Judge Dismisses Case Against Seeking Alpha: Implications for Publishers of Financial Information

August 26, 2024

In a recent decision, the US District Court for the Southern District of New York dismissed a proposed class action against Seeking Alpha, Inc., ruling that the financial content platform falls within the "publisher's exclusion" from the definition of an investment adviser.[1] This case sheds light on the scope of the exclusion in the digital age and, in a regulatory area with limited guidance, offers recent and valuable insights for financial publishers and content platforms.

The plaintiffs alleged that Seeking Alpha operated as an unregistered investment adviser, violating both federal and state laws. They sought rescission of their subscription contracts and restitution of fees paid. However, the court found that Seeking Alpha's activities, as described in the complaint, fit squarely within the publisher's exclusion.

Seeking Alpha operates a website offering premium services to paying subscribers, including exclusive access to articles by independent authors, aggregated ratings from Wall Street analysts, and a proprietary "Quant Rating System." Subscribers can receive email alerts about ratings changes and recommendations for stocks in their portfolios, which they can link to the service. The platform also provides "Factor Grades" for thousands of securities, rating them on metrics like growth and profitability, and offers features such as stock screeners and comparison tools.

The Investment Advisers Act of 1940 (Advisers Act) defines an "investment adviser" broadly, but specifically excludes, in Section 202(a)(11)(D), "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."[2] The Supreme Court, in its landmark *Lowe v. SEC* decision, interpreted this exclusion expansively, emphasizing Congress's intent to protect non-personalized publishing activities from regulation.[3]

In analyzing Seeking Alpha's services, the court focused on two key factors:

1. "Bona fide" nature of the publications — Relying on *Lowe*, the court found that Seeking Alpha's content was not personal communications, did not contain false or misleading information, and was not designed to tout securities in which Seeking Alpha had an interest.

2. "General and regular circulation" — The plaintiffs argued based on specific language from *Lowe* that to meet the "general and regular circulation" test, the publisher's "advice must be offered to the general public on a regular schedule" rather than "issued from time to time in response to episodic

[1] *Lingley et al v. Seeking Alpha, Inc.*, No. 1:23-cv-05849 (S.D.N.Y. Aug. 15, 2024).

[2] 15 U.S.C. § 80b-2(a)(11)(D).

[3] *Lowe v. SEC*, 472 U.S. 181 (1985).

> market activit[y]”[4] and that there must be “no indication that [the publications] have been timed to specific market activity, or to events affecting or having the ability to affect the securities industry.”[5] In other words, the plaintiffs argued that publications must adhere to a strict, predictable schedule to qualify for the publisher’s exclusion. The court rejected these arguments, specifically stating that the plaintiffs were reading *Lowe* too literally and that under such a reading, “virtually all modern financial news organizations, which publish breaking news and market updates in real time” would not be eligible for the publisher’s exclusion.[6] Instead, the court held that publications will meet the “general and regular circulation” test if they are “advertised and sold in an open market and are updated regularly.”[7] The court found that Seeking Alpha’s frequent updates and real-time market coverage satisfied this requirement.

Importantly, the court distinguished Seeking Alpha’s services from cases involving “auto-trading” programs, where publishers engaged in personalized communications with subscribers regarding investment advice and directly executed trades on behalf of subscribers. The court found that the plaintiffs failed to allege that Seeking Alpha had authority over subscriber funds or had been delegated decision-making authority over subscriber portfolios or funds.

The court also addressed the issue of customization. While Seeking Alpha allows subscribers to receive alerts and recommendations based on their portfolios, the court found that this feature merely filters generally available content rather than providing individualized advice that was created specifically for the plaintiffs. According to the court:

> Plaintiffs cannot escape the publishers’ exclusion by characterizing Seeking Alpha’s publications as ‘customized,’ ‘personalized,’ and ‘individualized.’ . . . [T]hese features merely allow the subscriber to filter generally available content that would be visible to any subscriber who looks for it or who signs up for the same alerts. That someone can create a unique filter based on his or her own personal mix of investments does not support a plausible inference that impersonal, disinterested, and generally available content becomes individualized and personal as soon as it is caught by the filter.[8]

Final Thoughts

This case is an example of a court looking beyond surface-level customization to determine whether a publication truly provides personalized advice. This decision also provides some reassurance to financial content platforms and publishers of financial information that offer subscription-based services with customizable features. Notwithstanding, persons who rely on the publisher’s exclusion under the Advisers Act, including operators of auto-trading platforms, index providers,[9] and providers of quantitative or other model portfolios should remain vigilant in structuring their services to avoid crossing the line into regulated investment advisory activities.

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4 *Lingley* at 11-12 (quoting *Lowe*) (internal quotations omitted).

5 *Id.* at 10.

6 *Id.* at 13.

7 *Id.* at 11 (quoting *Lowe*) (internal quotations omitted).

8 *Id.* at 15.

9 “I understand that the question of whether an index provider is an investment adviser or a fund adviser might appear to be settled. Under the Advisers Act, I believe index providers have historically concluded that, even if they are investment advisers, they may rely on the publisher’s exclusion from the definition of ‘investment adviser.’ However, recent developments appear to have moved certain index providers away from what we might think of as publishers.” Dalia Blass, Director, Division of Investment Management, Remarks at the Investment Company Institute 2018 Mutual Funds and Investment Management Conference, SEC (Mar. 19, 2018), https://www.sec.gov/newsroom/speeches-statements/speech-blass-2018-03-19.

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8/26/24