

## Timing Is Key In Juul-Altria Arbitration Row With Buyers

By **Bryan Koenig**

Law360 (December 15, 2021, 6:04 PM EST) -- A California federal judge offered a mixed bag in oral arguments Wednesday for consumers trying to avoid arbitration for antitrust claims against e-cigarette maker Juul and former rival Altria, saying he's likely to impose arbitration on recent online customers who agreed to the terms on Juul's website, but not those who agreed to earlier versions.

U.S. District Judge William H. Orrick has **imposed arbitration once before**, saying in August that the named direct purchaser plaintiffs at that time could not escape the fact that they clicked the box agreeing to Juul Labs Inc.'s terms and conditions, which included an arbitration clause and class action waiver, when buying from the company's website. To avoid that same fate, replacement buyers behind a September amended proposed class action complaint need to peg their claims to earlier disclosures.

"I'm inclined to grant the motion to compel based on the 2021 disclosure," Judge Orrick said Wednesday. But he said he'd likely reject an arbitration bid pegged to earlier versions of Juul's log-in pages.

Katharine L. Malone of the Joseph Saveri Law Firm LLP, representing the direct buyers suing alongside other groups, tried to convince the judge Wednesday not to base his decision on the latest disclosure.

Malone argued that the earlier pages didn't adequately put buyers on notice of what they were agreeing to. And while she acknowledged the 2021 version "is the best page that they've offered," she argued the notice still isn't conspicuous enough, including because "it's the only text that doesn't have anything special about it" and because it's partially obscured on the page. Nor is the notice tied closely enough to direct user action to show assent, she argued.

"It's just not enough," said Malone.

She also argued that even if the 2021 version is sufficient, it cannot be applied retroactively to claims from earlier pages, in part because she said Juul only tried to raise the matter in a reply brief, with no chance for the buyers to address the assertion. Malone argued further that because the arbitration agreement employs the present tense, "it means the agreement only goes forward in time" and thus cannot be applied to claims from earlier years.

Additionally, Malone said that while the most recent named direct buyers only filed in September, the lawsuit itself was filed in 2020, "well before" the new plaintiffs accessed the most recent version of Juul's webpage.

Even if Judge Orrick ultimately imposes an arbitration mandate, Malone said she'd want another chance to find new named direct buyers, arguing plaintiff counsel would be able to find purchasers who only made purchases predating the most recent version of Juul's disclosures.

"There's no question there's a class," Malone said.

Pushing for arbitration on behalf of Juul was Nowell D. Bamberger of Cleary Gottlieb Steen & Hamilton LLP, who argued Wednesday that the 2020 webpage also adequately put users on notice of the terms of service, including the arbitration clause.

Bamberger also rebutted Malone's assertion that the retroactivity argument was only made in the reply brief. Instead, he said the matter was raised in the opening brief. And he argued the arbitration clause itself uses "broad language" that should be applied retroactively, capturing "claims whether arising in the future or existing at the time."

The last time Judge Orrick mulled arbitration, he indicated that plaintiff counsel would likely be able to find substitute buyers because versions of Juul's log-in pages predating early August 2018 had an unenforceable arbitration provision.

Even more damaging at the time for Juul and Altria Group Inc. were Judge Orrick's conclusions upholding all but a few small slices of the consolidated class complaints from direct buyers, indirect purchaser plaintiffs who bought vaping products through retailers and the indirect reseller plaintiff retailers who went through distributors.

Judge Orrick's 45-page ruling rejected assertions from Juul, Altria and two members of Juul's board of directors also named as defendants, Nicholas Pritzker and Riaz Valani, that the three consolidated class complaints had failed to show antitrust injury.

That alleged injury stems from the \$12.8 billion Altria paid for a 35% stake in Juul in December 2018. Similar to Federal Trade Commission allegations that went to an in-house trial **in early June**, the private plaintiffs allege that the deal was cooked up by Juul to get Altria to bow out of the e-cigarette industry, leading to a reduction in the variety of products on the market and supracompetitive prices. The antitrust claims are separate from massive multidistrict litigation accusing Juul and Altria of marketing their products to teenagers.

The arbitration part of the ruling was based on changes made to the terms and conditions notification before all three named direct buyers purchased from Juul, with a clickbox the judge said was prominent enough that reasonable consumers would have seen it.

If the consumers had made their purchases before those August 2018 changes, however, according to the ruling, Judge Orrick may have been bound by a decision he made in another case against Juul, where he "concluded that the terms and conditions disclosure was 'not conspicuous enough to put' plaintiffs on notice."

Nor could the direct buyers get around the arbitration provision when going after the board members, according to the August ruling, which stated that they were acting as agents of Juul "even if they had their own ulterior motives — when conducting negotiations with Altria."

On Wednesday, the parties agreed that the question of whether the claims against the board members should be forced into arbitration is based entirely on the question for the claims against Juul.

The direct buyers are represented by Joseph R. Saveri, Steven N. Williams, Katharine L. Malone, Christopher K.L. Young and Anupama K. Reddy of the Joseph Saveri Law Firm LLP.

The indirect buyers are represented by Robin F. Zwerling, Susan Salvetti, Fred T. Isquith Sr. and Fred T. Isquith Jr. of Zwerling, Schachter & Zwerling LLP.

The indirect resellers are represented by Robert N. Kaplan, Elana Katcher and Jason A. Uris of Kaplan Fox & Kilsheimer LLP and Solomon B. Cera and Pamela A. Markert of Cera LLP.

Juul is represented by David I. Gelfand, Jeremy J. Calsyn and Nowell D. Bamberger of Cleary Gottlieb Steen & Hamilton LLP.

Nicholas Pritzker and Riaz Valani are represented by Mark C. Hansen, Michael J. Guzman and David L. Schwarz of Kellogg Hansen Todd Figel & Frederick PLLC.

Altria is represented by Beth Wilkinson, James Miller Rosenthal, Rakesh Kilaru, Alysha Bohanon, Moira K. Penza, Chanakya A. Sethi and Rahul Raghav Athrey Hari of Wilkinson Stekloff LLP.

The case is In re Juul Labs Inc. Antitrust Litigation, case number 3:20-cv-02345, in the U.S. District Court for the Northern District of California.

--Additional reporting by Sierra Jackson, Chelsea Naso, Nadia Dreid, Khorri Atkinson, Mike Curley and Dave Simpson. Editing by Michael Watanabe.