

Select '**Print**' in your browser menu to print this document.

©2007 ALM Properties, Inc.

Page printed from: [Cal Law](#)

[Back to Article](#)

McAfee Suit Reveals New Options Dynamic

Jessie Seyfer
The Recorder
12-19-2006

A new breach-of-contract lawsuit against McAfee may be the first in a wave of similar actions against companies that are barring current and former employees from exercising stock options during ongoing stock option backdating investigations.

Shareholder and shareholder-derivative suits have accused numerous companies caught in the backdating scandal of fraud and mismanagement, but the [class action filed Friday](#) in Northern California federal court takes a different tack.

Seven former McAfee employees, represented by Burlingame's Cotchett, Pitre Simon & McCarthy, say they were cheated out of about \$2 million total because the company did not permit them to exercise stock options that then expired during the software company's self-imposed "blackout" period.

Companies with backdating problems often delay filing financial statements until they can make necessary accounting adjustments. At the same time, some of those companies have also imposed a blackout barring the issuance of any new shares until the financials are restated.

Of course, employees whose option grants expire during the blackout are potentially out of luck, unable to exercise their vested shares. One way to remedy the dilemma is for the company to extend the expiration dates, so that the clock only starts ticking again once the blackout is over.

But that extension didn't happen at McAfee, according to the complaint.

The employees allege McAfee was contractually obligated to let them exercise their options grants within 90 days of the end of their employment, but did not. The net result, they say, is that the company is unfairly penalizing them for the alleged accounting misdeeds of management.

"All my clients had vested options where they could cash out any time they wanted to," said Cotchett, Pitre's [Mark Molumphy](#). "And the company said that even with these vested options, if they expire, you're out of luck."

McAfee's blackout began July 27 — the same day the company announced it would have to restate its financial statements — and it continues today.

[Robert Feldman](#), of Wilson Sonsini Goodrich & Rosati, represents McAfee and declined to comment on the suit.

Employment attorney [Alisa Baker](#), of San Francisco's Levine & Baker, said she has been talking recently with several employees who say they've been barred from exercising vested stock option grants because their companies won't offer extensions once blackout periods have ended.

She declined to name any of the companies, but said she expects many suits similar to the McAfee action to be filed over the next few months, by the rank-and-file and executives alike.

The new complaint is just the latest backdating-related problem for the Santa Clara-based company. On Friday, *The Recorder* [reported](#) that former McAfee General Counsel Kent Roberts was likely to be indicted by federal prosecutors within the month. The company fired Roberts in May.

The employees' suit further accuses the company of renegeing on promises to give former workers a 90-day extension on their window for exercising options. In August, then-Chief Executive George Samenuk sent an e-mail to all employees making this promise, and when he retired in October, interim CEO Dale Fuller decided to revoke it, the suit alleges.

Citing unnamed sources, the complaint accuses Fuller of telling senior management that he didn't understand why McAfee would "take money out of our pockets and our children's pockets and give it to employees who have left the company."

The Securities and Exchange Commission doesn't require companies to impose a blackout in this situation, as it does in some pension-fund disputes, Baker said.

But companies may choose to do so to prevent insider trading allegations, according to Morrison & Foerster corporate practice partner [Robert Townsend](#). If an employee or executive is allowed to make a stock trade during this time — when the company is uncertain about what may end up being material or immaterial information — the company opens itself up to potential liability, Townsend said.

"If insiders are trading with material, nonpublic information, it could force the company to issue a

[Optional Reading](#)



Read *The Recorder's* roundup of the stock-option backdating scandal. There won't be a test later ... but there might be a subpoena.

press release and disclose information it might not wish to disclose and create liability for the individual," he said. "They don't want people trading until they've told the public how the quarter turned out."

Though Townsend wasn't sure why a company wouldn't let former employees exercise their options, he speculated the company may want to make sure none of them make stock decisions based on information they got while still employed.