Articles + Publications | March 20, 2025

District Judge Orders Return of Mootness Fees in Akorn Shareholder Lawsuits and Hints at Further Sanctions

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In a decision that resonates with many critics of mootness fees, a U.S. district judge for the Northern District of Illinois ordered counsel for Akorn Inc. shareholders to return $332,500 in attorneys' fees extracted from a series of what he labeled as frivolous lawsuits against the company and signaled his openness to imposing additional sanctions.[1]

The litigation underlying this decision stems from a series of lawsuits filed by Akorn shareholders after Akorn announced a merger with another company. Akorn's shareholders filed five class actions and one individual action seeking to compel Akorn to supplement its proxy statement issued in connection with the merger, arguing it violated Section 14(a) of the Securities Exchange Act of 1934. These lawsuits were voluntarily dismissed as moot after Akorn amended its proxy statement and agreed to pay $322,500 in attorneys' fees.

Following dismissal, another Akorn shareholder, Theodore Frank, moved to intervene to challenge the mootness fee. He argued that plaintiffs' counsel should return the payment because the shareholder claims were frivolous. The court agreed.[2] While it denied Frank's motion to intervene, the court ultimately reconsidered the suits and found that the disclosures at issue were not "plainly material," as articulated by the Seventh Circuit in *Walgreen*.[3] Finding that the disclosures were "worthless" to the shareholders, the court exercised its inherent authority to order plaintiffs' counsel to return the attorneys' fees Akorn paid.

On appeal, the Seventh Circuit found that the district court did not have the inherent authority to reconsider the merger challenge and the mootness fees and that the court was wrong to deny Frank's motion to intervene.[4] The Seventh Circuit nevertheless agreed with the district court's reasoning and determined that its reference to "inherent authority" should have been to the Private Securities Litigation Reform Act, §78u–4(c)(1) (the PSLRA), and Rule 11,[5] which supply a mechanism for review of the underlying merit of a federal securities claim. The Seventh Circuit explained that these mechanisms incorporate the "plainly material" standard articulated in the *Walgreen* case. Accordingly, the Seventh Circuit remanded the case to the district court to conduct a proper proceeding under §78u–4(c)(1) and Rule 11.

Consistent with its prior holding, the district court found that none of the disclosures sought by the shareholders were "plainly material." Consequently, the court found the claims to be frivolous in violation of Rule 11 and, thus, sanctionable. As a result, the court affirmed its order that the mootness fees should be returned as a sanction.

The court also considered the additional sanctions Frank suggested, including (1) requiring all signing plaintiffs' counsel and their firms to disclose and cite the finding, along with the *Alcarez* opinion, in any future lawsuits or demand letters concerning corporate merger transactions, including tender offers; (2) requiring counsel to disclose retention agreements with the plaintiffs; (3) requiring counsel to disclose all purported mootness fees extracted by them in similar suits and demand letters; and (4) imposing monetary penalties. While the court rejected the fourth suggestion to impose further monetary sanctions, it noted that it is inclined to order the first three suggestions and requested further briefing on their propriety.

This decision serves as a reminder of the judiciary's increasing vigilance against frivolous corporate merger-related lawsuits and the improper extraction of mootness fees. By mandating the return of $332,500 in attorneys' fees and contemplating additional sanctions, the court has underscored the necessity for plaintiffs' attorneys to ensure that their claims are justified before filing a complaint.

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[1] *See Berg, et al. v. Akorn, Inc.*, No. 17 C 5016, 2025 WL 755704 (N.D. Ill. Mar. 10, 2025).

[2] *See House v. Akorn, Inc.*, 385 F. Supp. 3d 616, 623 (N.D. Ill. 2019).

[3] *See In re Walgreen Co. Stockholder Litig.*, 832 F.3d 718, 725 (7th Cir. 2016).

[4] *See Alcarez v. Akorn, Inc.*, 99 F.4th 368, 375 (7th Cir. 2024).

[5] The PSLRA provides that in "any private action arising under this chapter, upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion." 15 U.S.C. §78u–4(c)(1).

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