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Second Circuit: Reverses the Dismissal of a Securities Fraud Action Where the Allegations of a Material Omission Raised a Strong Inference of Recklessness

On August 3, 2020, the Second Circuit revived a putative securities fraud class action alleging that a real estate investment trust ("REIT") "misled investors by failing to disclose a $15 million working capital loan it made to one of its major tenants" in May 2017, which the tenant then used to make partial rent payments to the REIT. *Setzer v. Omega Healthcare Investors*, 2020 WL 4431902 (2d Cir. 2020) (Wesley, J.). The Second Circuit found plaintiffs adequately alleged that the REIT's "decision not to disclose the [l]oan . . . in the context of its disclosures regarding [the tenant's] financial health" was "a sufficiently extreme departure from the standards of ordinary care to satisfy the [Private Securities Litigation Reform Act's] requirement for showing recklessness."

Background

In the first quarter of 2017, the REIT disclosed that the tenant had fallen behind on its rent payments. Analysts subsequently "raised concerns regarding [the tenant's] ability to pay rent." During a July 27, 2017 conference call with analysts, the REIT's chief operating officer ("COO") expressed optimism that the tenant's "efforts will result in steadily improving margins and [will] eventually return to its former profitability." In its second-quarter 10-Q, the REIT stated that the tenant "has been showing signs of operational improvement and is currently making partial monthly rent payments." Plaintiffs contended that this statement "implied that [the tenant] had been making rent payments from its own operating income, when at least part of those rent payments was funded by the undisclosed loan [the REIT] had extended to [the tenant] several months earlier." Plaintiffs further alleged that the REIT's "repeated failure to disclose the existence of the [l]oan was part of a surreptitious scheme to avoid disclosing to the market both the gravity of [the tenant's] financial woes and the likely impact on [the REIT's] financial results."

The district court found plaintiffs adequately alleged the materiality of the REIT's failure to disclose the loan. However, the district court held that plaintiffs failed to plead scienter because there were no allegations of a GAAP violation, and the REIT otherwise disclosed the tenant's financial difficulties. Plaintiffs appealed.

Plaintiffs Adequately Alleged That Defendants' Failure to Disclose the Loan Was an Extreme Departure From the Standards of Ordinary Care

The Second Circuit began by noting that "[p]laintiffs' theory of scienter is based primarily on recklessness." The court explained that in order to state a claim that a material omission was reckless, plaintiffs must "allege a clear duty to disclose" and must further "allege facts supporting a strong inference of conscious recklessness—*i.e.*, a state of mind approximating actual intent, and not merely a heightened form of negligence."

The Second Circuit held that the REIT "was duty-bound to disclose that its loan was the source of [the tenant's] rent payments." The court found that "[b]y putting [the tenant's] rental payments in play, [d]efendants were required to speak accurately and completely." The court determined that "[t]he omission concealed the extent of [the tenant's] solvency problems: [the tenant] could not pay rent without borrowing from its landlord."

The Second Circuit further found that "the allegations in the [c]omplaint raise a strong inference that [d]efendants acted, at the very least, recklessly in choosing to disclose incomplete and misleading information regarding [the tenant]." The court focused its analysis on "[d]efendants' degree of knowledge and the seriousness of the impact that result[ed] from their conduct." The court noted that the tenant "represented seven percent of [the REIT's] investment portfolio" and "was a significant source of income through rental payments." The court found that because the tenant's "performance plainly impacted [the REIT's] overall financial health," the REIT "had to know that revealing the full extent of [the tenant's] performance problems would have been troubling news to its investors." The court concluded that "[t]he facts as alleged create a compelling inference that [d]efendants made a conscious decision to not disclose the [l]oan in order to understate the extent of [the tenant's] financial difficulties," particularly because "multiple analysts ho[n]ed in on [the tenant's] rental payments being key to [the REIT's] prospects."

The Second Circuit found it irrelevant for scienter purposes that plaintiffs did not allege "a GAAP violation or other accounting irregularity." The court explained that "[w]hile loaning money to a tenant to pay its rent and then expressing optimism about that tenant's performance because it is making partial monthly payments may not violate GAAP, it is still seriously misleading under the facts as alleged here." The Second Circuit also noted that defendants' "disclosures regarding [the tenant's] financial difficulties" did not "alter [its] conclusion." To the contrary, the court found "those disclosures support a finding of recklessness here as they strongly suggest that [d]efendants sought to use [the tenant's] partial rental payments to express optimism and underrepresent the extent of those very problems."

Alleging a Duty to Disclose, Standing Alone, Is Insufficient to Plead Recklessness in the Context of an Omission

The Second Circuit observed that "the distinction between materiality analysis and the recklessness prong of scienter warrants some attention" in the context of material omissions. The court explained that the "recklessness analysis resembles [the] materiality analysis" in such cases because "[a] defendant's duty to disclose often depends on the importance of the omitted information under the circumstances." The Second Circuit clarified that "where, as here, the duty to disclose is based on a requirement to disclose material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and the recklessness inquiry requires assessing the seriousness of the defendant's departure from its duty to disclose, . . . the seriousness required to adequately allege recklessness must typically go beyond the materiality showing required to allege a duty to disclose."

Second Circuit: Revives a Securities Fraud Action Where Plaintiffs Adequately Pled Falsity and Loss Causation

On July 13, 2020, the Second Circuit reversed the dismissal of putative securities fraud class action claims based on its determination that plaintiffs adequately alleged falsity and loss causation as to certain challenged statements. [*Abramson v. NewLink Genetics Corp.*, 965 F.3d 165 (2d Cir. 2020) (Walker, J.)]. However, the Second Circuit affirmed the dismissal of claims challenging defendants' optimistic statements regarding the results of a clinical trial because the court found those statements were "unactionable puffery."

Background

In September 2013, during a presentation for investors at a biotech conference, the company's President & Chief Medical Officer ("CMO") described the 24.1 month survival rate for participants in the company's Phase 2 trial as "remarkable." He stated that "all the major studies" show that "survival rates come between 15 to 19, 20 months. That's it." Several months later, in March 2014, an analyst asked how the company's statistical assumptions would be impacted if it assumed that the control group lived for 24 or 25 months. The President & CMO responded that the company did not have "any reason to believe that median survival [rate] for these patients will be more than [the] low 20s."

Plaintiffs alleged that the September 2013 and March 2014 statements were misleading because numerous significant studies "showed survival rates ranging from 25 months to 43 months." But the district court "determined that the September and March statements were unactionable statements of opinion or disagreements with how [d]efendants chose to interpret the historical data, rather than falsifiable statements of facts."

Plaintiffs also challenged a statement in the company's September 17, 2013 press release representing that the company had "met" its "accrual goal of 722 subjects" for its Phase 3 trial. At the conclusion of that trial, "the control group had a higher survival rate than the test group by three months." Plaintiffs presented confidential witness allegations that the company had enrolled ineligible individuals, and contended that this led to the failure of the Phase 3 clinical trial, which in turn caused plaintiffs' financial losses. The district court held that plaintiffs adequately alleged falsity with respect to the enrollment-related statement, but found plaintiffs failed to plead loss causation. Plaintiffs appealed.

Failure to Disclose Studies Showing Longer Baseline Survival Rates Rendered Defendants' Statements Misleading

The Second Circuit explained that Rule 10b-5 "renders both statements of fact *and* those of opinion actionable when such statements would be misleading without the contextualization of material facts." The court noted that prior to the Supreme Court's decision in *Omnicare v. Laborers Dist. Council Industry Pension Fund*, 575 U.S. 175 (2015), the Second Circuit "recognized sparingly few circumstances in which a statement of opinion would be actionable." The court observed that "*Omnicare* rejected the proposition that there can be no liability based on a statement of opinion unless the speaker disbelieved the opinion at the time it was made."[1]

The Second Circuit explained that after *Omnicare*, plaintiffs can state a securities fraud claim by "alleg[ing] that a statement of opinion, without providing critical context, implied facts that can be proven false."[2] The court pointed out that liability for such a statement turns on what a reasonable investor would expect in light of the context in which the statement was made. The court also made it clear that "a statement of opinion does not imply false information to a reasonable investor simply because there is some fact cutting the other way that the speaker omitted."

With respect to the September 2013 statement, the court noted that the President & CMO did not "couch his representation of survival rates with prefatory language like 'I believe' or 'In my estimation.'" He instead presented a "categorical proposition," and "cited the results of 'all the major American studies'" in support of his statement. The court found it significant that the statement was made "at an important conference for biotech investors." Given the context, the court determined that "[i]nvestors in attendance reasonably would not have interpreted his statement as a baseless, off-the-cuff judgment; instead, they would have credited his statement as researched and intentional, part of a well-prepared professional presentation." The Second Circuit held that the statement could lead "a reasonable investor" to believe that "no credible studies have shown resected pancreatic cancer patients to have survival rates higher than 20 months." The court found the March 2014 statement similarly misleading, "[b]oth because of its posture as a response to a specific question and its categorical nature."

1. Please click here to read our discussion of the Supreme Court's decision in *Omnicare*.

2. Plaintiffs can also "allege that a statement of opinion contained one or more embedded factual statements that can be proven false." *Abramson*, 965 F.3d 165.

Plaintiffs Adequately Pled Loss Causation by Alleging That the Stock Price Dropped Due to the Clinical Trial's Failure, Which Happened Because the Company Enrolled Ineligible Individuals

The Second Circuit explained that in order "[t]o establish loss causation, [p]laintiffs must demonstrate that the *subject* of the fraudulent statement or omission was the cause of the actual loss suffered." Plaintiffs alleged, *inter alia*, that defendants "materially misrepresented . . . the design of their Phase 3 clinical trial, and that these misrepresentations caused [p]laintiffs' financial losses." Specifically, plaintiffs contended that "the failure of the Phase 3 trial was attributable to the concealed" enrollment of ineligible individuals, "and that the failure therefore constructively disclosed the fraud." The Second Circuit found this theory of loss causation "persuasive," reasoning that "a sufficient number of improper enrollments would naturally and predictably affect a trial's statistical integrity." The court concluded that plaintiffs' theory "suffices" to plead loss causation "because, at this early pleading stage, we do not require conclusive proof of the causal link between the fraud and [p]laintiffs' loss."

Second Circuit: Plaintiffs Are Not Entitled to Multiple Opportunities to Amend Their Complaint

On August 12, 2020, the Second Circuit determined that the district court "applied the correct legal standard" and "acted well within its discretion" in denying plaintiffs' motion for leave to file a third amended complaint. *Metzler Inv. Gmbh v. Chipotle Mexican Grill*, 2020 WL 4644799 (2d Cir. 2020) (Sack, J.). The Second Circuit found it significant that "the district court issued a thorough opinion that identified defects" in the first amended complaint, yet "plaintiffs failed to cure such deficiencies in their [s]econd [a]mended [c]omplaint." The Second Circuit acknowledged that “a plaintiff afforded attempt after attempt . . . might one day succeed in stating a claim,” but determined that “the federal rules and policies behind them do not permit such limitless possibility.”

The Second Circuit held that the district court “correctly analyzed” plaintiffs’ motion under Federal Rules of Civil Procedure 59(e) and 60(b), and explained that “[i]t is well established that a party seeking to file an amended complaint post-judgment must first have the judgment vacated or set aside pursuant to Fed. R. Civ. P. 59(e) or 60(b).”[3] The Second Circuit found “no authority” for plaintiffs’ contention that the district court should have “consider[ed] only the standard that governs pre-trial motions for leave to amend a pleading pursuant to Federal Rule of Civil Procedure 15(a)(2), which states that before trial, . . . [t]he court should freely give leave when justice so requires.” The Second Circuit acknowledged that “[i]n the post-judgment context,” it has “given due regard to the liberal spirit of Rule 15 by ensuring plaintiffs at least one opportunity to replead.” But the court emphasized that it has not “given *sole* regard to Rule 15” because “[d]oing so would allow the liberal amendment policy of Rule 15(a) to swallow the philosophy favoring finality of judgments whole.”

The Second Circuit also found no basis for plaintiffs’ argument that the provisions of Rules 59(e) and 60(b) governing newly discovered evidence are “specific to actions in which judgment was entered following *trial*” and do not apply to “dismissal on a Rule 12(b)(6) motion.” The court explained that “[n]ewly discovered evidence must be of facts that existed at the time of trial or other dispositive proceeding.” The court held that “[t]he newly discovered evidence provisions of Rules 59(e) and 60(b) thus apply to the plaintiffs’ post-judgment motion for leave to amend because it was made following grant of a motion to dismiss which, like a trial, is a ‘dispositive proceeding.’” The court concluded that plaintiffs’ “challenge to the legal standard applied by the district court thus fails.”

3. The Second Circuit noted that a court may vacate a judgment pursuant to Rule 59(e) “only when the movant identifies an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” The court also recognized that Rule 60(b) permits a court to “relieve a party from a final judgment” in certain limited cases, including “when there are extraordinary circumstances justifying relief” and “when the judgment may work an extreme and undue hardship.”

Second and Eighth Circuits: Courts Reach Differing Conclusions on Whether Plaintiffs Can State an ERISA Duty of Prudence Claim by Alleging That Delaying an Inevitable Disclosure Results in Greater Stock Price Harm

Earlier this year, the Supreme Court vacated a Second Circuit decision holding that plaintiffs satisfied *Fifth Third*’s “more harm than good” pleading standard for an inside information-based ERISA claim against the fiduciaries of an employee stock ownership plan (“ESOP”)[4] by alleging that delaying an inevitable disclosure of an alleged fraud results in greater stock price harm. *Ret. Plans Comm. of IBM v. Jander*, 140 S.Ct. 592 (2020).[5] On June 22, 2020, the Second Circuit reinstated its earlier decision and remanded for proceedings consistent with its initial opinion. *Jander v. Ret. Plans Comm. of IBM*, 962 F.3d 85 (2d Cir. 2020) (per curiam).

Several weeks later, on July 28, 2020, the Eighth Circuit rejected the theory of ERISA liability endorsed by the Second Circuit. *Dormani v. Target Corp.*, 2020 WL 4289987 (8th Cir. 2020) (Kobes, J.). Plaintiffs claimed that the ESOP fiduciaries should have disclosed the company’s supply-chain management problems. Plaintiffs argued that “no prudent fiduciary could conclude disclosure would harm the Plan because

4. In *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014), the Supreme Court held that in order “[t]o state a claim for breach of the duty of prudence” against ESOP fiduciaries “on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.” Please click here to read our discussion of the Supreme Court’s decision in *Fifth Third*.

5. The Court explained that “[t]he question presented” was whether *Fifth Third*’s “‘more harm than good’ pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.” 140 S.Ct. 592. The Court noted that “[i]n their briefing on the merits, however, the petitioners . . . and the Government . . . focused their arguments primarily upon other matters[,]” which the Second Circuit did not address. The Court determined that the Second Circuit should have an opportunity to consider, in the first instance, questions raised concerning whether ERISA imposes any duty on ESOP fiduciaries to act on inside information, and whether claims for failure to disclose inside information are compatible with the federal securities laws. Please click here to read our discussion of the Supreme Court’s decision in *Jander*.

an efficient stock market provided with full information would not overreact to disclosure and profit seeking arbitrageurs would have acted quickly to bring the price back to fair value." In essence, plaintiffs "assume[d] some drop in stock price was inevitable and the earlier the fiduciaries disclosed [the company's] problems and the earlier the drop took place, the less time the Plan would spend purchasing artificially inflated [company] stock." The Eighth Circuit found "this chain of reasoning . . . uncertain" and determined that "a reasonably prudent fiduciary lacking the Plan participants' faith in arbitrageurs could still believe disclosure was the more dangerous of the two routes."

The Eighth Circuit also rejected plaintiffs' contention that "the fiduciaries violated the duty of loyalty in administering the Plan" by simultaneously serving as officers or directors of the company. The court explained that "ERISA authorizes fiduciaries to wear different hats." The Eighth Circuit held that "[m]ere officer or director status does not create an imputed breach of the duty of loyalty simply because an officer or director has an understandable interest in positive performance of company stock."

The Eighth Circuit further held that plaintiffs could not state a duty of loyalty claim by alleging that the fiduciaries made misleading statements to Plan participants. The court stated that "[l]itigants cannot use the duty of loyalty to circumvent the demanding [*Fifth Third*] standard for duty of prudence claims."

Seventh Circuit: Vacates Class Certification Where the District Court Failed to Consider Evidence Demonstrating the Absence of Price Impact

On July 16, 2020, the Seventh Circuit vacated an order granting class certification in a securities fraud action where the district court admitted, but did not consider, "the evidence that defendants offered to defeat the *Basic* presumption, an expert opinion that the alleged misrepresentations had no impact on the stock price." [*In re: Allstate Corp. Sec. Litig.*, 966 F.3d 595 (7th Cir. 2020) (Hamilton, J.)][6] The Seventh Circuit found the district court erred in "conclud[ing] that the issue was tied so closely to the merits that [the court] should not decide it on class certification." The Seventh Circuit held that under the Supreme Court's decision in *Halliburton Co. v. Erica P. John Fund*, 573 U.S. 258 (2014) (*Halliburton II*), "the district court must decide at the class [certification] stage the price impact issue posed by the defendants' price impact evidence and plaintiffs' rebuttal" and "may not defer that question for the merits."[7]

Background

In 2013, an auto insurance company "announced a new growth strategy [of] . . . attracting more new customers by 'softening' its underwriting standards." The company "disclosed that this approach could cause 'some pressure' on its auto claims 'frequency'" because "new and potentially riskier customers might file more auto claims." Plaintiffs alleged that when claims frequency increased after the implementation of this strategy, the company "misled the market by falsely attributing the increases to other factors such as

6. Under the *Basic* presumption of reliance, "an investor's reliance on any public material misrepresentations . . . may be presumed for purposes of a Rule 10b-5 action" based on the assumption that "the market price of shares traded on well-developed markets reflects all publicly available information and, hence, any material misrepresentations." *Basic v. Levinson*, 485 U.S. 224 (1988). The *Basic* Court specifically held that "[a]ny showing that severs the link between the alleged misrepresentation and either the price received (or paid) by the plaintiff, or his decision to trade at a fair market price, will be sufficient to rebut the presumption of reliance."

7. Please click here to read our discussion of the Supreme Court's decision in *Halliburton II*.

higher-than-usual precipitation and miles driven[.]" Approximately two years later, the company "announced that the higher claims rates it had experienced for three quarters had been fueled at least in part by the company's recent growth strategy[.]" The company's "stock price dropped by more than 10 percent" immediately after this announcement.

Defendants presented the report of an expert who "found no statistically significant increase in [the company's] stock price following any of the alleged misrepresentations[.]" Defendants' expert also stated that "the alleged misrepresentations could not [*i.e.*, as a matter of logic] have had price impact because [the company's] growth strategy, and the fact that the [c]ompany's growth strategy was expected to cause higher claims frequencies, was publicly disclosed" and, therefore, "would have already been impounded into [the company's] stock price."

Plaintiffs contended that defendants' expert report presented "a truth-on-the-market defense forbidden" for consideration at the class certification stage under the Supreme Court's decision in *Amgen v. Connecticut Ret. Plans and Trust Funds*, 568 U.S. 455 (2013).[8] Plaintiffs argued that the company "had at best disclosed only *potential* risks, but . . . chose not to inform the market that these dangers were in fact being realized." The district court agreed with plaintiffs and concluded that resolving the question of price impact in the case before it "essentially and improperly would require [it] to decide disputed material issues of fact underlying plaintiff's case" at the class certification stage. *In re Allstate Corp. Sec. Litig.*, 2019 WL 1512268 (N.D. Ill. Mar. 26, 2019). Defendants appealed.

District Court Erred in Declining to Resolve the Question of Price Impact

At the outset of its analysis, the Seventh Circuit acknowledged that recent Supreme Court decisions governing "[e]vidence supporting or refuting the *Basic* presumption of reliance . . . pose a difficult challenge at the class certification stage." The Seventh Circuit explained that under *Erica P. John Fund v. Halliburton Co.*, 563 U.S. 804 (2011) (*Halliburton I*), "[a] district court deciding whether to certify a plaintiff class *may not* use the evidence to decide loss causation[.]"[9] And under *Amgen*, a district court "*may not* use the same evidence to decide materiality[,]" or to credit a "truth-on-the-market defense." Yet under *Halliburton II*, "a court *must* consider the same evidence if the defense offers it to show the absence of transaction causation, also known as price impact." The Seventh Circuit observed that "[t]he crucial challenge for the district court is to decide only the issues the Supreme Court has said should be decided for class certification while resisting the temptation to draw what may be obvious inferences for the closely related issues that must be left for the merits, including materiality and loss causation, as required by *Halliburton I* and *Amgen*."

The Seventh Circuit "agree[d] with the district court that the [company's] price impact theory looks very much like the prohibited defenses of no materiality or 'truth on the market.'" But the Seventh Circuit "conclude[d] that the close similarity does not allow a district court to avoid a price impact defense at the class certification stage." The Seventh Circuit explained that in *Halliburton II*, the Supreme Court "made clear that the defense is entitled to offer evidence of a lack of price impact at the class certification stage[.]" The Seventh Circuit found "[t]he district court here made a legal error by embracing *Amgen* at the expense of *Halliburton II*—a tempting way of more cleanly managing price impact evidence—rather than engaging in the messier but required process of simultaneously complying

8. Please click here to read our discussion of the Supreme Court's decision in *Amgen*.

9. Please click here to read our discussion of the Supreme Court's decision in *Halliburton I*.

with the instructions from the Supreme Court in both cases." The Seventh Circuit "therefore vacate[d] the class certification and order and remand[ed] for further consideration of evidence relevant to price impact."[10]

Seventh Circuit Provides Guidance for the District Court on the Consideration of Price Impact

The Seventh Circuit provided the district court with detailed guidance for remand. First, the court addressed "the scope of discovery available at class certification." The Seventh Circuit stated that "[g]iven the significant and growing overlap between the evidence at stake at the certification and merits stages, district courts may well choose not to bifurcate discovery at all in putative fraud-on-the-market securities class actions."

Second, the Seventh Circuit agreed with the Second Circuit's decision in *Waggoner v. Barclays*, 875 F.3d 79 (2d Cir. 2017), that "once plaintiffs have made a prima facie showing [that the *Basic* presumption applies,] the burden of persuasion, not production, to rebut the *Basic* presumption shifts to defendants."[11] The Seventh Circuit explained that "*Basic* said that 'any showing that *severs the link*' would be sufficient to rebut the presumption, . . . not that mere production of evidence would defeat the presumption."

Third, the Seventh Circuit cautioned that "price *reaction* (the simple movement of the price in response to a given statement) is quite different from the legal concept of price *impact*" because "the price might have fallen even more if the full extent of the bad news were known." The court explained that "the best way to determine the impact of a false statement is to observe what happens when the truth is finally disclosed and use that to work backward, on the assumption that the lie's positive effect on the share price is equal to the additive inverse of the truth's negative effect." The Seventh Circuit instructed that "[o]n remand, the district court may take into account expert findings with regard to . . . whether the stock price responds when the alleged fraud is revealed to the market, only as backward-looking, indirect evidence of the core question here [of] . . . whether [the] stock price is distorted at the time that the plaintiff trades."[12]

The Seventh Circuit acknowledged that "separating this argument from the kind of truth-on-the-market defense proscribed by *Amgen*'s holding on materiality cuts extraordinarily fine." The court explained that it "see[s] this case as a question of scope and specificity[,]" given plaintiffs' contention that "the more general representations that [the company] made do not encompass the more specific representations it should have made[.]" The Seventh Circuit instructed that "the question at class certification is . . . the level of specificity of the information the market would have understood the price of [the company's] common stock to transmit at the time of the purchase transaction."

Seventh Circuit: Where a Statement in a Tender Offer Was "Subject to Change," Updating That Statement Cannot Give Rise to Securities Fraud Liability

On June 22, 2020, the Seventh Circuit affirmed the dismissal of a securities fraud action alleging that a company violated Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 in connection with a tender offer by preliminarily announcing the number of shares it would be purchasing and the purchase price, and then correcting those numbers in a press release after trading closed. *Walleye Trading v. Abbvie*, 962 F.3d 975 (7th Cir. 2020) (Easterbrook, J.). Because the company expressly cautioned that the preliminary numbers were "subject to change," the Seventh Circuit held that the preliminary numbers could not be misleading as a matter of law.

The Seventh Circuit found the plaintiff's Section 10(b) claims "perplexing." The court questioned, "How can an announcement, explicitly subject to change, become false or

10. The Seventh Circuit expressly declined to hold that class certification should have been denied, and explained that "[m]uch of plaintiffs' evidence and analysis seems compelling and could easily support class certification."

11. Please click here to read our discussion of the Second Circuit's decision in *Waggoner*.

12. The Seventh Circuit noted that defendants' expert opinion that the alleged misrepresentations had no price impact was "difficult . . . to square with the 10 percent price drop on August 4, 2015."

misleading when it is indeed changed?" The court held that "[i]t does not: [the company] did not make a false or misleading statement. It accurately reported [the] preliminary numbers" provided by the financial firm the company retained to receive all offers. The court also rejected the plaintiff's contention that defendants' failure to verify the accuracy of the financial firm's preliminary numbers supported an inference of scienter. The court held that "neither the statute nor any regulation requires an issuer to verify someone else's data before reporting them."

As to the plaintiff's Section 14(e) claim, the Seventh Circuit explained that only the SEC and "private persons who can show that they relied on false or misleading statements filed with the [SEC] can recover damages" under Section 14(e). The court noted that the plaintiff did not even "try to show that [the company's] statements were filed with the SEC or that [the plaintiff] relied on them." Instead, the plaintiff simply "assume[d] that § 14(e) gives it a private right of action to collect damages for press releases issued after a tender offer closes." The court found that "the end of the tender offer placed [the plaintiff] outside the zone of interests protected by § 14" because "when [the company] announced the results of the Dutch auction, there was no longer any way for shareholders to participate in it." The court concluded that "an investor cannot use §14(e) to challenge a statement made after a tender offer has closed."

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