

## Litigators of the Week: In Case of 'Phantom Damages,' Kirkland Scores a Come-From-Behind Win for TransUnion



Courtesy photos

(L-R) Mark Premo-Hopkins and  
Britt Cramer of Kirkland & Ellis.

By Ross Todd  
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The word is tenacious.

**Mark Premo-Hopkins** and **Britt Cramer** of **Kirkland & Ellis** signed on to represent TransUnion last year after the company had already taken a hit at summary judgment in its dispute with Endless River Technologies, a company it partnered with to build a software platform aimed at improving the process of buying and selling auto insurance online. U.S. District Judge Donald Nugent in Cleveland last February found TransUnion breached its contract with Endless River when it failed to hand over source code back in 2018.

But even with Cramer undergoing cancer treatment during the run-up to trial, the Kirkland team kept chipping away at Endless River's case. Eventually, the only question left for the jury last fall was breach of contract damages. The jury awarded Endless River \$18.3 million at trial in September, well short of the \$55 million in lost profit damages it was seeking—not to mention what could have been at stake with punitive and exemplary damages.

Last week the judge took it a step further reducing the jury's award to \$0. Nugent found a lack of evidence of direct damages and that the development agreement between the companies barred consequential damage.

**Lit Daily: Who was your client and what was at stake?**

Mark Premo-Hopkins: Our client is TransUnion, who you may know from its role as a credit

reporting agency. But more than that, TransUnion is a leading global information and insights company that makes trust possible between consumers and businesses. Here, TransUnion entered into a Development Agreement to build a software platform with Endless River Technologies, a consulting firm with experience in the insurance industry. After TransUnion put in a significant financial investment and years of effort, the platform did not deliver on the business case and was therefore discontinued.

Disappointed with how the relationship ended, Endless River filed a lawsuit in April 2018, and eventually sought \$55 million in damages from TransUnion. That's obviously a lot of money for a product that failed to meet the parties' expectations. From the moment Kirkland took on the case, we focused on the idea that the damages Endless River was seeking were a mirage or a fiction; we called them "phantom damages" at trial. Ultimately, the judge agreed.

**How and when did you get brought into this case?**

Britt Cramer: We teamed up with TransUnion in February 2022, right after the judge granted summary judgment against our client, ruling that TransUnion breached the Development Agreement. The trial was set for September. Given the schedule, we knew we had a significant amount of work ahead of us on a compressed timetable. Kirkland is often brought into cases after a summary

judgment outcome with trial on the horizon, and we appreciate the opportunity to help clients in those situations.

Premo-Hopkins: I think for the two of us parachuting in for trial tends to be some of the most fun and rewarding work we get to do at Kirkland. But we can only do it with a deep bench of extremely talented trial lawyers. With the tight timeline and high stakes, I felt very lucky to have a rising star like Britt co-lead the team with me.

**Who all was on your team and how did you divide the work?**

Premo-Hopkins: I'm really proud that we had such a strong and diverse trial team. Britt gave the opening statement and executed some of the most powerful cross-examinations of Endless River's witnesses. I focused on the main plaintiff witnesses: their key principal and damages expert, and gave closing argument. **Cameron Ginder**, who has tried cases with Britt and me before, examined one of our key witnesses and locked down testimony that helped lead to dismissal of the tort claims. Associates **Danielle O'Neal**, **Amarto Bhat-tacharyya** and **Evelyn Cai** skillfully helped with countless motions and legal arguments before and during trial. Our graphics and paralegal teams always made sure we were on top of our game with a compelling presentation ready for the judge and jury.

Cramer: The TransUnion team—both in-house lawyers, **Linda Lu** and **Ann Chen**, and business leaders who had worked on the Quote Exchange—worked right alongside us on case strategy and additional fact development in the few months we had before trial. We were grateful to have such a supportive client, especially given the tight deadlines in the case.

**In parachuting into a case like this, where your client has already lost at summary judgment, where do you even begin? What were your first steps in trying to turn things around and gear up for trial?**

Premo-Hopkins: One of the things I really learned during my time in the plaintiff's bar is how important it is to understand your client's perspective at a very fundamental, gut level. When we did that with our team at TransUnion, what emerged was a straightforward story of a disappointed business partner seeking an inflated damage recovery. The case then became all about what

we eventually called "phantom damages." Once we had that central theme locked in, Britt and the rest of the team went to work on how we put that story front-and-center for the court before, during, and after the trial.

Cramer: We filed a series of strategic motions attacking Endless River's damages expert and seeking additional discovery on mitigation and other damages issues. That new evidence became one important part of our defense at trial and in our post-trial motions.

**What were your key trial themes and how did you try to hammer them home with the jury?**

Cramer: Like Mark said, our main theme was phantom damages: the idea that Endless River and its expert had to ignore reality (including the contract) to ask the jury for an undeserved windfall. I think "phantom damages" was the first phrase that came out of my mouth when I stood up for opening statement. "Phantom damages" was a powerful theme because the platform hadn't met financial expectations. At the end of the day, large insurance carriers just didn't have a need for the product, and even Google had tried and failed to develop a similar product at the same time. One moment that sticks out from trial was when Mark cross-examined Endless River's main principal on this topic and the witness tried to convince the jury that Endless River would have succeeded in generating hundreds-of-millions of dollars where tech-giant Google had previously failed to do the same.

Premo-Hopkins: Endless River's expert also had to deal with the fact that his client created dozens of "damages models" over the years—documents we received just a couple of weeks before trial—that had significantly different financial information than the expert used in his analysis. The expert was not aware that most of the alternative models existed before trial. And different Endless River witnesses had different explanations for the conflicting models. We used that to argue that Endless River did not truly believe the outsized damages story it was asking the jury and the court to accept.

**Tell me about how you developed your winning JMOL argument. How did the work you did probing and attacking the plaintiff's damages model pretrial contribute to this outcome?**

Premo-Hopkins: We wanted to laser-focus the judge on phantom damages from the start of

our work on the case. Through *Daubert* motions, motions to reopen discovery, a *Daubert* hearing, and pretrial motions *in limine*, our team repeatedly explained the series of legal and factual errors in Endless River's damages case. By the time we got to trial, Endless River had been forced to defend and explain its damages in so many different ways that it gave us many angles to attack the weakness in Endless River's arguments.

Cramer: Throughout trial, Mark and our team were always reminding the judge of the importance of these critical damages issues. At the start of every trial day, and again at every break, we made some sort of motion or request that reminded the judge of the faults in Endless River's damages case. This had the added benefit of forcing Endless River to double down on its legally problematic lost profits theory again and again. We were not going to let the judge forget how this unfair, phantom damages number infected every aspect of the case.

**What can other companies in your client's position take from this outcome?**

Premo-Hopkins: If you can tell a simple story with the facts and law on your side, there will be a number of opportunities during litigation to win the day. We were glad we could help vindicate our client with a simple story that aligned with the facts and the law, even if it took until post-trial motions for that story to result in a complete victory.

**Britt, you were battling cancer at the same time you were gearing up for this trial. How did you manage that? And how are you doing now?**

Cramer: I was diagnosed with triple-negative breast cancer in August 2021 and had been undergoing treatment for several months by the time Kirkland was brought on to this case. Although trial work is my passion, Mark and others at the firm had to be persuaded that I really, truly wanted to help work up the case before my treatment concluded; everyone was understandably insistent that I keep my health priority one. But after months of slogging through doctors' appointments, chemotherapy, and hospital logistics, I was ready to dive back in and do something mentally

stimulating and sitting around in a waiting room gives you a lot of time to think and strategize!

There's no question that working on something as demanding and sometimes grueling as a trial can be exhausting in the best of times, but I was able to make it work because our team (and our clients) were read into the situation and understood if I had to disappear for awkward hours in the middle of the day or log off a bit early. I also had tremendous support at home from my husband and my parents, which was invaluable. Fortunately, my regimen of chemotherapy, surgery, radiation and immunotherapy has proved successful. Last month, I finally got the word from my doctors that I won't need to see my oncologist for another six months, for a routine follow up screening. It's a relief to be on the other side (knock on wood!).

Premo-Hopkins: I was and am still in awe of Britt's strength and perseverance, as well as her incredible positivity that lifted our whole team. She is a true rockstar!

**What will you remember most about this matter?**

Cramer: The dedication of our team. In a very compressed time frame, we doggedly pursued additional fact discovery, re-deposed plaintiff's key witnesses, disclosed additional experts, developed a new trial narrative, filed dozens of motions and briefs with the court, tried a one-week trial, and briefed post-trial motions. There were a lot of long days. Simply put, none of that would have been possible without the trust and assistance of our TransUnion witnesses and in-house attorneys, the ingenuity and commitment of our associates and trial support team, and Mark's guidance and leadership.

Premo-Hopkins: It sounds corny, but I'm grateful for getting to prepare and try a case with such a great Kirkland/TransUnion team. Certain members of our team went to trial for the first time, others had their own memorable trial "firsts." To be able to lead the team with Britt was a true pleasure. It took a ton of work, over lots of late nights. But we did it well together and had a lot of fun in the process!