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- [Diversity Snapshot](#)
- [Practice Groups of the Year](#)
- [Rising Stars](#)
- [Titans of the Plaintiffs Bar](#)

- Sections
- [Adv. Search & Platform Tools](#)
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- [Bankruptcy](#)
- [Class Action](#)
- [Competition](#)
- [Employment](#)
- [Energy](#)
- [Expert Analysis](#)
- [Insurance](#)
- [Intellectual Property](#)
- [Product Liability](#)
- [Securities](#)

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- [Track docs](#)
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2022 Trials To Watch: Opioids, Oracle And Theranos Redux

By [Cara Salvatore](#) · [Listen to article](#)

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Law360 (January 3, 2022, 12:03 PM EST) -- After languishing on hold for much of 2020, trials came roaring back in 2021 alongside the wide availability of vaccines. But court backlogs are still sizable. With trials

continuing amid the resurgence of the Delta variant and the rise of the Omicron variant, trial lawyers are busy.

Here are some of the biggest trials anticipated for the coming year.

Second Theranos Honcho Goes on Trial

Former Theranos executive Sunny Balwani is set to stand trial in February following Elizabeth Holmes' [own lengthy trial](#), in which a jury is currently deliberating.

Balwani, 19 years Holmes' senior and a onetime romantic partner, is facing similar charges of defrauding investors and patients with blood-testing technology he allegedly knew didn't work.

Balwani has [told a court](#) that most prosecution witnesses in Holmes' trial will likely take the stand in his as well. Prosecutors have said Balwani may gain an advantage after his attorneys had a chance to watch the Holmes trial and its press coverage and to see the evidence presented in civil lawsuits involving Theranos.

"If you talk to people in Silicon Valley, you'll hear, well, that's how these people just generally work. They're enthusiastic about the prospects of their product," said Ann Kim of [Hogan Lovells](#), a former federal prosecutor and former [SEC](#) senior enforcement counsel.

"We've rarely seen criminal prosecutions over those things. I think this is the first of its kind related to the sale or the pitch that a startup company is making to potential investors," Kim said.

If the government ends up with two convictions, it could "open the floodgates" for more prosecutions, she added.

Holmes' testimony regarding her relationship with Balwani could be cause for attention to Balwani's trial. Holmes testified that Balwani established [obsessive emotional control](#) over her while she was in a vulnerable state after being raped at Stanford by a different party and that this dynamic went on for years. She testified he outlined her daily schedule, which included waking up at 4 a.m. to "rise, thank God" and wash her face, followed by "praying" at 6 a.m., and eating greens and tofu for lunch and broccoli for dinner. The daily schedule for Holmes also allegedly said, "Do everything I say — word for word," "Show no excitement," and "Do not react." She testified he "would force me to have sex with him when I didn't want to."

[Winstead PC](#) securities litigation co-chair Toby Galloway, a former SEC trial counsel, said it's possible Holmes could testify against Balwani.

"She obviously has waived her Fifth Amendment privilege and after this trial wouldn't have it anyway, so presumably the prosecution would put her on the witness stand against Balwani," he said.

The case is important because the story of Theranos is "one of the largest corporate frauds in recent memory" — this period's Enron or Worldcom, Galloway said.

Service Members Get Earplug Bellwethers Against 3M

3M continues to fight the nation's largest multidistrict litigation. Centralized in Florida, the litigation is scheduled to see numerous bellwether trials in 2022 with over 272,000 claims now pending — most on a special administrative docket and completely unvetted, 3M has stressed.

The plaintiffs are military service members who claim their use of military-issue earplugs made by 3M-acquired Aearo left them with hearing loss or tinnitus. U.S. District Judge M. Casey Rodgers has called the situation an "unprecedented backlog" and has aggressively set rapid runs of bellwethers, even recruiting other federal judges to hold sometimes-simultaneous trials.

So far, the two sides have had wins in roughly equal numbers. The [biggest plaintiffs' verdict](#) notched thus far

was some \$25 million awarded to one service member who says he suffered hearing damage from using 3M earplugs.

Kate Helm of [Nelson Mullins](#), a specialist in commercial litigation and class actions, said there are at least nine bellwethers set for next year — meaning the MDL is on course to rack up an unusually large number of bellwethers overall.

Given the roughly even split in trial outcomes, "this appears to be very fact-driven litigation," she said, with each trial turning on "specific facts to the specific plaintiff and his or her unique circumstances."

Hearing loss is also an interesting kind of claim, Helm said. "There's nothing broken that you can see on, for example, an x-ray. There's been no surgery that's been performed. There's, 'Does this person have hearing loss,' and I think that's somewhat subjective," Helm said.

Maura Monaghan of [Debevoise & Plimpton LLP](#) said the litigation is "up there with the [Monsanto Roundup](#) cases and, before the J&J effort in bankruptcy, the talc cases," in terms of its importance to lawyers who work in mass torts and class actions.

"It's not in any way a threat to 3M's solvency or ongoing business or anything like that. They can handle verdicts this size," Monaghan said. But in mass litigation so sprawling, it's nigh impossible to knock out all claims in one blow, and that wears on defendants, she said.

More Courts Consider Whether Opioids Are a Public Nuisance

If 2021 was the year of opioid trials, 2022 promises to give it a run for its money. Opioid defendants and the governments suing them received key decisions in 2021 from a judge in California, a state supreme court in Oklahoma, a jury in Cleveland, and — in the final days of the year — [a jury in New York's Suffolk County](#), yielding information about the strength of these cases that they didn't have at this time last year.

Not only that, more outcomes are expected shortly: Verdicts should be around the corner in a bench trial that ended in West Virginia in July and a bench trial in [state court in Seattle](#) that started in November and continues into the new year.

The Ohio federal judge in charge of the MDL and who oversaw the liability jury verdict against three pharmacy chains in November will preside over a second phase in May 2022 in which he'll decide their monetary bill.

Meanwhile, fresh opioid trials are set to begin in 2022 in multiple places around the country, including Dallas state court on Feb. 7, San Francisco federal court in April, and Pasco County, Florida, state court, on April 4. And there are numerous other cases selected as federal bellwethers that have no trial dates set.

These suits are expected to be hard fought and to continue to help parties on both sides — particularly companies that have never reached any settlement deals — figure out where they stand with regard to the strength or weakness of the core opioid claim, public nuisance. This [central theory](#) holds that the spread of addiction has burdened not only users but also their support networks, communities, and society at large. A judge and a state supreme court have rejected the theory, while two juries have embraced it.

Oracle and HP Duke It out Over Software Update Protections

A long-running, multicase dispute between tech giants Oracle and HP is set to yield another trial starting May 23, after an appeals court last year [upheld](#) a \$3 billion verdict against Oracle over a software support contract.

This year's scheduled trial will delve into Oracle's claims that [Hewlett Packard Enterprise Co.](#) was instrumental in illegally offering Oracle customers updates, or patches, to their Solaris operating systems, as part of a scheme allegedly concocted by another company, Terix Computer Co. Inc.

Oracle already sued Terix and came away with a \$58 million settlement, and it's now suing HP after allegedly discovering the company played a role in the Terix scheme. Oracle says HP emails reveal knowledge of misconduct and that the company worked with Terix to steal business from Oracle regarding third-party support for Oracle products.

The case has already been to the Ninth Circuit, which revived claims that HP infringed copyrights, meddled with customer relationships and violated California's competition law.

HP is a bigger fish than Terix, and Oracle's pursuit could bring higher damages than in the Terix case, according to Ben Hodges of [Foster Garvey PC](#), a technology and patent lawyer. He said the case also contains interesting questions about vicarious or contributory copyright liability.

"If you're not the one directly infringing, how involved do you need to have been?" he said. "It'll be interesting to see, for the jury ... if they believe HP had significant enough involvement to warrant nondirect copyright infringement claims."

And long term, Hodges is looking to see if Oracle's now-dismissed fair use claim will be reactivated when the outcome of the trial is appealed. That's of interest to IP lawyers following Oracle's big Supreme Court case against [Google](#) on fair use, which [Oracle lost](#).

"Oracle will find itself in another appeal involving software fair use," he said. "I would be utterly shocked if this didn't end up at least in the Ninth Circuit, and possibly get all the way to the Supreme Court."

Tech Billionaire Fights Tax Fraud Prosecution

The coming year could bring a trial in what prosecutors say is the largest-ever U.S. tax fraud case against an individual. Robert Brockman, chief executive officer of multibillion-dollar software company [Reynolds & Reynolds Co.](#), is charged with using offshore entities to hide approximately \$2 billion from the [IRS](#) after investing some of his Reynolds money in private equity funds.

Brockman [is accused](#) of taking his earnings from Ohio-based Reynolds, which develops software for car dealerships, and seeding San Francisco venture capital firm [Vista Equity Partners](#), then hiding the capital gains he made.

Brockman allegedly had the capital gains wired from Vista's bank accounts to accounts in Bermuda and Switzerland and concealed for decades his control over various offshore companies and trusts, filing false tax documents.

Vista's founder, Robert Smith, reached a nonprosecution agreement in a separate case and has agreed to pay \$139 million in taxes and penalties. He is cooperating with prosecutors and the IRS.

The case, which started in California but has been moved to Texas, is currently awaiting a decision on Brockman's claim that he's not competent to stand trial, following a multiday hearing.

"Obviously certain of the prosecutors are portraying this as a last-ditch effort by Brockman to escape responsibility. They put up witnesses [saying] that Brockman had sat for depositions in 2019 on unrelated civil matters and was completely coherent and articulate," said Nick Secco, trial practice group chair at [Benesch Friedlander Coplan & Aronoff LLP](#).

The "defense is arguing that his condition has deteriorated" significantly, Secco said.

If Brockman is found competent, the biggest tax prosecution in history could be a blockbuster trial, and "the government has a fairly powerful suite of cooperating witnesses," including a lawyer in the U.K., Secco said.

GEO Group Preps for Second \$1-A-Day Wage Class Action Trial

In this case, private prison giant GEO faces claims by a class of thousands of immigrants detained while awaiting decisions on their status, who say they cleaned and maintained their holding facility for grossly illegal wages of \$1 per day.

If that sounds familiar, it's because GEO just lost a nearly identical class action in Washington federal court. A jury there awarded \$17.3 million to Tacoma detainees, and a judge followed up with \$5.9 million more to the state attorney general.

This year's follow-up, set for May 10, concerns a different facility in California, named Adelanto. The detainees [have said](#) it's not only one of the largest ICE detention sites, but is also one of the deadliest. In 2017, "more detainees died there than in any other detention center in the United States that year," they said in their third amended complaint.

The detainees accuse GEO of forcing them to work — paying them "just \$1 per day, or nothing at all," and certainly not California minimum wage. They aren't provided with basic food, water and hygiene products, they have said, meaning they must accept GEO's salary offer if they want to have necessities.

The detainees have also alleged that the Boca Raton, Florida-based real estate investment trust threatened to place detainees in solitary confinement or report them for criminal prosecution if they didn't work.

GEO has said the company is not responsible here, because the work program is overseen by [U.S. Immigration and Customs Enforcement](#).

[Trump Organization CFO Defends Compensation Charges](#)

Trump Organization Chief Financial Officer Allen Weisselberg is expected to go to trial in late August or early September 2022 [on charges](#) of a 15-year-long scheme to evade paying taxes on executive compensation, a case that lies steps away from a former president who has repeatedly faced accusations of financial misdeeds.

According to the indictment, Weisselberg avoided taxes on over \$1.76 million in income by keeping it off the books. The Trump Organization allegedly excluded from Weisselberg's reported income money he received for rent on his New York City apartment, tuition for his children and leases for two Mercedes-Benzes.

Weisselberg concealed the money from his tax preparer and omitted it from tax returns, prosecutors say, and even hid the fact that he was a New York City resident to avoid local tax.

Prosecutors' focus on recategorizing the money Weisselberg received is "an interesting theory," said Galloway, of Winstead. Prosecutors will look to argue that the money constitutes "executive perks that are not disclosed," he said.

"You can't separate the politics" from the case, "since Trump may run again," Galloway said. "There's some unindicted coconspirators in the indictment; there has been a lot of speculation that more indictments are forthcoming."

--Additional reporting by Dorothy Atkins, Carolina Bolado, Frank G. Runyeon, Natalie Olivo, Emily Field, Jeff Overley and Sarah Martinson. Editing by Alyssa Miller.

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