

## Legal teams representing falsely accused unite, call for task force

*AI-based program incorrectly flagged unemployment claims as fraudulent*

By: Kelly Caplan in News Stories March 12, 2020

Late last year, a Michigan Court of Appeals panel held that the plaintiffs in *Bauserman v. Unemployment Insurance Agency* could seek damages, stating that the state's actions were "egregious," and the plaintiffs' due process rights were violated when the state falsely accused them of unemployment fraud.



The *Bauserman* suit, and a similar case, *Cahoo v. FAST Enterprises, et al.*, initially were filed after the State of Michigan's Unemployment Insurance Agency's artificial intelligence-based software program, known as MiDAS, incorrectly flagged more than 40,000 unemployment claims as fraudulent over a three-year period.

While the legal teams and advocacy agencies representing the thousands of people affected are preparing for the next legal battle in the state's highest court, they are also working toward a solution to prevent similar situations

in the future.

Attorneys from Pitt McGehee Palmer & Rivers PC in Royal Oak, Ernst Charara & Lovell PLC in Detroit, and Sugar Law Center for Economic & Social Justice in Detroit have joined forces, calling on Gov. Gretchen Whitmer to form a task force to vet AI-based decision-making systems use in government agencies.

Their goals for the task force, they say, are to protect people from these systems being used as "judge and jury," require accountability, and ensure that those who are harmed are fully compensated.

Jennifer Lord, an attorney with Pitt McGehee, said it's important for experts in AI to weigh in on these systems before they are implemented.

"We have not heard anything from the governor's office about our request for a task force to vet the use of AI in the state," Lord said. "Debacles like *Bauserman* continue to occur around the country and the world. It only makes sense that Michigan proactively address the problem to prevent another computer meltdown like the MiDAS fiasco."

Tony Paris, of Sugar Law Center, was involved in the *Zynda, et al. v. Zimmer, et al.* case, which was the first federal challenge that sought injunctive relief against using the automated system.

"We just wanted to have human beings review any of the fraud determinations that might have been made by the automated system," he said. "It has been clear for years that MiDAS was purposefully designed to seek out and create fraud findings, oftentimes years after someone had been off unemployment and without adequate notice. This all came at a true human cost, jeopardizing our clients' lives and trust in their government at a vulnerable time."

He added that while the governor has paid lip service to the problem, and has made some appointments he respects, including a new director at the agency, the lack of forward momentum is frustrating. He wants to see something more tangible.

"If the governor doesn't create a task force, we're hoping she has all parties come to the table to figure out what we can do so it stops costing the state money to litigate the case," he said.

Calls left with the governor's office were not returned before deadline.

## Damages

The litigation has spanned years, wending its way through the state and federal legal systems. Many of the plaintiffs' lives are still in a state of upheaval — some filed bankruptcy, others lost property — while waiting for resolution.

Lord said there are several categories of damages being sought.

"First, we are asking that the state repay the money that it seized from innocent claimants," she said. "That is close to \$80 million."

They are also seeking compensation for other ways people were harmed. And while it will be difficult to pinpoint a dollar value, she anticipates retaining experts to help value these damages once the appeal process is complete.

"The agency has admitted that 1,100 families filed for bankruptcy as a result of MiDAS, and 350 people pled guilty to crimes that they didn't commit," she explained. "People's credit ratings were damaged. Applicants for jobs failed background checks because the 'fraud' finding was widely reported."

Meanwhile, Paris said many people still have not received a full refund, even when they've been vindicated, or they still have yet to be properly reviewed.

"We are seeking additional damages beyond that, and any damages that would be allowed under Section 1983 that could compensate these folks who are victimized by the system," he said. "Three of our five named people went into bankruptcy. There are folks who lost tax returns that were needed, and could have made a difference in whether they were evicted or lost their homes."

## Greater accountability needed

Lord said AI-based decision-making systems are everywhere, from facial recognition to pre-hearing criminal detention guidelines, to determining who is entitled to public benefits. She said there are some benefits to AI, and its use will only increase in the future.

"These types of programs are very good at flagging potential issues and problems," she noted. "The problem occurs when there is no accountability and no human intervention. Computers can't weigh evidence or determine credibility and intent."

She said it's problematic that agencies are outsourcing the development of these systems to private companies.

"There is no ability for the public to understand why or how decisions are made," she said. "The agencies and private companies hide behind the 'intellectual property' defense. That makes no sense as applied to public programs where the presumption is and should be transparency in government."

Experts say these cases are examples of how the use of AI by governments is harming citizens.

Christian Sandvig is director of the Center for Ethics, Society, and Computing in the School of Information at the University of Michigan. His work focuses on the implications of algorithmic systems that filter and curate culture, and one of his areas of interest is algorithmic fairness and justice.

Sandvig said in a recent news conference that there is a need for greater accountability in the use of algorithms in government systems, especially those that determine who receives public services and how those services are provided.

"Advances in computing have made it possible to apply computer systems to more problems than ever before, but independent research into these systems has uncovered a long list of projects that are expensive, dramatically overstate their capabilities, are unaccountable to their constituencies, and even worsen the problems they are

designed to address,” he stated. “Bureaucrats who follow lists of rules have their drawbacks, but automated decision-making by private companies can be far worse — we may never know what the rules are.”

Paris agreed.

“We hope the remnants of this failed experiment in Michigan doesn’t spread to other states where computers are programmed to make credibility determinations, and take over the role of what trained examiners were doing for decades,” he said. “A system that is automatically programmed to default to find fraud for nonresponse is not the world we should be living in.”

## Background

Lord said the *Bauserman* case began in 2013, when she noticed several individuals reaching out with the same story: that they had been accused of committing fraud by the UIA, or that they had their tax refunds seized or wages garnished.

She spoke to other civil rights and employment law practitioners, and discovered they were getting the same types of calls.

Then, Lord and her team uncovered something distressing. In 2013, the Michigan Unemployment Insurance Agency laid off its fraud detection unit after purchasing the algorithmic decision-making computer called MiDAS.

“We learned that the UIA had nominated itself for a nationwide award for rolling out MiDAS in record-breaking time,” she said. “Almost immediately, we realized that the state had essentially outsourced the fraud determination function of the UIA to a computer that had been rushed online.”

Lord said the computer was left to operate without oversight and, a year later, the Michigan auditor general issued two different reports finding the computer was wrong 93 percent of the time.

*If you would like to comment on this story, email Kelly Caplan at [kcapan@mi.lawyersweekly.com](mailto:kcapan@mi.lawyersweekly.com).*

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