Brands has indicated in bankruptcy filings that its special advisers were investigating whether receivables had been turned over to third-party factors upon receipt and whether receivables may have been factored more than once.

Read more: First Brands Probing Billions of Off-Balance-Sheet Financing

(Updates with Morgan Stanley analyst commentary in fifth paragraph. An earlier version of this story was corrected to explain nature of Jefferies' exposure to First Brands.)

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Expert Opinion | **Commercial Litigation**

Why Contingency Commercial Litigation Is Gaining Ground in Business Disputes

Commercial litigation is notoriously expensive. It's not unusual for a case to take years and cost hundreds of thousands of dollars in legal bills, just to get to trial. That financial barrier causes many businesses, especially smaller ones, to walk away from claims they could win. But there's a lesser-known option that can change the equation: contingency commercial litigation.

October 09, 2025 at 11:15 AM By **Jason Goldman**



Jason Goldman, Co-Managing Partner of Davis Goldman. Courtesy photo

Legal disputes in the business world can be both financially and emotionally draining. For companies involved in contract breaches, fraud claims, or intellectual property fights, deciding whether to pursue a case often comes down to one tough question: Can we afford the legal fees?

Commercial litigation is notoriously expensive. It's not unusual for a case to take years and cost hundreds of thousands of dollars in legal bills, just to get to trial. That financial barrier causes many businesses, especially smaller ones, to walk away from claims they could win. But there's a lesser-known option that can change the equation: contingency commercial litigation.

Whether in the form of a pure contingency fee arrangement or a hybrid model in which a reduced hourly fee and a contingent percentage for the law firm are paid when the client wins, these types of arrangements create flexibility, reduce risk, and flip the traditional pay structure on its head. Instead of billing by the hour, the law firm takes on the case with no upfront legal fees or significantly reduced legal fees, and only gets paid a contingency fee if the client wins and makes a recovery. The firm typically receives a percentage of the settlement or judgment, and if the client loses, the lawyer doesn't get paid at all or only gets paid the significantly reduced fee for its services. For the client, it's a chance to pursue justice without the risk of draining their bank account.

Contingency arrangements are standard in personal injury law, but they're considerably rarer in the commercial space. Still, they're starting to gain ground, particularly in cases where there are extensive damages and a likelihood that a judgment will be collectable. Examples are seven-figure contract disputes, business torts, or high-value intellectual property issues, where the defendants are companies or individuals that have deep pockets. These types of cases can be a good fit, especially when the opposing party is a solvent business and there's a strong legal foundation to the claim.

Of course, not every case qualifies. For a firm to take on that level of risk, there needs to be a real chance of success and a realistic path to collecting any damages awarded. Even if a business has been wronged, suing a bankrupt company or one with no assets doesn't make sense under a contingency or a hybrid model.

Another factor is the cost of the litigation itself. Commercial cases often require expert witnesses, forensic accountants, and extensive document review. All of that adds up quickly. Contingency litigation can be a lifeline for businesses that simply cannot front both the costs and the fees necessary for such expensive litigation, or for those that simply prefer not to.

Sometimes, business owners explore litigation funding instead. This involves a third-party company covering the legal expenses in exchange for a share of the recovery. While this can ease the financial burden, it also brings another party into the mix—one that might not always see eye to eye with the client or the attorney. And because funders usually take a cut off the top, the client's portion may end up being smaller than expected. With direct contingency or hybrid litigation, there's no middleman, and the relationship stays between the client and their law firm.

One of the biggest upsides to a contingency arrangement is how it shifts incentives. If a firm is taking on the risk, it has every reason to be fully invested in the outcome. That often means a more aggressive and efficient litigation strategy. Firms that bill by the hour, on the other hand, do not always have the same level of dedication or the incentives to be efficient and devoted to a claim.

Clients in those cases may feel pressured to settle early, just to stop the clock on mounting legal fees.

That said, contingency litigation is not risk-free. Businesses still give up a portion of any recovery, and depending on the agreement, they may still need to cover certain expenses, like court costs, filing fees, and depositions. And because only a handful of firms have the resources, staffing, and know-how to take these cases on, it can take time to find the right legal partner.

For companies that have been wronged and feel priced out of the legal system, contingency commercial litigation can be a powerful tool.

These arrangements will not work for everyone, and they are not right for every case. But in the right situation, it can level the playing field, give businesses access to justice, and hold bad actors accountable, without having to write a large check just to get started.

Jason N. Goldman, *co-managing partner of Davis Goldman, focuses his practice on commercial litigation, handling complex business disputes from inception through trial and post-judgment proceedings. He also handles transactional matters, including asset purchases and sales, mergers, corporate formations, drafting shareholder and operating agreements, and a diverse range of contract negotiations.*

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FirstEnergy Investors Seek Clarity On 6th Circ. Privilege Order

By **Jessica Corso**

Law360 (October 8, 2025, 7:49 PM EDT) -- FirstEnergy investors asked the Sixth Circuit Wednesday to clarify a recent ruling blocking them from accessing internal investigation documents in a lawsuit over a \$1 billion bribery scandal, arguing that the company is holding up depositions due to its misreading of the court's opinion.

The Sixth Circuit **ruled last week** that the investors could not access documents prepared by Jones Day and Squire Patton Boggs after they were hired by FirstEnergy and its board of directors to perform internal investigations after the scandal became public.

The investors said Wednesday that FirstEnergy's counsel is now instructing witnesses that they don't have to reveal facts that they may have learned from the attorneys involved in those investigations. The investors argue that is a misinterpretation of the court's ruling and are asking the Sixth Circuit to clarify the ruling or, in the alternative, rehear the dispute.

Not clarifying the ruling could put the court at odds with its own 2022 decision in [U.S. v. Sadler](#), in which the Sixth Circuit ruled that "communications are not protected 'when an attorney conveys to his client facts acquired from other persons or sources,'" according to the investors.

"A single sentence from this court ... that this court's order should not be read as vacating the deposition-testimony order and thus overruling Sadler could save months or years of delay if FirstEnergy refuses to comply with the district court's deposition-testimony order, as its recent comments suggest it intends to do," the investors told the court Wednesday.

Attorneys for FirstEnergy didn't immediately respond to a request for comment.

Investors filed the lawsuit against the company following the arrest of then-Speaker of the Ohio House of Representatives Larry Householder in 2020, arguing that they suffered billions of dollars of damages after the company's alleged fraud was exposed.

Householder was convicted and sentenced to 20 years in prison for accepting \$60 million from FirstEnergy in order to push through a \$1 billion bailout package for two of the company's failing nuclear plants. The company **admitted to bribing Householder** and others in a deferred prosecution agreement in 2021 in which it agreed to pay \$230 million to avoid a federal wire fraud conspiracy charge.

FirstEnergy has argued that **bribery is not securities fraud** in its bid to overturn class certification. The Sixth Circuit **issued a ruling** on that bid in August, stating that the district court applied the wrong standard in certifying the class, but indicated the class could be recertified on remand.

FirstEnergy is represented by Robert Giuffra, Sharon Nelles, David Rein, Nicholas Menillo, Morgan Ratner and Maxwell Gottschall of Sullivan & Cromwell LLP.

The investors are represented by Jason Forge, Darren Robbins and Mark Solomon of Robbins Geller Rudman & Dowd LLP and Joseph Murray and Brian Murphy of Murray Murphy Moul & Basil LLP.

The case is In re: FirstEnergy Corp., case number 24-3654, in the U.S. Court of Appeals for the Sixth Circuit.



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3 Trends From AI-Related Securities Class Action Dismissals

By **Courtney Quirós, Sierra Shear and Lauren Funk** (October 8, 2025, 4:00 PM EDT)

The rise of artificial intelligence has fueled a new wave of securities class actions, with 34 cases filed since 2023, including 12 in the first half of this year alone. At the current pace, 2025 is on track to break the record for AI-related securities class action filings.[1]

As AI-related securities cases advance through the courts, early rulings on motions to dismiss are shaping this emerging legal landscape. We analyzed the nine motions to dismiss decisions issued in AI-related securities class actions filed between Jan. 1, 2023, and June 30, 2025, and identified some key trends for practitioners and corporate counsel managing AI-related litigation risks.

Despite early predictions that AI-related cases would be more likely to survive a motion to dismiss, the cases from this period were no more likely to survive than average. In all nine cases during this period, the courts granted a defendant's motion to dismiss in whole or in part.

From these rulings, three key trends stand out.

1. Scrutiny of Statements About AI's Capabilities

Courts continued to scrutinize representations about companies' AI capabilities, repeatedly emphasizing that plaintiffs must allege specific, concrete facts demonstrating that companies' AI did not have those purported capabilities to withstand a motion to dismiss.

For instance, in *Lamontagne v. Tesla Inc.*, the U.S. District Court for the Northern District of California **dismissed** claims on Sept. 30, 2024, that Tesla exaggerated its self-driving technology's no-human intervention capabilities, because the plaintiffs failed to provide specific, contemporaneous facts showing the technology could not achieve zero-intervention drives as described.[2]

The court also declined to credit allegations based on a confidential witness's assertion that Tesla's autopilot department "absolutely" knew the statements were exaggerations, finding the allegations too vague "to show that [Elon] Musk's statements were false or misleading."

Likewise, the U.S. District Court for the Eastern District of Michigan's March 28 decision in *In re: General Motors Co. Securities Litigation* **found** the Cruise LLC subsidiary's statement describing self-driving cars as "safer than a human driver" inactionable, because the complaint did not allege facts allowing a meaningful comparison between the cars and human drivers.[3]

Although the complaint described how the cars "tend to drive 'erratically,'" it did not address whether human drivers also engage in similar behaviors.

Even in the context of statements about new, fast-paced technological developments like AI, courts



Courtney Quirós



Sierra Shear



Lauren Funk

still require detailed, comparative factual allegations to support claims that statements about a technology's capabilities are materially misleading.

2. Scrutiny of Claims About Who Is Doing the Work — AI or Humans

Courts are closely examining claims where companies allegedly represented human work as AI-driven.

For example, in *In re: GigaCloud Technology Securities Litigation*, the U.S. District Court for the Southern District of New York **found** on Jan. 27 that the plaintiff sufficiently pled that GigaCloud's statement that it used "complex AI software in [its] technology infrastructure" was false, since the company in fact "relied on manual computations" requiring "100 IT employees to maintain." [4] The court largely credited these allegations because of supporting statements from IT and supply chain employee confidential witnesses.

Additionally, in the General Motors case, the court found that a reasonable investor could plausibly interpret statements by Cruise's CEO that self-driving cars operated with "the human out of the loop" to mean the vehicles operated without any human input at all, not merely without a safety driver. The court declined to dismiss the claims, noting the defendants did not dispute that humans were involved in operating the vehicles.

In contrast, the Eastern District of Michigan granted the defendants' motion to dismiss other statements that the cars were "fully driverless" or "fully autonomous," concluding that a reasonable investor would interpret them to mean that self-driving cars could operate without a safety driver physically present while still allowing for some human involvement, such as remote operators.

Because GM and Cruise consistently clarified that "fully driverless" referred only to the absence of a safety driver in the vehicle and disclosed the use of remote operators, the court held that the plaintiffs failed to plead falsity.

These cases illustrate that courts are scrutinizing statements about AI performing work without human labor or intervention, but — as in other securities cases — plaintiffs must specifically allege facts showing those statements were false.

3. Issues Unrelated to AI Still Drive Many Outcomes

The decisions on motions to dismiss from this period also highlight that many AI-related cases, including multiple cases involving companies offering AI-related products or services, will continue to turn on issues that aren't AI-specific, such as claims about business prospects or scienter.

For instance, in *In re: Vicor Securities Litigation*, the Northern District of California considered claims that Vicor's statements about an agreement with a significant and existing customer for Vicor's AI-related service were misleading. [5] The court **dismissed** these claims on June 6 as forward-looking and expressed as expectations, not assurances of a concrete deal, and also found the complaint failed to plead scienter.

These cases illustrate how courts may resolve securities claims involving AI by applying established pleading standards rather than focusing on the unique nature of AI-related disclosures.

Takeaways

With this wave of litigation gaining momentum and courts providing initial guidance, companies should understand these distinctions to effectively manage risk and disclosure. Here are some practical steps.

Review and substantiate AI-related statements.

Ensure all public statements about AI capabilities, performance, and integration are accurate and substantiated. Avoid broad or unqualified comparisons between AI and human performance unless they can be supported by data.

Clarify the role of human labor.

Be clear about the extent of human involvement in processes described as AI-driven. Explicitly distinguish between tasks performed by AI, and those requiring human oversight, intervention or manual work. Misrepresenting human work as AI can create significant litigation risk.

Maintain established disclosure practices.

Continue applying established standards of accuracy, transparency and appropriate cautionary language when disclosing AI developments. Courts are still evaluating these disclosures under traditional securities law principles, so when in doubt, rely on those standards.

Monitor evolving case law.

Track new decisions in this rapidly developing area. A record number of AI-related cases are expected this year,[6] and nearly three-quarters of defense counsel expect the trend to continue, according to a survey conducted by Inigo Insurance.[7] Early rulings are shaping the standards for pleading and proving AI-related misstatements.

Conclusion

AI may be new, but the courts are applying the same exacting standards that have long governed securities litigation.

Courtney Quirós is a partner, Sierra Shear is a senior associate and Lauren Funk is an associate at Alston & Bird LLP.

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

[1] Cornerstone Research, Securities Class Action Filings: 2025 Midyear Assessment (2025).

[2] *Lamontagne v. Tesla, Inc.* , No. 23-cv-00869 (N.D. Cal.).

[3] *In re: Gen. Motors Co. Sec. Litig.*, No. 23-CV-13132 (E.D. Mich.).

[4] *In re: GigaCloud Tech. Inc. Sec. Litig.* , No. 23-cv-10645 (S.D.N.Y.).

[5] *In re: Vicor Securities Litigation* , No. 24-cv-04196 (N.D. Cal.).

[6] Cornerstone Research, Securities Class Action Filings: 2025 Midyear Assessment(2025).

[7] Inigo Insurance, Inigo Defense Counsel Survey 2025 (2025).

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Battery Maker Enovix Gets Investor Suit Trimmed Again

By **Emilie Ruscoe**

Law360 (October 8, 2025, 6:07 PM EDT) -- A California federal judge has pared an investor lawsuit against lithium battery maker Enovix to a single claim, after finding that two allegedly misleading statements by the company about its production equipment testing were significantly taken out of context.

In **the order Tuesday**, U.S. District Judge Susan Illston granted Enovix's motion for partial judgment on the pleadings, siding with the company in tossing the pair of Enovix statements about its equipment testing processes.

The latest version of the investor suit said Enovix and certain of its officers and directors hurt investors by concealing the company's struggles to get battery production equipment up and running at the speed the company projected its machinery should be able to work at.

In their suit, the investors pointed to market records showing trading prices for Enovix shares declined as the company acknowledged its first factory build-out hadn't gone according to plan and its actual production capacity was still a far cry from the metrics it had projected it would achieve.

Judge Illston said one of those statements had been offered in response to an analyst's question about the company's "proprietary equipment," which had been made by a different vendor than the underperforming equipment at the heart of the suit's securities fraud claims.

The other statement was incomplete, but not untrue, the judge said, noting that it referenced the company's qualification process at its own factory, not a test the company said it would undertake on site at the factory where certain pieces of its equipment were made.

The company didn't seek to shed the suit's remaining alleged misstatement. In that statement, an Enovix representative told the public that certain equipment testing the company had waived had been "performed at the vendor's facility" before the company accepted delivery of the equipment.

In an earlier dismissal ruling, Judge Illston said regarding that statement, "the court agrees with plaintiffs that, if the equipment never passed the [factory acceptance test], it was false and misleading for Enovix to state that the site acceptance test would 'confirm' the equipment was meeting performance requirements and to state that the [factory acceptance test] was 'already performed' without revealing that the equipment had failed" the test.

On Wednesday, counsel for Enovix told Law360 via email that "we appreciate the court's thoughtful opinion and look forward to defeating the sole remaining claim."

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

The investors are represented by Laurence M. Rosen, Phillip Kim and Josh Baker of The Rosen Law Firm and Lawrence M. Rolnick, Marc B. Kramer, Nicole Castiglione and Shane Kunselman of Rolnick Kramer Sadighi LLP.

Enovix and the individual defendants are represented by Emily C. Kapur, Michael Ethan Liftik, Andrew J. Rossman and Courtney C. Whang and Brenna D. Nelinson of Quinn Emanuel Urquhart & Sullivan LLP.

The case is In Re: Enovix Corp. Securities Litigation, case number 3:23-cv-00071, in the U.S. District Court for the Northern District of California.

--Additional reporting by Katryna Perera. Editing by Stephen Berg.

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Cepton Accused By Investor Of Hiding Better Takeover Bid

By **Sydney Price**

Law360 (October 8, 2025, 9:54 PM EDT) -- Light detection and ranging technology company Cepton Inc. has been hit with a shareholder's proposed class action in California federal court, accusing it of concealing a third party's "credible" attempt to buy Cepton for more than double the amount Japan-based Koito Manufacturing Inc. paid to acquire it in January.

According to the suit filed by investor Lisa Kabula on Tuesday, a suit from former Cepton shareholders regarding the transaction was unsealed in Delaware's Court of Chancery last month. The Delaware suit alleged that an inspection of the company's books and records revealed Cepton agreed to be acquired by Koito "at a price that was so unreasonable as to shock the conscience," according to Tuesday's complaint.

Kabula's complaint states that Cepton announced it had signed an agreement to be acquired by Koito on July 29, 2024, the day the proposed class period for her suit begins. The \$3.17-per-share, \$125.4 million take-private acquisition would provide Cepton with "the financial stability and scalability that are crucial to the commercialization of its lidar technology," the company said at the time, according to the complaint.

For several months, the companies emphasized that the deal would underscore a "shared vision for long-term growth and innovation," the complaint states. On Sept. 25, 2024, Cepton filed a preliminary proxy statement related to the acquisition affirming that the transaction was "fair" in the "best interests" of the shareholders, according to the complaint. Subsequently, Cepton filed a definitive proxy statement before the deal closed in January.

The suit alleges that the Delaware shareholder lawsuit "revealed" the true nature of the transaction to the public for the first time. The suit alleged, among other things, that Cepton CEO Jun Pei was subject to conflicts in his negotiations with Koito and encouraged the board to recommend accepting the acquisition to protect his own personal economic interests.

The special committee permitted Pei to negotiate post-close employment directly with Koito after Koito conditioned the deal on retaining Pei as CEO, the Delaware suit revealed, according to Tuesday's complaint.

The identity of the alleged third-party interested buyer is not identified in either lawsuit. But the suits allege the would-be buyer was willing to pay more than double Kaito's \$125 million offer, according to Kabula.

"While the Board deemed the more lucrative offer as 'unworthy of even being discussed,' it responded to Koito's \$3.17 per share bid by commencing a Special Committee process," Kabula's suit states.

In addition to Pei, Cepton's interim chief financial officer Dong Chang and chief commercial officer Mitchell Hourtienne are individual defendants in the suit. The suit accuses them of violating the Exchange Act and acting with scienter.

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

Kabula is represented by Jennifer Pafiti, Jeremy A. Lieberman and J. Alexander Hood II of Pomerantz

LLP.

Counsel information for Cepton and the individual defendants was not immediately available on Wednesday.

The case is Kabula v. Cepton, Inc. et al., case number 3:25-cv-08571, in the U.S. District Court for the Northern District of California.

--Editing by Vaqas Asghar.

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Fortinet Brass Misled Investors With Rosy Outlook, Suit Says

By **Emilie Ruscoe**

Law360 (October 8, 2025, 9:33 PM EDT) -- Executives and directors of cybersecurity company Fortinet Inc. were hit Wednesday with a shareholder derivative action alleging they made the company misrepresent its revenue expectations for certain customer upgrades despite knowing that certain rosy projections were unrealistic.

In a complaint filed in California federal court, Fortinet investor Jack Pittrof claims the company's brass knew, or should have known, that it was unlikely the company would see as much as \$450 million in revenue from a round of upgrades to its flagship firewall product.

However, in reality, Pittrof says, the refresh cycle largely included products that were 12 to 15 years old and were sold when Fortinet's business was a fraction of its current size, "meaning that the total number of FortiGates eligible for an upgrade was inherently limited."

According to the investor, the company was eventually forced to acknowledge that the refresh was "a pretty small percentage of our total business."

Following that August disclosure, Pittrof says trading prices for Fortinet shares fell 22%, or approximately \$22, from nearly \$97 to just over \$75, hurting investors.

Pittrof's suit also echoes allegations from a proposed investor class action filed in September, **accusing** Fortinet of securities fraud in connection with the same alleged misstatements about its upgrade forecast.

In that case, an institutional investor has accused the company and some of its brass of concealing "that they did not have a clear picture of the true number of FortiGate firewalls that could be upgraded" in the refresh cycle.

The investor also claims that "while telling investors that the refresh would gain momentum over the course of two years, Fortinet misrepresented and concealed that it had aggressively pushed through roughly half of the refresh in a period of months."

According to Pittrof, the individual named defendants breached their fiduciary duties, unjustly enriched themselves and wasted corporate assets in connection with the alleged scheme.

Both suits name Fortinet CEO Ken Xie and Chief Technology Officer Michael Xie. The proposed class action also names former Chief Financial Officer Keith Jensen and current CFO Christiane Ohlga, and the derivative action names six members of the company's board.

Counsel for Pittrof and representatives for Fortinet did not immediately respond to requests for comment Wednesday.

Pittrof is represented by Gina M. Serra of Rigrodsky Law PA

Counsel information for the defendants was not immediately available Wednesday.

The case is Pittrof v. Xie et al., case number 5:25-cv-08592, and the proposed investor class action is Oklahoma Firefighters Pension and Retirement System v. Fortinet Inc. et al., case number 5:25-cv-

08037, both in the U.S. District Court for the Northern District of California.

--Additional reporting by Sydney Price. Editing by Drashti Mehta.

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Del. Jurist Says Blue Bell's Late Stand Defies Common Sense

By **Jeff Montgomery**

Law360 (October 8, 2025, 9:05 PM EDT) -- Challenges to purportedly late-raised defenses on Wednesday sidetracked arguments at the Court of Chancery that sought dismissal of a derivative stockholder suit seeking damages from Blue Bell Creameries USA Inc. fiduciaries for company losses tied to a deadly tainted ice cream incident in 2015.

During arguments for a judgment on the pleadings, Vice Chancellor Nathan A. Cook pressed counsel for the Blue Bell's directors and officers to explain what the plaintiffs attorneys described as "absurd" arguments that could have been raised years ago by the company, that a limited partnership unitholder settlement seeking damages for the same contamination episode released claims raised in the derivative stockholder damage suit.

"I'll tell you, I came into this hearing with probably one of the foremost questions in my mind being: How is it that the defendant didn't raise this immediately?" the vice chancellor said. He added later, "It defies, I suppose, common sense" for "a defendant to delay or be slow" in raising it.

The arguments focused on a \$60 million derivative settlement approved by Vice Chancellor Joseph R. Slight III in 2020 for a case brought by Blue Bell unitholders in *Wenske v. Blue Bell Creameries*. *Wenske* was filed soon after the original stockholder derivative case, *Jack L. Marchand v. John W. Barnhill Jr.*, and was settled in 2020; *Marchand* was dismissed and then revived by Delaware's Supreme Court in 2019.

"Defendants ask the court to accept as a responsible interpretation that the *Wenske* parties and their counsel requested" a settlement releasing claims in the *Marchand* case "without any mention of *Marchand*," Vice Chancellor Cook said, or that *Wenske*, upon approval, "immediately barred, precluded, obviated, mooted this *Marchand* action."

The long-running Blue Bell Creameries case has its roots in repeated health and safety lapses at Blue Bell plants that led to a listeria outbreak and recall in 2015. Blue Bell has said the events cost it hundreds of millions in lost profits.

Attorneys for public stockholder Roseann Marchand asked the court in July for an order compelling access to records on the *Wenske* damage suit settlement and on the possibility that the *Wenske* decision was used to release claims in the case she represents, originally led by her late husband, Jack Marchand.

Attorneys for Marchand argued they never received details regarding the unitholder assertions before the *Marchand* case revival. The revival sent the *Marchand* claims back to Chancery Court, and the company soon afterward formed a special litigation committee that initially sought its own investigation, followed by a handoff to Roseann Marchand as lead plaintiff.

Vice Chancellor Cook told Srinivas M. Raju of Richards Layton & Finger PA, counsel to former Blue Bell officer Paul W. Kruse, that in order to be comfortable when approving a settlement he had to ensure he had received all needed information.

"Particularly," the vice chancellor added, "if a settlement is going to impact in an extraordinarily material way a case on my docket, and not just any case on my docket, but, one may argue, was the premier decision by the Delaware Supreme Court in the last five years that spawned a million CLE

panel discussions."

Robert J. Kriner Jr. of Chimicles Schwartz Kriner & Donaldson-Smith LLP, counsel to the investors, told Vice Chancellor Cook that "Delaware Supreme Court law says you can't get rid of these claims without the court's blessing."

"The other side knew Marchand's claims were not released under the Wenske settlement, which specifically excluded" the public company "from any settlement consideration," Kriner said.

Raju argued, among other points, that allowing public stockholders to receive a direct recovery from the individuals for harm that occurred at the limited partner level would amount to a double recovery. The unitholders also argued that Blue Bell's claims were barred by releases in the earlier settlement agreement.

"I'm not saying plaintiff has no grounds, doesn't have, maybe, a theory for harm," but not harm to Blue Bell "that led to the complaint we see here today," Raju said.

Vice Chancellor Cook said the "damages quantum" might not be large — "even attorney fees for retaining counsel to deal with the alleged corporate trauma. I think we could come up with a list of sundries" that would "at a minimum preclude granting a motion for judgment on the pleadings."

The vice chancellor added a question that might arise regarding "is the juice worth the squeeze" that results.

"Even setting aside the five-year lapse in which this argument has been raised," Vice Chancellor Cook said. "I think it's understandably troubling to me that this was not brought to the vice chancellor's attention" in Wenske. "The answer may be that no one knew how these words would work at the time, and this is just an unforeseen consequence."

The Supreme Court in its reversal found in part that a majority of the board was too conflicted to consider a demand to pursue derivative claims against key company officials on behalf of public stockholders. That decision was seen as underscoring the duties of oversight and loyalty arising from the appellate court's landmark **In re: Caremark International**  ruling in 1996.

Vice Chancellor Cook said on Wednesday that "If one is to believe that folks are out there giving appropriately aggressive and sophisticated counsel, I would expect this description of what happened is entirely counterfactual to what actually happened, and I would have to believe that extraordinarily counterfactual to grant a motion for judgment on the pleadings."

Roseann Marchand is represented by Robert J. Kriner and Scott M. Tucker of Chimicles Schwartz Kriner & Donaldson-Smith LLP.

The Blue Bell and general and limited partner parties are represented by Rolin P. Bissell, James M. Yoch and Jillian A. Tyson of Young Conaway Stargatt & Taylor LLP, Lewis H. Lazarus, Albert J. Carroll, Kirsten A. Zeberkiewicz, Barnaby Grzaslewicz and Samuel E. Bashman of Morris James LLP, David Schertler and Lisa Schertler of Schertler Onorato Mead & Sears LLP, Lisa M. Zwally, Bryan T. Reed and C. Mark Stratton of Greenberg Traurig LLP, Srinivas M. Raju, Kevin M. Gallagher, Jason J. Rawnsley and Alfred P. Dillione of Richards Layton & Finger PA, Lawrence Finder of R. McConnell Group PLLC and Chris Flood of Flood & Flood.

The case is Roseann Marchand as administrator of the estate of Jack L. Marchand v. John W. Barnhill Jr. et al., case number 2017-0586, in the Court of Chancery of the State of Delaware.

--Editing by Michael Watanabe.



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Semtech Gets Suit Over Revised Sales Projections Trimmed

By **Katryna Perera**

Law360 (October 8, 2025, 10:25 PM EDT) -- A California federal judge has trimmed shareholder claims against semiconductor supplier and cloud service provider Semtech Corp. in an investor suit alleging share prices for the company dropped and investors were hurt after it downgraded bullish sales expectations for a certain product portfolio it had earlier said would be used by chipmaker Nvidia.

U.S. District Judge Mark C. Scarsi issued an **order** Tuesday partially granting a dismissal motion filed by Semtech, its CEO Hong Hou and Chief Financial Officer Mark Lin.

The suit, filed in February, **claims** Semtech investors were hurt when trading prices for its shares fell 31%, from over \$54 to under \$38, after the company disclosed that it expected to see sales revenue that was lower than previously expected for its CopperEdge product portfolio, which is used for networks with active copper cable.

On Tuesday, Judge Scarsi dismissed four of the eight challenged statements in the suit, finding that they were made by third-party analysts and not any of the defendants.

"Plaintiff has not alleged that defendants had any control over what each analyst included in their reports. Without such an allegation, the complaint fails to raise an inference that anyone but the analysts are the 'makers' of the challenged statements," the order stated.

Two other statements, concerning Semtech's projections of CopperEdge's demand and sales, were also tossed as forward-looking, but the other statements were kept in the suit as they concerned "current or present facts" and were adequately pled as false at the time they were made.

"Statements 4 and 5 ... are claims about Semtech's ongoing belief in the continued viability of the [Nvidia's Blackwell server racks and pods]. Hou stated that Semtech management had 'invested time with [their] customer and end users of the racks over the past few months,' which 'reaffirmed [their] expectation of exceeding the floor case,'" the order stated.

"Whether management had actually engaged with consumers and end users and concluded that [Nvidia's product] was still viable is a statement of past or current fact, not forward-looking," the order said.

Finally, Judge Scarsi found the investors had adequately pled scienter, or knowledge of wrongdoing by the individual defendants. According to the order, the investors claim that by 2024, Semtech's debt had become an "existential threat," and the defendants wanted to delay disclosing that the company's revenue opportunity with Nvidia "had evaporated" until after a planned December 2024 public stock offering.

The order stated that the alleged plan was successful, with Semtech raising \$661 million through the offering and significantly decreasing its debt leverage ratio. On Tuesday, Judge Scarsi said not only do the investors raise a plausible inference that the defendants had a financial motive to lie, but they also allege Semtech management "quickly changed their public statements after the successful stock offering."

"The short period between the earnings call statements, the stock offering, and the eventual changed

projection supports an inference of scienter," the order stated.

The judge also said the sudden resignation of long-time Semtech board member Rockell Hankin, less than two weeks before the stock offering, is "suspicious."

"While this likely would not be enough to establish an inference of scienter on its own, it is just one of the factual circumstances that plaintiff has alleged to support such an inference," the order said.

Investors claim that between Aug. 27, 2024, and Feb. 7, 2025, trading prices for Semtech's shares were artificially inflated because the company had concealed from investors that its CopperEdge products didn't meet certain customer needs, and therefore, architecture changes would need to be made, so the company ultimately wouldn't ramp up CopperEdge sales as it had said in a previous forecast that it was planning during its 2026 fiscal year.

In August 2024, the company announced that it expected to see "annual opportunities" for certain CopperEdge offerings exceed its previous \$50 million floor case estimate for its 2026 fiscal year, referring investors to a "well-documented application" for certain CopperEdge products in which the company "partnered with [chipmaker] Nvidia to implement low power, low latency active copper cables ... for [Nvidia's] Blackwell [server] racks and pods," according to the complaint.

Following Semtech's announcement name-dropping its Nvidia relationship in connection with its financial projections, trading prices for Semtech shares climbed from about \$40 to a January 2025 peak of over \$77.

Fast-forward to February 2025, and Semtech reversed course, saying its financial estimate revision was "based on recent feedback from a server rack customer and correlated to discussions with end users of the server rack platform."

For the relevant fiscal year, the company said, "net sales from its CopperEdge products used in active copper cables are expected to be lower than the company's previously disclosed floor case estimate of \$50 million due to rack architecture changes, with no expected ramp-up" during the fiscal year.

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

The investors are represented by Jacob A. Walker, Jeffrey C. Block, Michael D. Gaines and Zoe Van Vlaanderen of Block & Leviton LLP.

Semtech and the individual defendants are represented by Sara B. Brody, Jaime A. Bartlett and Sarah A. Hemmendinger of Sidley Austin LLP.

The case is Colleen Kleovoulos v. Semtech Corporation et al., case number 2:25-cv-01474, in the U.S. District Court for the Central District of California.

--Additional reporting by Emilie Ruscoe. Editing by Janice Carter Brown.



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Musk Ordered To Explain Attys' Role In Twitter Dispute

By **Jessica Corso**

Law360 (October 8, 2025, 4:14 PM EDT) -- Elon Musk must explain whether he plans to argue that he relied on legal advice to defend himself against a dispute over his acquisition of an ownership stake in Twitter, with a New York federal judge saying Musk's statements on the matter have so far been contradictory.

U.S. Magistrate Judge Gabriel Gorenstein on Tuesday ordered Musk to explain the "discrepancy" that he said popped up in a September brief that the billionaire filed in a case accusing him of failing to timely file a beneficial ownership report once his stake in the social media company surpassed 5%.

"Defendants' filings repeatedly assert that they do not intend to rely on any advice of counsel in their defense of this matter," Judge Gorenstein said. "However, at one point in their brief, they make a contrary assertion: namely, that they intend to offer evidence that they 'followed counsel's guidance in making proper disclosures.'"

The other defendants in the case include Musk's wealth manager, Jared Birchall, and the family office that Birchall manages on Musk's behalf.

The present dispute **popped up in August**, when former Twitter shareholders said Musk was attempting to shield his communication with his attorneys while potentially asserting an advice of counsel defense that would make the disclosure of those discussions important to the case.

"This is a classic effort by defendants to rely on their counsel as a shield and a sword, which is unfair and prejudicial to plaintiff," lead investor Oklahoma Firefighters Pension and Retirement System told Judge Gorenstein in a letter requesting that Musk be forced to explain himself.

Musk said in response last month that plaintiffs already have their answer: he is not asserting an advice of counsel defense and will not waive his attorney-client privilege.

"Plaintiff's motion seeks to solve a problem that does not exist," he said.

But Judge Gorenstein still had questions on Tuesday.

"Defendants' filings to date do not make clear whether or not they intend to offer evidence or argue that they had a good faith belief in the lawfulness of their actions (or omissions) in the period after they consulted counsel," the judge said.

Even if Musk does not explicitly state that he relied on his attorney's advice, an argument that he believed his actions were legal could still force him to waive his attorney-client privilege, the judge said.

He gave Musk until Friday to respond.

The lawsuit, filed in 2022, accuses Musk of saving an estimated \$200 million by waiting for a deadline to run out before declaring his ownership interest in Twitter, a social media platform that he later purchased and renamed X.

The parties are currently in discovery as the pension fund seeks to certify a proposed class of all individuals and entities who sold Twitter common stock or call options, or purchased put options between March 25, 2022, and April 4, 2022.

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

The investors are represented by Salvatore Graziano, Katherine Sinderson, Jeremy Robinson, Jonathan D'Errico, Emily Tu and Rebecca Temkin of Bernstein Litowitz Berger & Grossmann LLP and Frank Partnoy of Bishop Partnoy LLP.

Musk and the other defendants are represented by Alex Spiro, Sarah Heaton Concannon, Jesse Bernstein, Jacob Waldman, Brenna Nelinson, Nathan Goralnik and Rachel Frank of Quinn Emanuel Urquhart & Sullivan LLP.

The case is Oklahoma Firefighters Pension and Retirement System v. Musk, case number 1:22-cv-03026, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Katryna Perera. Editing by Vaqas Asghar.

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Meta Sued Over Financial Scam Impersonation Ads

By **Lauren Berg**

Law360 (October 8, 2025, 10:12 PM EDT) -- Meta Platforms Inc. is knowingly publishing and profiting from scam advertisements that unlawfully impersonate licensed financial professionals to ensnare social media users in fraudulent investment schemes involving thinly traded China-based securities, two financial professionals allege in a proposed class action in California federal court.

Scammers have been using paid advertising on Facebook and Instagram to pose as real financial experts and funnel users to their fraudulent WhatsApp "investment" groups, according to the **complaint** filed Tuesday by John Suddeth and Sara Perkins of Florida, who say their likenesses were misappropriated to further a pump-and-dump scheme.

California and Florida law, as well as Meta's own policies, prohibit the unauthorized commercial use of someone's identity and false or misleading ads, the suit points out. But it says that hasn't stopped Meta and its subsidiaries from approving and profiting from ads and promotional content that misappropriated professionals' identities to sell fraudulent securities schemes.

"Class members like plaintiffs — licensed investment advisers, planners, brokers and other financial professionals — did not consent to the use of their names, likenesses, voices or personas in Meta-served ads or WhatsApp solicitations, nor did they authorize any endorsement of the promoted securities," the complaint says.

"The impersonation ads and group solicitations were designed to and caused consumer confusion, diverted prospective clients, damaged goodwill, as well as exposed class members to reputational harm, regulatory inquiries and lost business opportunities," it continues.

Attorneys general from 40 states and the District of Columbia in June **publicly urged** Meta to help stem the tide of widespread investment scams across Facebook and WhatsApp that they said have caused people to lose "life-changing" amounts of money.

Within the WhatsApp groups, scam investors give recommendations to buy specific thinly traded penny stocks, or those with low trading volume, the states said. As users snatch up these securities, prices pump up, and then the scammer turns around and sells, or dumps, them at the artificially high price.

But Meta ignored this warning, Tuesday's lawsuit alleges, and the social media giant continued to approve and deliver impersonation ads that funneled users to fraudulent WhatsApp groups.

"Complaints and reports from affected professionals and users followed, yet substantially similar social media advertising ... and group channels reappeared under new ad accounts and group names, demonstrating that Meta failed to implement the reasonable, platform-level safeguards requested by the AGs," the plaintiffs say, adding that the evidence shows these campaigns were systemic, not isolated.

What's more, scammers don't choose financial professionals to impersonate just based on their notoriety or audience size — they're also mimicking local and regional advisers, which exposes all such professionals "to reputational injury, client confusion, regulatory inquiries and diversion of prospective business," according to the complaint.

Suddeth and Perkins want to represent a nationwide class of possibly thousands of financial professionals "whose names, images, voices, likenesses, credentials, branding or professional

personas were used without consent in paid advertisements or related promotional content on Meta's platforms ... to promote securities or investment opportunities" from Jan. 1, 2023, through the present.

The suit claims false endorsement or false association in violation of the Lanham Act, unfair competition, misappropriation of name and likeness, unjust enrichment, breach of contract, and violations of Florida's Deceptive and Unfair Trade Practices Act.

It seeks an order requiring Meta and the other defendants to stop publishing and monetizing content that uses a financial professional's name, likeness or branding without written consent, as well as damages, litigation costs and attorney fees.

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

Suddeth and Perkins are represented by John T. Jasnoch of Scott + Scott Attorneys At Law LLP and Tom Grady of Grady Law.

Counsel information for the defendants was not immediately available.

The case is John Suddeth et al. v. Meta Platforms Inc. et al., case number 5:25-cv-08581, in the U.S. District Court for the Northern District of California.

--Additional reporting by Abigail Harrison. Editing by Nick Petruncio.

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Sanctions Bid In Ohio Derailment Deal Criticized As Premature

By **Matthew Santoni**

Law360 (October 8, 2025, 1:51 PM EDT) -- The former administrator of Norfolk Southern's \$600 million settlement with the residents of East Palestine, Ohio, urged a federal court to reject the plaintiffs' bid to seek sanctions without waiting for an audit, arguing that the change in procedure would potentially double the court's workload and leave the administration firm scrambling to respond.

Kroll Settlement Administration, which was **removed in June** from distributing the money from the settlement, which stemmed from a fiery 2023 derailment, responded Tuesday that the plaintiffs' request to hold Kroll in civil contempt before the audit is complete would be unfair and create unnecessary work for the court.

"The process of merely stating aloud the steps inherent in class counsel's proposal exposes its unfairness," **Kroll's response** said. "Kroll cannot reasonably respond to class counsel's allegations without seeing the finished audit report on which those allegations are supposed to be based. ... Class counsel's proposal asks this court to rule upon a contempt motion with an incomplete record."

The former settlement administrator asked U.S. District Judge Benita Y. Pearson of the Northern District of Ohio to reject the plaintiffs' proposal and keep her original order, which said an independent audit of Kroll's handling of the settlement administration had to be completed before the court would determine whether to hold Kroll in contempt or levy sanctions.

In September 2024, Norfolk Southern got final approval for a **\$600 million settlement** stemming from the Feb. 3, 2023, derailment, chemical spill and fire in the village along the Ohio-Pennsylvania border. But Kroll, the first court-appointed administrator, was ousted in June amid dissatisfaction over delays and possible miscalculations of how much some class members should get.

Judge Pearson replaced Kroll with Epiq Class Action & Claims Services Inc. and ordered an audit of Kroll's handling of the case. Last week, the plaintiffs **asked the judge to modify her order** and break the process up into two parts: an immediate motion for Kroll to show why it should not be held in contempt of court for mishandling the court's plan of distribution, then, after the audit is complete, assessment of any additional penalties based on the outcome of the review.

In response, Kroll said skipping the audit would leave it in the dark as to the specific accusations against it.

"Kroll would then be forced to respond to these accusations without knowledge of any specific details or support from the audit report, and this court would be expected to rule without the benefit of the findings, reasoning and conclusions of the auditor it has requested," the response said.

Instead of an audit followed by a single round of motions, briefs, arguments and a ruling from the court, the plaintiffs' proposal would double everyone's work, Kroll said.

"Class counsel's proposal requests a complete round of briefing, followed by a decision from the court as to the issue of contempt, which could result in a potential appeal of that decision," the response said. "Then there would be a second round of briefing and decision, in which the first decision would likely be called into question based on the specifics of what the auditor finds and Kroll's responses to the auditor. A second appeal could follow."

The plaintiffs had called for the earlier contempt ruling because they say they have discovered additional errors in Kroll's administration of the settlement. They wanted to reassure residents and businesses that their claims were being audited and would be accurately paid out in the future.

But Kroll said that goal could be accomplished without changing the judge's order — simply by posting updates on the audit process to the website for the settlement.

"Given that class counsel's goal can be accomplished by alternative means, the request to significantly alter the measured process ordered by this court is not justifiable," Kroll said.

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

Kroll Settlement Administration is represented by Stephen V. D'Amore, Scott M. Ahmad, Scott P. Glauberman and Rachael E. Thompson of Winston & Strawn LLP, and by Christopher J. Joyce of Flannery Georgalis LLC.

The plaintiff class is represented by co-lead counsel Jayne Conroy of Simmons Hanly Conroy LLP, Elizabeth Graham of Grant & Eisenhofer PA and Seth Katz of Burg Simpson Eldredge Hersh & Jardine PC.

The case is In Re: East Palestine Train Derailment, case number 4:23-cv-00242, in the U.S. District Court for the Northern District of Ohio.

--Editing by Karin Roberts.

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