



Keeping Up With the Class Actions: Plaintiffs Allege Kim Kardashian, Others Liable for Misleading Class of Investors About New Cryptocurrency

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Kim Kardashian's compensated reference to a certain cryptocurrency may have been the most widely seen financial promotion in history, as observed by an industry expert. But is she liable to a putative class of investors who took her advice and lost money?

A new [class action](#) lawsuit brought in the Central District of California, alleges that on June 14, 2021, Kim Kardashian posted to her Instagram:

“Are you guys into Crypto???? This is not financial advice but sharing what my friends just told me about the Ethereum Max Token! A few minutes ago Ethereum Max burned 400 trillion tokens – literally 50% of their admin wallet giving back to the entire E-Max community.”

Kardashian's ability to reach audiences is nearly unmatched. Her Instagram account, with 282 million followers, is the eighth-most followed account on the service. And 19% of respondents to a poll who heard about Kardashian's post invested in EthereumMax, a little-known cryptocurrency launched in 2021. But only one day later, plaintiffs contend, EthereumMax lost 98% of its value, with people who invested based on Kardashian's post left holding the bag. Kardashian is alleged to have been paid between \$300,000 and \$1 million for her post by the creators of the cryptocurrency.

Trends in Enforcement

Over the last several years, interest in cryptocurrencies has ballooned, believed in part to be due to the pandemic, the growing ease of investing in cryptocurrencies through platforms such as Robinhood and Coinbase, their public promotion by public figures like Elon Musk, and the extraordinary growth in value.

Cryptocurrencies are also uniquely susceptible to “pump-and-dump” schemes, in which influential individuals recommend a cryptocurrency to unsophisticated investors, only for the promoters to then offload their own tokens at inflated prices. Cryptocurrencies are easily transferred, liquid, and their value – like stocks and bonds – fluctuates directly and immediately in response to supply and demand. Little-known cryptocurrencies – much like penny stocks – are particularly susceptible, due to the limited number of players in the market.

Interest in regulation of cryptocurrencies has grown as well, with the SEC, the FTC, and other regulatory bodies wading into the new industry. But the SEC's jurisdiction is not limitless over cryptocurrencies, due in part to the fact that not all "cryptocurrencies" are securities, including the well-known Bitcoin.^[1]

In addition to the regulators, private enforcement has also grown. Over the last two years, plaintiffs have begun filing class actions based on "pump-and-dump" schemes and other manipulation of the cryptocurrency markets, either under securities laws,^[2] commodities laws,^[3] or state statutory and common laws, to varying degrees of success.

The Kardashian Suit

In the case against Kardashian,^[4] plaintiffs brought suit against the promoters, as well as the developers of the cryptocurrency. Plaintiffs chose to avoid wading into the thorny issue of whether EthereumMax was a "security," instead suing under California statutory and common law, including California's Unfair Competition Law (UCL), California Consumer Legal Remedies Act (CLRA), and demanding restitution. Plaintiffs also sued promoters for "aiding and abetting" the actions of the developers of the cryptocurrency. According to plaintiffs, where promoters "know the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act," promoters can be liable for aiding and abetting a tort. But aiding and abetting liability depends on establishing one of the other underlying claims.

Whether the UCL or the CLRA are available bases for a class action against a "pump-and-dump" cryptocurrency scheme is a case of first impression in California. The UCL is a broad "catch-all" statute, prohibiting anything that can be considered an "unlawful, unfair, or fraudulent business act or practice" or an "unfair, deceptive, untrue, or misleading advertising." Similarly, the CLRA prohibits anyone from representing that "goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have," or "representing that goods or services are of a particular standard, quality or grade... if they are of another."^[5]

It remains to be seen whether liability against the promoters will stick. Defendants might disclaim any reliance on their statements, or argue that they did not in fact make any unfair representations, but merely noted an interesting cryptocurrency. In particular, Kardashian posted a "#Ad" disclaimer on her Instagram post, and also stated "this is not financial advice," which she is likely to argue was sufficient warning for purchasers of EMax. Other defenses are likely to attack the requirements for a class action – numerosity, commonality, typicality, adequacy, predominance and superiority of the class, as well as the sufficiency of the plaintiffs' pleadings themselves, under the heightened pleading standard for the CLRA and for the "fraudulent" prong of the UCL.

Conclusion

Promoting cryptocurrencies can be profitable, and even valuable to the market, when it provides legitimate investment advice based on sound principles. While public enforcement currently receives the most attention, creative plaintiffs will continue to find new ways of asserting liability against promoters of cryptocurrencies on the private side even where a given cryptocurrency is not considered a security, including under the common law and statutory schemes of the various states. Given the uncertainties and significant risks of class actions, promoters of cryptocurrencies are well advised to conduct due diligence, exercise caution, and seek advice of counsel before making any recommendations.

^[1] <https://www.cnn.com/2018/06/06/sec-chairman-clayton-says-agency-wont-change-definition-of-a-security.html>

^[2] *Audet v. Fraser*, 332 F.R.D. 53 (D. Conn. 2019)

^[3] *BMA LLC v. HDR Global Trading Ltd.*, 2021 WL 949371 (N.D. Cal. Mar. 12, 2021); *BDI Capital LLC v. Bulbul Investments LLC*, 446 F. Supp. 3d 1127 (N.D. Ga. Mar. 11, 2021).

^[4] The case is titled *Huegerich v. Gentle et. al*, 2:22-cv-00163 (C.D. Cal.)

^[5] *In re Arizona Theranos, Inc. Litig.*, 256 F. Supp. 3d 1009 (D. Ariz. 2017).

Authors

[Jeffrey J. Amato](#)

[Marjon Momand](#)

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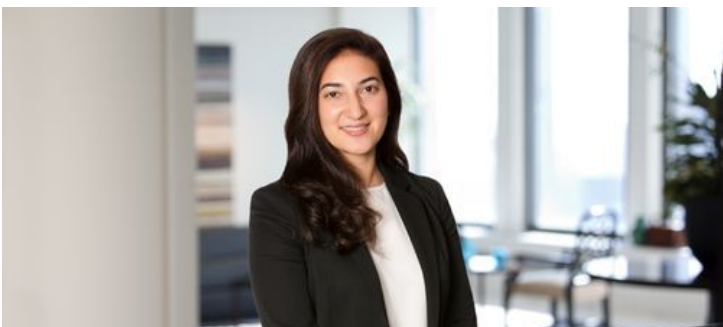
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[Jeffrey J. Amato](#)



Marjon Momand

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