

# WORST CORPORATE CONDUCT OF 2018





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The American Association for Justice works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.



777 6th Street, NW, Suite 200  
Washington, D.C. 20001  
[www.justice.org](http://www.justice.org)

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# INTRODUCTION: SORRY, NOT SORRY – THE AGE OF THE CORPORATE APOLOGY

The violent removal of passenger David Dao, and a host of other incidents, put United Airlines in the news for all the wrong reasons in 2017. United issued multiple apologies, each one less begrudging than the one before. At first United apologized for “the overbook situation,” then for the “upsetting event,” while blaming Dao for being belligerent, before issuing its “sincerest apology” a month later.<sup>1</sup>

In September 2017, Equifax CEO Richard Smith apologized first by video and then via a *USA Today* op-ed for the breach that compromised the personal information of 145 million Americans.<sup>2</sup> Equifax replaced Smith with Paulino do Rego Barros Jr., who immediately offered another “sincere and total apology.”<sup>3</sup>

Smith wasn’t done apologizing, however, coming back in October 2017 to tell a congressional committee he was “deeply sorry” (and then saying it again in front of three more congressional committees over the next 48 hours).<sup>4</sup>

While Smith was apologizing to one congressional committee, across the hall Wells Fargo CEO Tim Sloan was telling a different congressional committee he also was “deeply sorry,” for the bank’s massive fraud. Sloan apologized to the public via video two weeks later.<sup>5</sup>

In November 2017, the Equifax apology hat shifted back to Rego Barros Jr., who offered what would be Equifax’s eighth apology—one for every 17 million Americans who had their information stolen.<sup>6</sup>

In March 2018, United Airlines CEO Munoz—by now becoming known as the airline’s Chief Apology Officer—apologized for the death of a 10-month-old French bulldog who died after a flight attendant forced his family to place him in an overhead compartment for the entirety of a three-hour flight from Houston to New York.<sup>7</sup> The family reported hearing their dog bark for two hours, but when they arrived he was dead.<sup>8</sup>

Later that week the airline was forced to apologize for another dog-related incident when a German shepherd bound for Kansas was instead flown to Japan on a 16-hour flight with no food or water.<sup>9</sup>

That same month, Facebook began testing a new almost-apology ad campaign in Chicago. The corporation wasn't sorry exactly, but it promised to "do more to keep you safe and protect your privacy."<sup>10</sup>

In April, Facebook's finalized sorry-not-sorry ad campaign—the company's biggest ever, and its first broadcast on television —ran nationwide during the NBA playoffs.<sup>11</sup>

In May, Uber dropped half a billion dollars on its own quasi-apology campaign, titled, "Moving Forward."<sup>12</sup> Coincidentally, Wells Fargo was doing the same, with its second rebranding campaign in two years, this time called "Re-established."<sup>13</sup>

That same month, George Barrett, executive chairman of opioid-distributor Cardinal Health, apologized to another congressional committee for his company's role in the opioid crisis, saying, "With the benefit of hindsight, I wish we had moved faster and asked a different set of questions. I am deeply sorry we did not."<sup>14</sup> Yet when pressed by the panel chairman whether Cardinal had actually contributed to the opioid crisis, Barrett replied, "no" (fellow CEO John Hammergren of distributor McKesson also denied any role but didn't bother with the apology).

In July, Papa John's founder John Schnatter resigned and apologized after using a racial slur during a conference call.<sup>15</sup> The following month, new CEO Steve Ritchie issued another apology, thanking customers for their "anger, criticism, and honesty."<sup>16</sup>

These apologies reflect less a new found humility amongst America's CEOs and more an understanding that "sorry" is a good strategy. The corporate apology is now an integral part of the MBA playbook.<sup>17</sup>

Business-focused publications such as *Forbes*, the *Harvard Business Review*, *Chief Executive*, and *Ad Week* run articles examining how to craft just the right apology.<sup>18</sup>

Uber used economists to study the best way to say sorry.<sup>19</sup>

The corporate apology is not a cure-all, but the theory goes that it can lessen the damage. But if a corporate apology is purely a business decision, as heartfelt as an earnings call, does it have any real value? Does anyone really believe Uber or Facebook or Wells Fargo is really sorry?

This report illustrates how the only real way to hold corporations and institutions accountable when they cause harm is through the workings of the civil justice system. From the energy companies who spent decades denying their role in climate change, to a university and sports program that for years protected a pedophile instead of students and athletes, institutions have shown time and again they will not act in the public's best interest unless something forces them to. In these cases, and others involving unscrupulous student lenders, defective airbags, child slave labor, and corporate attempts to rig justice, the civil justice system has allowed Americans to hold bad actors accountable and change the way they do business.



# CORPORATIONS THAT SHOULD APOLOGIZE – THE WORST CORPORATE CONDUCT OF 2018

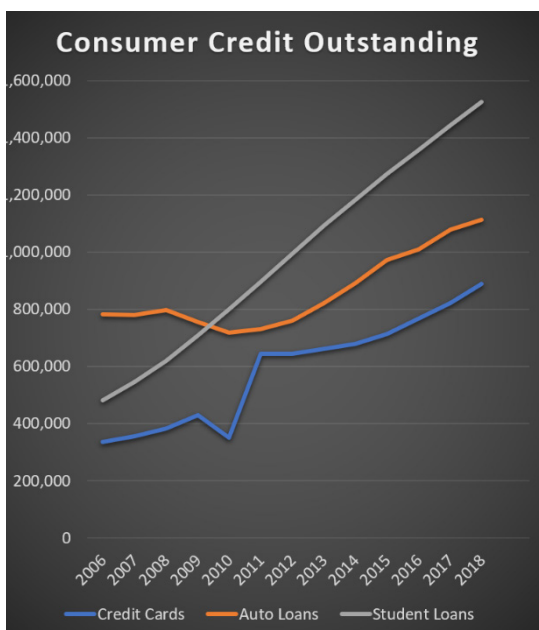
## Navient

The U.S. is suffering from a student loan debt crisis that is so serious it threatens the entire economy. More than 44 million people owe a combined \$1.5 trillion—more than the GDP of Russia.<sup>20</sup> Eight million borrowers are in default, while 3 million more are behind on their payments.<sup>21</sup> By 2023, 40 percent of all borrowers are predicted to be in default.<sup>22</sup> Nor is the problem limited to students—the Parent Plus loan program, which allows parents to take out loans on behalf of their children, has a higher default rate than the U.S. mortgage rate at the height of the housing crisis.<sup>23</sup>

The student loan debt problem is so bad that many experts believe it will form the basis of the next financial crisis, in part because the lenders package the loans together and sell them as asset-backed securities on Wall Street, much like mortgage lenders did prior to the 2008 financial crisis.<sup>24</sup> And it's been made far worse by lenders that have made millions engaging in deceptive and unfair practices, none more than Navient.

Navient is a for-profit corporation, formed in 2014 as a spin-off from Sallie Mae, and one of the three student loan lenders that dominate the market. In the four short years of its existence, Navient has managed to make itself the poster child for student loan abuses. Despite being the smallest of the three major student loan lenders (Navient has 21 percent of the market while its competitors Nelnet and AES/FedLoan have 41 percent and 31 percent respectively), the company has racked up more than three times as many complaints about its conduct as its competitors.<sup>25</sup> Examples of Navient's deceptive practices include:<sup>26</sup>

- Steering borrowers into forbearance rather than more affordable repayment plans when they had trouble making payments, allowing interest to accumulate on the loans. Navient made at least \$4 billion this way;
- Reporting severely and permanently disabled borrowers, including veterans,



*Consumer Credit Historical Data, Board of Governors of the Federal Reserve*



as having defaulted on their loans when in fact they had had them forgiven through federal disability programs;

- Placing borrowers into repayment plans that made them ineligible for public service forgiveness programs;
- Sending borrowers \$0 due bills when they chose to overpay in a particular month, but then counting the absence of additional payments as a failure to make on-time payments (for instance, if a borrower owed \$100, but paid \$300, Navient would send \$0 due bill for the next two months, but would count those two months as a failure-to-pay if no additional payments were made);
- Overcharging service members in violation of the Servicemembers Civil Relief Act (SCRA), which caps the interest rate such borrowers must pay at 6 percent (Navient was forced to pay \$60 million in restitution to the service members);
- Putting up arbitrary barriers to prevent co-signers from being released from loans even when eligible;
- Failing to adequately warn borrowers on income-based plans that they needed to annually certify their income to avoid significant repayment hikes;
- Collecting more than was owed when borrowers fell behind on payments;
- Going after the families of deceased borrowers despite promises such loans would be forgiven (Navient also charged interest on such efforts).

These sort of practices at one point attracted the attention of the Consumer Financial Protection Bureau (CFPB), which had received 60,000 complaints about student loan lenders, and Navient in particular, through August 2017. Under former director Richard Cordray, the bureau succeeded in returning \$750 million to scammed borrowers.<sup>27</sup>

But the U.S. Department of Education, which had already started to roll back student loan borrower protections under Secretary Betsy DeVos,<sup>28</sup> derailed the CFPB's lawsuit against Navient when it refused to share student-loan data with the bureau.<sup>29</sup> And when Mick Mulvaney replaced Cordray, the bureau's efforts stalled completely. Mulvaney, who had received contributions from eight of the top 10 companies with the most complaints in the CFPB database throughout his congressional career, folded the division that had been pursuing lenders into a consumer education office, signaling that it would move from investigation to information-sharing.<sup>30</sup>

In August 2018, Seth Frotman, the CFPB's student loan ombudsman, quit the bureau, saying in his resignation letter that, "the Bureau has abandoned the very consumers it is tasked by Congress with protecting. Instead, you (Mulvaney) have used the Bureau to serve the wishes of the most powerful financial companies in America."<sup>31</sup>



*CFPB director Mick Mulvaney speaking at the 2018 Conservative Political Action Conference (CPAC) in National Harbor, Maryland – Gage Skidmore*

Frotman, who had been with the CFPB since its inception in 2011, alleged that under Mulvaney the CFPB had undercut enforcement actions against lenders and allowed them to impose “legally dubious account fees.”

## Of the 28,000 borrowers who had applied to the Public Service Loan Forgiveness Program, 99 percent had been denied.

At issue for Frotman was the way lenders were treating the Public Service Loan Forgiveness Program (PSLF), a program created in 2007 under President George W. Bush, that promised loan forgiveness to those working in public service. Under the program, a borrower who spent 10 years working for a federal, state, or local government agency—including, for instance, nurses, police officers, and teachers—or a 501(c)3 non-profit, and who kept up the payments on their loan, would have the rest forgiven. Yet data released by the Department of Education in mid-2018 revealed that of the 28,000 borrowers who had applied to the program, 99 percent had been denied. In fact, only 96 people had actually had their loans forgiven.<sup>32</sup>

Many more borrowers didn’t even realize they were eligible for the program because lenders were misleading them about their loans. Navient, and other lenders, misled borrowers or failed to tell that they could become eligible for the program, for instance by consolidating their loans into one provided by the federal government.<sup>33</sup> Lenders also deliberately misapplied payments in ways that excluded them from counting towards the 120 monthly payments required for forgiveness, or put them in forbearance, which also canceled eligibility, or just flat out denied eligibility.<sup>34</sup>

With the CFPB’s lawsuit in limbo, others have stepped up against Navient. California, Illinois, Pennsylvania, and Washington have all filed lawsuits seeking to hold Navient accountable, as has the American Federation of Teachers.<sup>35</sup>

## BP, Chevron, ConocoPhillips, ExxonMobil, and Royal Dutch Shell

In January 2018, New York City sued the world’s five largest publicly traded oil companies alleging that the companies together were responsible for 11 percent of the world’s global warming gases and that they have long known about the impact they have had on the environment.<sup>36</sup>

The suit seeks not only compensation—New York is spending billions to protect its infrastructure from the effects of climate change—but also to pressure the

companies to take serious action over climate change. In October 2018, the New York Attorney General's office also sued ExxonMobil, on the basis that it had misled investors about the financial risks climate change entailed.<sup>37</sup> ExxonMobil has fought back hard, claiming the lawsuits violate the company's right to free speech and deposing government officials in anticipation of a countersuit.<sup>38</sup>

However, New York is not alone. Cities and counties in California, Colorado, Maryland, Massachusetts, Rhode Island, Texas, and Washington have filed similar suits, as have other entities, including groups representing fishermen whose industry is being increasingly affected by climate change, and by groups representing the youth of America, who have sued the U.S. government for failing to rein in the fossil fuel industry.<sup>39</sup>

“By the time global warming becomes detectable it could be too late to take effective countermeasures to reduce the effects or even to stabilize the situation.”

– 1988 internal Shell memo

Bolstering the claims of climate change activists is the mounting evidence that the oil companies were aware of the threat of climate change decades ago and, in fact, were eerily accurate in their predictions of the global impact it would have.

Recently uncovered internal documents from the 1980s reveal that Shell's researchers believed global warming “mainly due to from fossil fuel burning and deforestation” would “create significant changes in sea level, ocean currents, precipitation patterns, regional temperature and weather.” The researchers believed the changes would be larger than any that had occurred over the last 12,000 years, and concluded:

“Such relatively fast and dramatic changes would impact on the human environment, future living standards and food supplies, and could have major social, economic and political consequences... By the time global warming becomes detectable it could be too late to take effective countermeasures to reduce the effects or even to stabilize the situation.”<sup>40</sup>

Ten years after Shell's researchers wrote that memo, another Shell internal memo in 1998 predicted that by 2010, a series of storms and social pressure to reduce fossil fuel burning, including the suggestion that not doing so would result in a class action against the company:

“Following the storms, a coalition of environmental NGOs brings a class-action suit against the US government and fossil-fuel companies on the grounds of neglecting what scientists (including their own) have been



*The Empire State Building lit up in green to mark New York City's decision to divest its pension funds from fossil fuels.*

saying for years: that something must be done. A social reaction to the use of fossil fuels grows, and individuals become ‘vigilante environmentalists’ in the same way, a generation earlier, they had become fiercely anti-tobacco. Direct-action campaigns against companies escalate. Young consumers, especially, demand action.”<sup>41</sup>

In 2012, two years later than the Shell prediction, Hurricane Sandy hammered the East Coast, killing at least 147 people and causing \$71 billion in damage.<sup>42</sup>

#### EXXON POSITION

- EMPHASIZE THE UNCERTAINTY IN SCIENTIFIC CONCLUSIONS REGARDING THE POTENTIAL ENHANCED GREENHOUSE EFFECT.
- URGE A BALANCED SCIENTIFIC APPROACH.

*Excerpt from a 1988 internal Exxon memo titled “The Greenhouse Effect”*

Exxon also had long predicted the devastating effects of climate change and even led research into the subject during the 1980s. By 1990 though, the company had embarked on a massive disinformation campaign, launching ad campaigns questioning global warming and using influence to shut down critical research and “emphasize uncertainty.”<sup>43</sup>

Exxon helped found the Global Climate Coalition, an industry group which vigorously opposed policies to reduce greenhouse gases and led the fight to prevent ratification of the Kyoto treaty.<sup>44</sup> The company spent millions lobbying and even took out full-page ads denying climate change, even as they simultaneously factored climate change into their operations.<sup>45</sup>

The types of lawsuits filed have varied from nuisance claims to negligence to investor suits, reflecting the urgent need advocates feel to pressure oil and gas companies into change. Past attempts to sue the oil and gas industry have foundered over the difficulty in attributing any single event to climate change. That has begun to change as science has advanced and “extreme event attribution” has become a recognized and rapidly expanding field of science.<sup>46</sup> Scientists and legal experts now increasingly see litigation as a viable, and perhaps the only, way of forcing giant multinational corporations to change their ways.

And with good reason—we are running out of time. In October 2018, a landmark report from the United Nations’ Intergovernmental Panel on Climate Change concluded that if drastic cuts to carbon pollution were not made within a dozen years, there would be massive environmental impact, including an increase in extreme weather events, droughts, floods, and extreme heat, which in turn

would cause planet-wide threats to health, food security, and water supply, and throw hundreds of millions of people into poverty.<sup>47</sup> The following month, the federal government released a congressionally-mandated report that concluded, “climate change is expected to cause growing losses to American infrastructure and property and impede the rate of economic growth over this century.”<sup>48</sup> The study—involving 13 federal agencies and more than 300 climate scientists—was dismissed the following week by President Trump, who said, “I don’t believe it.”<sup>49</sup>

## State Farm

In September 2018, State Farm agreed to pay \$250 million to settle claims that the company secretly conspired to install its preferred candidate on the Illinois Supreme Court, then lied about it so the newly-elected justice would not have to recuse himself from a billion-dollar appeal the company was facing. The justice, Lloyd Karmeier, eventually cast the deciding vote vacating the appeal.

The appeal itself stemmed from a 1999 fraud and breach of contract case, *Avery v. State Farm*, in which the insurer had been found to have instructed auto repair shops to fix its policyholders’ cars with lower quality aftermarket parts instead of original automaker-branded parts. The \$1.06 billion verdict was affirmed by an appeals court in 2001 and then went to the state supreme court, which State Farm then decided to target.<sup>50</sup>

State Farm handpicked Karmeier because of his business-friendly beliefs, then secretly funneled millions of dollars to his campaign. The company also used its influence, and financial contributions, to recruit business groups, such as the U.S. Chamber of Commerce and the Illinois Civil Justice League, to the plot. The allied business groups were accused of mail and wire fraud, and the Chamber’s top officials, CEO Thomas Donohue and executive VP Lisa Rickard, had been expected to be called to testify, as well as now Chief Justice Karmeier.<sup>51</sup> Between money funneled through these groups, identified as “unnamed co-conspirators,” and direct contributions, State Farm was responsible for 90 percent of Karmeier’s \$4.8 million campaign fund.<sup>52</sup>

Karmeier cast the deciding vote absolving State Farm from accountability in 2005, but it wasn’t until a former FBI agent’s investigation years later that the insurance giant’s secret role in the campaign came to light, leading the insurer to agree to settle a \$250 million Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuit just before the case was set to go to trial in September 2018.

## General Motors/Takata

By 2018, Takata’s exploding air bag scandal had largely fallen from the news, yet millions of Americans remain in danger from defective air bags that have yet to be





*Air Force Lieutenant Stephanie Erdman was permanently blinded when shrapnel from her Takata air bag exploded into the interior of her car. Ms. Erdman testified before Congress in 2014.*

replaced. As of the National Highway Traffic Administration's September 2017 analysis, nearly 20 million recalled vehicles, 7 percent of all vehicles, are still on the roads with one or more of Takata's ticking time-bombs installed.<sup>53</sup>

More than 4 million air bags that *were* replaced will have to be replaced again, as the interim air bags themselves have been found to be faulty.<sup>54</sup> And the recall continues to expand—in January 2018, a decade after the first recall, Takata called back an additional 3.3 million air bags, while separately Honda and Acura recalled yet another 1.4 million cars and Toyota another 600,000.<sup>55</sup>

Meanwhile, deaths and injuries keep occurring, including one tragic case in which a driver was killed by his defective Takata air bag in a “relatively minor collision” just two days before the air bag was due to be replaced.<sup>56</sup> Worldwide, the air bags have been linked to 24 deaths and 266 incidents of injury, the majority in the United States.<sup>57</sup> As if this situation weren't bad enough, one automaker is refusing to recall its Takata-equipped vehicles. General Motors, the fourth-biggest vehicle manufacturer in the world, has filed three petitions in two years to try and get out of having to recall its vehicles. GM claims the defective Takata air bags in its vehicles are, “not likely to pose an unreasonable risk to safety.”<sup>58</sup>

GM's motivation was clear—in a filing with the Securities and Exchange Commission (SEC), GM admitted that it would save “approximately \$1 billion” if it did not have to repair the defective air bags.<sup>59</sup>

Ironically, GM is one of the automakers previously alleged to have known about the risks posed by defective Takata air bags years before disclosing them to the public.<sup>60</sup> A lawsuit filed in March 2018, alleged that GM knew of the risks as early as the late 1990s, when it received a warning from its then air bag supplier, Autoliv, that Takata's use of ammonium nitrate made its air bags prone to explode.<sup>61</sup>

Owners of GM vehicles had been complaining for years that the company was not replacing the air bags, even though it acknowledged its vehicles were on the recall list, leading critics to suggest the company was deliberately stalling.<sup>62</sup>

GM's stance stands in stark contrast to other automakers. In July 2018, Ford became the seventh automaker to reach a settlement in the Takata multidistrict litigation. The company agreed to pay class representatives \$299 million, employ a “state-of-the-art outreach program” to contact consumers who were still driving with defective Takata air bags, and provide compensation to consumers with out-of-pocket expenses and rental cars to those waiting for repairs.<sup>63</sup> Peter Prieto, lead counsel for the plaintiffs, described the settlements as, “proving to be vital in protecting consumers from dangerous Takata air bags.”<sup>64</sup>

Vehicle manufacturers affected include Acura, Audi, BMW, Cadillac, Chevrolet, Chrysler, Daimler, Dodge, Ferrari, Fisker, Ford, GMC, Honda, Infiniti, Jaguar, Jeep, Land Rover, Lexus, Lincoln, Mazda, Mercedes, Mercury, Mitsubishi, Nissan, Pontiac, Saab, Saturn, Scion, Subaru, Tesla, Toyota, and Volkswagen. To see if your vehicle has a

recalled air bag, visit [www.safercar.gov](http://www.safercar.gov), and enter your car's vehicle-identification-number (VIN).

## Theranos

At one point Theranos, the biotech company that bragged it would revolutionize blood-testing, was considered one of the hottest start-ups in the world, valued at \$9 billion and ready to change the world. The biotech company was founded in 2003 by then 19-year-old Elizabeth Holmes who quickly came to be seen as a visionary tech leader, even featured as “The Next Steve Jobs” on a *New Yorker* cover.<sup>65</sup>

The company claimed it could make blood-testing cheaper and more accessible. Rather than having to have blood drawn via the traditional needle-in-vein, then waiting for expensive lab tests, Theranos promised that a wide range of medical conditions, from diabetes to cancer, could be detected from just a drop or two of blood, for just \$2.99. With its partner, Walgreens, Theranos opened more than 40 centers offering blood-testing to anyone with an insurance card.<sup>66</sup>

The only problem? Theranos's technology could not run the tests it said it could. Instead, the company used a shell company to buy commercial lab equipment which then ran the lab tests.<sup>67</sup> Theranos also faked demonstrations, lied about its analyzers being deployed by the U.S. Department of Defense in Afghanistan, and misled investors into thinking various pharmaceutical companies had endorsed the technology.<sup>68</sup> Tyler Shultz, a Theranos employee and also the grandson of Theranos board member George P. Shultz, the former Secretary of State, attempted to blow the whistle on the fraud.<sup>69</sup> In response, the company aggressively pursued him via the law firm of another board member, David Boies.

Theranos was forced to shut down its centers after it failed inspections by the Centers for Medicare and Medicaid Services. Years of blood test results were voided.<sup>70</sup>

When Theranos's fraud became clear, Holmes was indicted on wire-fraud charges. The company settled civil cases with some investors and the SEC fraud charges. Theranos ceased operations in September 2018.

Multiple former Theranos patients have filed suit. Several of them were diagnosed with conditions they did not have, including autoimmune diseases and thyroid conditions, by the Theranos test, requiring further medical treatment and even in one case an emergency room visit, until tests from other lab companies revealed that the initial diagnoses were false.<sup>71</sup>



*Elizabeth Holmes, CEO of Theranos. Photograph by Krista Kennell*



## Nestlé

Nestlé is the world's largest food and beverage company and one of the world's most boycotted companies as a result of its labor practices. The multinational's seafood, coffee, and chocolate supply chains are blighted with forced-labor use.<sup>72</sup> The company has also resisted full acknowledgment of its failure to stamp out such practices in its supply chains, leaving it free from the market repercussions of socially-aware consumers.

The multinational is heavily dependent on West Africa, where 70 percent of the world's cocoa is grown. Child and slave labor is rife in the region, with an estimated 2.1 million children engaged in inappropriate and frequently dangerous child labor in Ivory Coast and Ghana, where most cocoa is harvested.<sup>73</sup>

“[D]efendants have taken steps to perpetuate a system built on child slavery to depress labor costs.”

– Judge D.W. Nelson, U.S. Court of Appeals for the Ninth Circuit

In October 2018, the Ninth Circuit reinstated a lawsuit accusing Nestlé USA and Cargill Co., of perpetuating child slavery at cocoa farms in Ivory Coast.<sup>74</sup> The six plaintiffs in the case were kidnapped from Mali as children and forced to work on Ivory Coast plantations for as much as 14 hours per day without pay. The court ruled that not only had the companies failed to use their economic leverage to remove child and slave labor from the cocoa production process, but they had also taken “taken steps to perpetuate a system built on child slavery to depress labor costs.”<sup>75</sup> Nestlé's \$89 billion-a-year revenue is more than twice Ivory Coast's GDP.<sup>76</sup>

Unlike other companies, such as Starbucks and Illy, which have blacklisted plantations known to use forced labor, Nestlé claims it cannot keep track of which plantations are in its supply chain.<sup>77</sup> In 2001, Nestlé was one of eight companies to agree to the Harkin-Engel Protocol, also known as the Cocoa Protocol, under which it pledged to end child labor in its cocoa fields. More than 15 years later, millions of West African children are still harvesting the cocoa. Nestlé now says it won't meet the Protocol's goal until 2020 at the earliest.<sup>78</sup>

In some cases, the companies had exclusive buyer/seller agreements with the farmers and visited the farms several times a year. Nestlé argued that such arrangements were just part of the normal course of business, but the court highlighted the fact that the companies' provided “personal spending money” to slave-owning farmers as evidence that the companies had gone above and beyond

to keep the price of cocoa low through slavery. Such payments were “kickbacks” in the court’s view and rendered them liable under U.S. law through the Alien Tort Statute. The court concluded, “the allegations paint a picture of overseas slave labor that defendants perpetuated from headquarters in the United States.”<sup>79</sup>

While Nestlé claims it is unable to exert its market power to stop forced labor in its supply chains, another lawsuit filed in February 2018 in Massachusetts aims to use the market power of U.S. consumers to force Nestlé to change its ways. The lawsuit filed on behalf of plaintiff Danell Tomasella claims that Nestlé deceived consumers by not revealing that their products may contain cocoa cultivated by forced labor. Consumers, the suit argues, would be less likely to purchase Nestlé products had they known the truth about the company’s involvement in slavery.<sup>80</sup> Nestlé has argued that there is no room on its labels for any disclosure of the possibility of forced labor in its supply chains.<sup>81</sup> It does, however, have room for a seemingly innocuous statement about cocoa origins:

## USA Gymnastics/MSU

The Larry Nassar sexual assault scandal exposed not only the horrendous crimes of one doctor but also the abysmal misconduct of coaches and executives at institutions that were supposed to protect the young people they represented—instead, they allowed the abuse to continue unabated for decades.

Nassar was a highly respected physician at Michigan State University (MSU) and an official doctor for the USA women’s gymnastics team. He also sexually assaulted hundreds of girls and women for decades.<sup>82</sup> The abuse came to the attention of people in both USA Gymnastics and MSU, yet was allowed to continue.

In the case of USA Gymnastics, a nonprofit heavily backed by corporations, Nassar’s conduct came to light in the spring of 2015 (if not earlier—on October 17, 2018, former USA Gymnastics CEO Steve Penny was arrested on a felony charge of tampering with evidence after he allegedly hid or destroyed documents related to the Nassar investigation).<sup>83</sup> A coach discovered Nassar’s abuse, and the information was relayed to USA Gymnastics soon after. Steve Penny, then the organization’s president and CEO, told the abused girl’s mother not to tell the police.<sup>84</sup> Penny then waited 41 days before informing law enforcement, during which time Nassar continued to molest young athletes.<sup>85</sup>

USA Gymnastics was far from the only institution that failed to look after its young athletes. Over two decades, at least 14 MSU employees—including athletic trainers, coaches, a university police detective, and an official who



*Larry Nassar sexually assaulted hundreds of girls and women for decades. Over the years, multiple people knew of the abuse but did nothing. Nassar faces a minimum of 100 years in prison.*

became MSU's assistant general counsel—were aware of Nassar's abuse but did nothing to stop it.<sup>86</sup>

Over two decades, at least 14 MSU employees—including athletic trainers, coaches, a university police detective, and an official who became MSU's assistant general counsel—were aware of Nassar's abuse but did nothing to stop it.

In 1992, George Perles, the university's then-athletic director, allegedly intervened to shut down an investigation into a student-athlete's claim that Nassar had drugged, raped, and impregnated her. Nassar also allegedly videotaped the rape. The student, Erika Davis, told her coach, Martha Ludwig, who demanded, and received the video, and reported the incident to Perles. Perles allegedly forced the coach to return the video, resign, and sign a non-disclosure agreement. Davis was stripped of her scholarship. Perles is now an MSU board trustee.<sup>87</sup>

In the late 1990s, two then-teenage athletes told MSU women's gymnastics head coach Kathy Klages that Nassar had sexually assaulted them. Klages allegedly upbraided the athletes and discouraged them from filing a complaint.<sup>88</sup>

In response to a student's sexual harassment complaint MSU conducted an investigation into Nassar in 2014. The eventual report passed to the victim cleared Nassar of misconduct, but a second version shared among university officials warned that Nassar's medical practices were causing unnecessary trauma to his patients and might expose the university to liability.<sup>89</sup> The university required him to have a third person present at exams from that point on.<sup>90</sup>

In September 2015, the U.S. Department of Education's Office of Civil Rights found that MSU's handling of sexual assault cases on campus had violated Title IX and placed the university under federal monitoring.<sup>91</sup> Nassar continued to abuse young women.

It wasn't until Rachael Denhollander, an attorney and former gymnast and patient of Nassar, came forward that Nassar's abuse was stopped. Denhollander contacted the journalists at the *Indianapolis Star*, who had been investigating USA Gymnastics' long history of covering up complaints about coaches.<sup>92</sup>

The reckoning for officials at both USA Gymnastics and MSU is ongoing.

In March 2017, Penny resigned under pressure from the U.S. Olympic Committee (USOC).<sup>93</sup> Ironically, years earlier, the USOC had objected to USA Gymnastics' practice of banning coaches convicted of sex crimes and threatened to revoke the organization's official status. In separate court cases in 2017 and 2018, former

USA Gymnastics chief executives Kathy Scanlan (1994-1998) and Bob Colarossi (1998-2005) both stated that they had told the USOC of endemic sexual abuse problems in gymnastics, but had been discouraged from taking action.<sup>94</sup>

In January 2018, Paul Parilla, chairman of the board for USA Gymnastics was forced out, as were two other board members.<sup>95</sup> Meanwhile that same month at MSU, university president Lou Anna Simon resigned on the same day Nassar was sentenced to a defacto lifetime prison sentence. She was replaced by interim president John Engler, a former governor of Michigan, president and CEO of the National Association of Manufacturers, and president of the Business Roundtable. Engler publicly said that he would “move forward as if my own daughter were on this campus,” yet immediately sparked outrage by pressuring a victim to settle without her lawyer present, accusing the first victim to speak out publicly—Rachael Denhollander—of stirring up other victims in exchange for a “kickback,” criticizing legislative attempts to protect victims, and attacking ESPN for its reporting on the scandal.<sup>96</sup> After withstanding a week of calls to step down, Engler finally issued an apology and was allowed to keep his job.<sup>97</sup>

In August 2018, USA Gymnastics’ women’s developmental coordinator Mary Lee Tracy, was asked to resign three days after being hired. The hiring was bewildering to onlookers because Tracy had notoriously defended Nassar as “amazing” three days after his indictment on federal child pornography charges. Her resignation was triggered after she tried to contact Olympic gymnast Aly Raisman, who had criticized her appointment and was suing the organization over its handling of the Nassar case.<sup>98</sup>

That same month, Kathy Klages, the former MSU women’s gymnastics coach (MSU had suspended her in 2017 as reports of her obstruction came to light, at which point she retired) who had covered up the 1997 abuse report, was charged with a felony count of lying to a peace officer for telling Michigan State Police that she had not known about Nassar’s sexual misconduct.<sup>99</sup>

In September 2018, USA Gymnastics CEO Kerry Perry—who had replaced Steve Penny just nine months before—resigned amidst claims she had failed to change the culture at the organization.<sup>100</sup> Her interim replacement, former Congresswoman Mary Bono, lasted only five days, resigning after sparking controversy over her criticism of Nike’s support of former NFL quarterback Colin Kaepernick (Nike was also a major sponsor of U.S. gymnasts) and her connections to a law firm that allegedly helped cover up that Nassar was under investigation for sexual assault in 2015.<sup>101</sup>

In October 2018, USA Gymnastics national coach Sergio Galvez resigned pending an investigation into allegations of misconduct.<sup>102</sup>

Nassar received a 60-year federal prison sentence, and two Michigan state prison sentences—one for 40 to 175 years for seven counts of sexual assault of a minor and one for 40 to 125 years for three additional sexual assault counts. The state



sentences run concurrently, but the federal and state sentences are to be served consecutively, meaning Nassar faces a minimum of 100 years in prison.

In May 2018, MSU reached a \$500 million settlement with 500 victims.<sup>103</sup> In October 2018, three athletes, including former Olympian Tasha Schwikert, filed a lawsuit against USA Gymnastics under the RICO Act, alleging the defendants engaged in a pattern of racketeering activity that included sexual exploitation and abuse.<sup>104</sup> Attorney John Manly, who represented many of the victims, said that their stand against Nassar and the institutions that protected him would make a difference in the future. “I’ve told every one of these clients you will never meet the little girls you’ve saved. But they exist.”<sup>105</sup>

In November 2018, after the missing documents that had landed former CEO Penny before a grand jury were suddenly “found” at USA Gymnastics headquarters, the USOC moved to revoke USA Gymnastics’ status as the sport’s governing body.<sup>106</sup>



*Rachel Denboller, an attorney and former gymnast and patient of Dr. Larry Nassar—seen here at Larry Nassar’s sentencing on January 24, 2018—came forward to stop Nassar’s abuse.*

# THE WORST CORPORATIONS OF 2017

## REVISITED

Many of the corporations featured in Worst Corporations of 2017 embarked on expensive PR and rebranding campaigns to rehabilitate their brands. However, that didn't necessarily stop the misconduct.

### United Airlines

After the outcry in response to United's violent removal of a passenger from a plane in 2017, the airline made a big show of its promises to be more consumer-friendly in the future. Behind the scenes though, the airline was trying to persuade the Department of Transportation to scratch dozens of regulations meant to protect consumers. Among the regulations slated for elimination in 2018: no more fines for leaving passengers stranded on planes for long periods, no more 24-hour grace period to change a reservation when booking a flight, no more on-time and cancellation data, no more requirement to honor a mistaken ticket price, and no more requirement for "prompt" wheelchair service. Plus, the airlines would get to charge extra for said wheelchair service, as well as being able to charge a change fee for typos, not have to show the full price of a fare, and be allowed to buy up whole pages of booking systems so consumers never see competitors' fares. United's list of targeted regulations came to 50 pages and would effectively gut the only rules that protect passengers from airline mistreatment.<sup>107</sup>

Why would United be so concerned with cutting consumer protections? In the first half of 2018, United received 17 percent of all airlines complaints in the United States, more than any other airline but American Airlines.<sup>108</sup>

### Monsanto

For decades, Monsanto worked to influence the scientific research concerning glyphosate, better known as the company's flagship weedkiller Roundup. The giant agrochemical company went so far as to ghostwrite scientific reports and magazine articles and used its influence to persuade the U.S. Environmental Protection Agency and the U.S. Department of Health and Human Services not to categorize glyphosate as carcinogenic.<sup>109</sup>

#### The Worst Corporations of 2017

##### **United Airlines**

Forces a Passenger off a Plane, Breaks His Nose, Knocks Out His Teeth

##### **Monsanto**

Ghostwriting of Scientific Studies

##### **Wells Fargo**

Wrongful Repossession of 25,000 Customers' Cars

##### **Fox News**

\$50 Million One-Year Bill for Sexual Harassment

##### **Wall Street Banks**

The Push to Repeal the CFPB Rule on Forced Arbitration

##### **Equifax**

Profiting from its Massive Data Breach

##### **Johnson & Johnson**

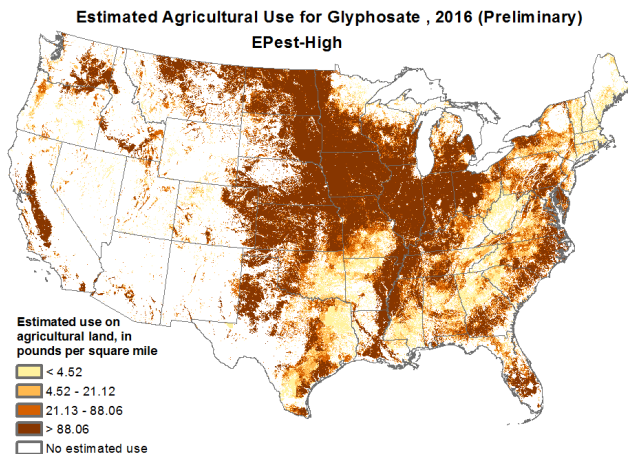
A Catalog of Dangerous Products

##### **Takata**

The Cover Up of 70 Million Potentially Lethal Air Bags

##### **McKesson**

Billion-Dollar Profiteering from the Opioid Crisis



*U.S. use of glyphosate - U.S. Geological Survey*

In 2015, the International Agency for Research on Cancer (IARC)—part of the World Health Organization—classified glyphosate as a “probable carcinogen.”<sup>110</sup> In February 2018, lawmakers threatened to cut U.S. funding to the IARC over its Roundup categorization.<sup>111</sup>

Monsanto and its new parent Bayer have spent about \$120 million on federal lobbying in the last decade.<sup>112</sup>

In August 2018, a San Francisco jury ruled that Monsanto was liable for a terminally ill man’s cancer, awarding him \$289 million in damages. Dewayne Johnson, a 46-year-old groundskeeper for a public school district in California, became the first individual to take to Monsanto trial for allegedly hiding the cancer risks of its widely used weedkiller Roundup. As part of his job, Johnson would spray as much as 150 gallons of Roundup on the school sports fields. The Roundup had no warning labels, and in a training session, Johnson was told it was “safe enough to drink.”<sup>113</sup> After two years of use, Johnson began seeing skin rashes and then lesions. He now has non-Hodgkin lymphoma and may have only months to live. The judge in the trial eventually reduced the damages to \$78 million but refused Monsanto’s request for a new trial. Johnson accepted the reduced verdict, thereby avoiding a new trial.<sup>114</sup> Hundreds more glyphosate cases await trial.<sup>115</sup>

A few weeks before the Johnson verdict, Monsanto—the maker not only of Roundup but also Agent Orange, toxic PCB chemicals, and white phosphorous bombs—merged with Bayer, the German pharmaceutical giant with a dark history of its own, including the invention of Zyklon B (the poison used in Nazi gas chambers), marketing heroin as cough medicine for children, knowingly selling HIV-infected blood-clotting agents in the 1980s, and decimating the world’s honeybee population.<sup>116</sup>

Bayer-Monsanto now is the biggest of the four companies that dominate the U.S. food chain.<sup>117</sup>

## Wells Fargo

In 2017, Wells Fargo hit the news for charging more than 800,000 customers for auto insurance they didn’t need and often didn’t know about. As many as 274,000 customers were forced into delinquency by the expense of the unneeded insurance, and almost 25,000 had their cars wrongfully repossessed.<sup>118</sup>

Early in 2018, the Federal Reserve hit Wells Fargo with an unprecedented set of sanctions for its “ineffective oversight,” including the removal of four members of the board and a cap on the bank’s growth for the foreseeable future.<sup>119</sup>

In May, Wells Fargo launched a rebranding campaign—its second in two years—to try and rehabilitate its image. A few weeks later, the bank again hit the news for improperly altering documents about its corporate customers.<sup>120</sup> In November, the bank admitted



it had incorrectly foreclosed on at least 545 distressed homeowners, and denied help to hundreds of other qualified homeowners dating back as far as 2010.<sup>121</sup>

## Fox News

Fox News sexual misconduct woes did not end in 2017. In July 2018, Fox News host Kimberly Guilfoyle left the company after a human resources investigation into allegations of inappropriate behavior, including showing personal photographs of male genitalia to colleagues (and identifying whose genitalia they were) and being emotionally abusive toward hair and makeup artists and support staff.<sup>122</sup>

In May, Fox News appointed its first female CEO, Suzanne Scott, despite accusations that she contributed to the toxic workplace for women at the cable network, for instance by allegedly enforcing previous CEO Roger Ailes's miniskirt dress code.<sup>123</sup>

## Wall Street

In 2017, Wall Street banks spent \$19 million on lobbying, which led to the repeal of the CFPB rule banning class action waivers in the fine print of credit card agreements. In 2018, the tenth anniversary of the 2008 financial crisis, Wall Street got even more bang for its buck. In the first half of 2018, Wall Street banks took in a record \$112 billion in profits, a 25 percent jump from last year, driven in part by President Trump's tax cuts, which allowed the banks \$3.6 billion in direct tax savings.<sup>124</sup>

Despite the booming profits, many of the issues that triggered the 2008 crisis have not gone away. In 2018, the 10 largest banks still hold more than half of all total assets, while the U.S. national debt has tripled since 2008, from \$5 trillion to \$15 trillion.<sup>125</sup>

In September, three men intimately tied to the 2008 crisis – former Fed chair Ben Bernanke, Bush Treasury Secretary Hank Paulson, and Obama Treasury Secretary Tim Geithner – warned that another crisis was inevitable and that regulators needed more authority to bail out banks.<sup>126</sup>

No leading executive was ever punished for the reckless actions that caused the crisis. Of the nine original CEOs of the banks that received \$125 billion in bailouts during the crisis, only one is still at the head of their bank: Jamie Dimon of JPMorgan Chase. In 2012, JPMorgan lost \$6 billion in the “London Whale” scandal, in what was deemed an indicator of lax oversight (the unit in question reported directly to Dimon). In 2013, JPMorgan paid \$13 billion to settle with regulators over the sale of defective mortgages. Despite this,



*CEOs from Goldman Sachs, JPMorgan Chase, Bank of New York, Bank of America, State Street, Morgan Stanley, Citigroup, and Wells Fargo testify before bailout hearings in 2009. Only JPMorgan's Jamie Dimon remains with his bank.*

Dimon remains in command at JPMorgan and has even suggested he might one day run for President.<sup>127</sup>

## Equifax

Equifax makes massive profits from buying, sharing, and selling individuals' information, often without those individuals' permission or even knowledge. In 2017, the company's shockingly bad security, which included storing passwords in plaintext (instead of encrypting them) and failing to patch basic software, led to the largest data breach in history. At least 145 million U.S. consumers had their information exposed, a problem compounded by the company's errors and negligence immediately after, including the failure to let the public know for six weeks, burying forced arbitration language in the fine print of the identity protection products it offered, and directing consumers to a phishing website.

*Reuters* reported that the CFPB had pulled back from a full-scale probe of Equifax and canceled plans to test the company's data protection systems.

In early 2018, documents provided to the Senate Banking Committee, but not released directly to the public, revealed that the breach was worse than the company had originally stated, with 2.4 million additional consumers affected, and tax IDs and drivers' license information also among the data stolen.<sup>128</sup> Meanwhile, *Reuters* reported that the CFPB—largely defanged under the leadership of Mick Mulvaney, a former critic of the bureau who once called it a “sick, sad” joke—had pulled back from a full-scale probe of Equifax and canceled plans to test the company's data protection systems.<sup>129</sup>

A class action representing customers whose data was breached is ongoing in Georgia, where Equifax is headquartered.<sup>130</sup> However, some consumers opted to forego the class action and take on the credit giant themselves in small claims court.<sup>131</sup> When one Minnesota man won \$7,200 for damages from the breach, Equifax claimed it could not afford to pay.<sup>132</sup>

## Johnson & Johnson

Johnson & Johnson (J&J) is the world's largest health care products company and the world's most prodigious manufacturer of dangerous and defective products. J&J dominates products liability litigation, with its products responsible for 11 of the top 17 products liability verdicts over the last two years.<sup>133</sup>

In 2018, juries in California, Missouri, and New Jersey found that J&J had known its talc products contained asbestos and that the company was responsible for the mesothelioma and ovarian cancer the plaintiffs developed. Many of the plaintiffs

have since died. The juries awarded a combined \$600 million in compensatory damages and \$4.2 billion in punitive damages against the company.<sup>134</sup> At least 9,000 more talc cases are pending.<sup>135</sup>

J&J also faces litigation over other dangerous products, including 21,400 cases over Xarelto, a blood-thinner that is thought to cause uncontrollable internal bleeding. Xarelto is one of a class of three anticoagulant drugs marketed as more convenient than the established Warfarin. However, Warfarin's bleeding action can be countered by an antidote, whereas the newer drugs cannot. Since 2010, at least 8,000 deaths have been linked to Xarelto and the two other new drugs, making up 90 percent of all anticoagulant deaths while accounting for only 10 percent of anticoagulant prescriptions.<sup>136</sup>

J&J and Bayer, which developed Xarelto together, expect the drug to bring in more than \$5.3 billion in sales, despite the side effects and recent studies showing the drug is no more effective than low dose aspirin.<sup>137</sup>

Besides cancer-causing talc and Xarelto's uncontrollable bleeding, J&J faces claims regarding pelvic mesh that can cause severe and irreversible injuries, that its antipsychotic Risperdal causes males to grow breasts, and that it knew its artificial hips are prone to poisoning and premature failure.<sup>138</sup>

J&J and its subsidiary companies account for 20 percent of the entire federal civil caseload, a situation that might intensify as the company now faces the prospect of accountability for its role in the nation's opioid epidemic.

In fact, J&J and its subsidiary companies account for 20 percent of the entire federal civil caseload, a situation that might intensify as the company now faces the prospect of accountability for its role in the nation's opioid epidemic.<sup>139</sup>

## McKesson

More than 500 U.S. cities and counties are suing McKesson and other drugmakers and distributors for their role in the nationwide opioid crisis.<sup>140</sup> In October, an Ohio judge said a test-case seeking to hold the corporations accountable and should be allowed to go forward.<sup>141</sup> The case was brought on behalf of four municipalities in Ohio, one of the states hit hardest by the crisis, and accused McKesson and its fellow corporations of racketeering, fraud, conspiracy, and negligence. Pain medications make up an estimated three percent of all the drugs McKesson distributes.<sup>142</sup>

# CONCLUSION

Even with two bankrupt companies and two non-profits, the dozen or so corporations and organizations featured in this 2018 list represent more than one trillion dollars in annual revenue. The corporations from 2017 represent one trillion more. Corporate accountability is not a threat to corporate profits. Even a company like General Motors—doing its best to get out of replacing deadly air bags in order to save \$1 billion— isn't truly threatened by the prospect of doing the right thing. The billion-dollar cost of making sure consumers aren't torn apart by their own car's safety mechanism would cost GM less than one percent of one year's revenue. Bear in mind, this is also the same company that got a \$51 billion government bailout 10 years ago, which, even with paybacks, eventually cost U.S. taxpayers \$11 billion. If consumers can help out the world's fourth largest car company in its hour of need, the least it can do is not put profits before people by refusing to swap out deadly air bags.

Meanwhile, under the Trump administration enforcement activity at the two agencies principally responsible for corporate oversight—the S.E.C. and the Justice Department—has markedly decreased. Penalties imposed by the S.E.C. and the Justice Department have dropped 62 percent and 72 percent respectively since the Obama administration, and many corporations have managed to escape anticipated criminal charges.<sup>143</sup>

All the million-dollar, economist-designed, corporate apology campaigns in the world mean nothing if they are just a bet against the bottom line. Consumers don't want apologies. They want to be safe from deception and negligence, from a car that can kill them, from exploitation by financial companies; they want to enjoy something as simple as chocolate without subsidizing the slave trade; and they want to be able to trust their children to coaches and doctors who are supposed to have their best interests at heart without fear that they may face sexual harassment or abuse.

It's not much to ask.

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The American Association for Justice works to preserve the constitutional right to trial by jury and to make sure people have a fair chance to receive justice through the legal system when they are injured by the negligence or misconduct of others—even when it means taking on the most powerful corporations.



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