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Securities and Corporate Governance Litigation Quarterly

Decisions of Interest for Corporate and Transactional Lawyers

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Welcome to the third issue of Securities and Corporate Governance Litigation Quarterly*, Seyfarth's quarterly publication of the Securities & Financial Litigation Group focusing on decisions or other items of interest for corporate and transactional lawyers. Each summary below is followed by key practice takeaways.*

Omnicare - The Supreme Court Opines About Opinions in Securities Transactions

The Supreme Court on March 24 issued its opinion in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[1] in which the Court provided a comprehensive analysis of an issuer's potential liability for its statements of opinion expressed in registration statements. As expected, the Court reversed the Sixth Circuit's holding that Section 11 of the Securities Act of 1933 ("Securities Act") imposes liability for opinions, no matter how genuinely held, that turn out to be inaccurate. However, the Court's decision did not end the inquiry for Omnicare because the case was remanded for consideration as to whether Omnicare's statements of opinion omitted facts that made the opinions misleading.

Background

Omnicare provides pharmacy services to nursing home residents. In its registration statement filed with the Securities and Exchange Commission (SEC), Omnicare expressed two opinions regarding its compliance with legal requirements: "We believe our contract arrangements … and our pharmacy practices are in compliance with applicable federal and state laws" and "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements …." *Id.* at 3. But Omnicare also mentioned several state enforcement actions, as well as expressions of "significant concern" by the Federal government about certain rebate and pricing practices in the pharmacy business that could be problematic for Omnicare.

After Omnicare was sued by the Federal government for violation of anti-kickback laws, the pension fund plaintiffs (who acquired stock pursuant to the registration statement that included these opinions) sued on the basis that Omnicare's statements about legal compliance were materially false and omitted to state material facts necessary to make Omnicare's statements not misleading, in violation of Section 11 of the Securities Act.

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[1] No. 13-435, 2015 WL 1291916 (Mar. 24, 2015). Available here.

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Misstatements of Material Fact

The Court held that Section 11 pertains to misstatements or omissions of "facts" and that opinions — because they "express a view, not a certainty" — by their nature are not facts, except the fact of the speaker's belief. *Id.* at 7. So long as the speaker of the opinion actually holds the stated belief, there can be no misstatement of a fact and no cause of action under Section 11. *Id.* at 7.

However, the Court indicated that some statements of opinion could have embedded facts. The Court distinguished between a CEO's hypothetical statement that "I believe our TVs have the highest resolution available on the market" (which is a statement of the CEO's own belief and would not subject the CEO's company to Section 11 liability if it turned out that other TVs had better resolution), and a second hypothetical statement that "I believe our TVs have the highest resolution available because we use patented technology to which our competitors do not have access" (which expresses both the CEO's stated belief but also an underlying fact about the use of patented technology; and which could expose the CEO's company to Section 11 liability for false statements if the CEO did not in fact hold that belief or if the supporting facts were not true).

Although Omnicare's opinions about its legal compliance turned out to be incorrect, Section 11's prohibition against misstatements of material fact "does not allow investors to second-guess inherently subjective and uncertain assessments. In other words, the provision is not … an invitation to Monday morning quarterback an issuer's opinions."
Id. at 9.

Omissions of Material Fact

The Court then turned to the question of whether the issuer's opinion could involve an omission of a material fact necessary to make the stated opinions not misleading. With respect to omitted facts, the Court was more sympathetic to the plaintiffs: "because a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion — or, otherwise put, about the speaker's basis for holding that view."
Id. at 11.

The Court again contrasted two statements from the hypothetical CEO: "I believe we have 1.3 million TVs in our warehouse" versus "I believe we have enough supply on hand to meet demand." A reasonable person would think a more detailed investigation supported the first statement, and an issuer's failure to disclose that in fact no investigation had taken place could be the basis for a Section 11 claim for omitting to state a material fact necessary to make the disclosed opinion not misleading. *Id.* at 13, note 8.

The Court cited the Restatement of Contracts for the principle that the recipient of an opinion may justifiably conclude that the speaker of the opinion knows of no facts incompatible with the opinion and that the speaker knows of facts sufficient to justify the speaker holding the opinion. *Id.* at 15, note 10. The Court then specifically considered a "hypothetical" statement of opinion about legal compliance: "We believe our conduct is lawful." The Court held that if "the issuer makes that statement without having consulted a lawyer, it could be misleadingly incomplete. In the context of the securities markets, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry — rather than, say, on mere intuition, however sincere." *Id.* at 12. Similarly, opinions about complex accounting issues would be expected to be vetted by accountants, and opinions about a drug's efficacy, would be expected to be vetted by competent medical professionals.

With respect to Omnicare's stated opinion that "[w]e believe our contract arrangements … and our pharmacy practices are in compliance with applicable federal and state laws," the Court rejected Omnicare's argument that prefacing any statement with "we believe" or "we think" always insulates the statement that follows from liability. Still, the Court held that the plaintiffs must allege specific facts that were omitted from Omnicare's statements that made them misleading. The Court observed that the plaintiffs had alleged at least one fact — that an attorney had warned Omnicare that a contract "'carrie[d] a heightened risk' of legal exposure under the anti-kickback laws" — as an example of what the trial court should consider on remand, together with the all of the other hedges, disclaimers or qualifications in the registration statement on the subject.

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Practice Takeaways

The Court's opinion highlights several important things about preparing securities offering documents and litigating investor claims:

- *Omnicare* makes it clear that merely couching a statement as an opinion does not insulate issuers from liability for false or misleading statements (*Id.* at 16). Such statements still must be carefully vetted for the words used to express them, the degree of diligence supporting the opinion, and the significance of the opinion to a reasonable investor in light of its context (including other disclaimers urging caution or non-reliance).
- The Court did not make reference to Item 10(b) of Regulation S-K (Commission Policy on Projections), but the *Omnicare* opinion is generally consistent with the SEC's views on projections and opinions of future performance. The many hypotheticals the Court used in *Omnicare* provide further guidance to issuers in formulating disclosure materials.
- While *Omnicare* specifically addresses Section 11 claims for registration statements, the "misstatement or omission of material facts" rubric of Section 11 carries through a number of other anti-fraud provisions of the securities laws and the reasoning should be generally applicable in those situations, including the general anti-fraud provisions of the Securities Exchange Act of 1934, including Section 10(b) and SEC Rule 10b-5 that cover both public and private sales of securities, and Section 14(a) that covers proxy solicitations.
- *Omnicare* sets a high pleading bar for plaintiffs asserting Section 11 claims. Plaintiffs must allege either that the speaker did not actually hold or believe the opinion stated, or that the speaker had no basis to make the opinion. The Court noted that an opinion might not be actionable even if there was some fact contrary to the stated opinion because the presence of conflicting facts is one reason why an issuer might frame a statement as an opinion, "thus conveying uncertainty." *Id.* at 13.

Second Circuit Holds Failure to Disclose Trends Can Create Liability Under Section 10(b)

In a case of first impression for the Second Circuit, the Court held in *Stratte-McClure v. Morgan Stanley*[2], that the failure to disclose known trends or uncertainties that the issuer expects will have a material unfavorable impact on revenues or income (as required by Item 303 of Regulation S-K, 17 C.F.R. § 229.303(a)(3)(ii)) can result in liability under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5. While the Second Circuit had previously held that a violation of Item 303 could lead to liability under Section 11 and 12(a)(2) of the Securities Act of 1933, the Court in *Stratte-McClure* expanded the scope of potential liability for Item 303 disclosure to Forms 10-K and 10-Q. The Second Circuit is now in conflict with the Ninth Circuit which came to the opposite conclusion in *In re NVIDIA Corp. Securities Litigation*, 768 F.3d 1046 (2014).

Background

The case arose from two large proprietary trades by Morgan Stanley leading up to the subprime mortgage crisis. In the first trade, Morgan Stanley took a $2 billion "short" position by purchasing credit default swaps ("CDSs") on collateralized debt obligations ("CDOs") backed by mezzanine tranches of subprime residential mortgage-backed securities ("RMBSs"). That trade was like an insurance policy if the housing market worsened. In the second trade, Morgan Stanly took a $13.5 billion "long" position by *selling* CDSs on super-senior tranches of CDOs that were higher rated and lower risk than the CDOs in the short position. In essence, Morgan Stanley was betting that the defaults in the subprime mortgage market would be significant enough to impair the higher risk CDO tranches, but not significant enough to impair the value of the lower risk tranches.

By mid-2006, the housing bubble had burst and in 2007 the subprime crisis had deepened. Plaintiffs alleged that Morgan Stanley understood by then that it had underestimated the magnitude of the collapse and eventually lost billions on the proprietary trades. Plaintiffs claimed, among other claims, that Morgan Stanley had failed to disclose in its 10-Q filings in

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[2] No. 13-0627-cv (January 12, 2015). Available here.

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the second and third quarters of 2007 the existence of the long position trade and that the company was likely to incur additional significant losses on the trade in the future. The plaintiff argued that Item 303 of Regulation S-K and related SEC guidance requires companies to disclose on their 10-Q filings any "known trends, or uncertainties that have had, or might reasonably be expected to have, a[n]…unfavorable material effect" on the company's "revenue, operating income or net income." plaintiff argued that Morgan Stanley knew by then that losses on the long position would have an unfavorable material effect on revenue.

The Second Circuit's Decision

The Court began its analysis by noting the Supreme Court's instruction in *Basic v. Levinson* that "[s]ilence, absent a duty to disclose, is not misleading under Rule 10b-5." Such a duty to disclose, however, is imposed by Item 303 of Regulation S-K and the SEC's guidance "where a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations." Exchange Act Release No. 6835. According to the SEC, Item 303 disclosures "give investors an opportunity to look at the registrant through the eyes of management by providing a historical and prospective analysis of the registrant's financial condition and results of operations." *Id.* That being so, reasoned the Second Circuit, "a reasonable investor would interpret the absence of an Item 303 disclosure to imply the non-existence of 'known trends or uncertainties…that the registrant reasonably expects will have a material…unfavorable impact on…revenues or income from continuing operations.'" As a consequence, "Item 303 imposes the type of duty to speak that can, in appropriate cases, give rise to liability under Section 10(b)."

Liability under Section 10(b) and Rule 10b-5 and the Supreme Court's decision in *Basic v. Levinson* requires that a forward looking disclosure be *material* which is determined by "a balancing of both the indicated probability that an event will occur and the anticipated magnitude of the event in light of the totality of the company activity." "[T]he duty to report under Item 303, on the other hand, involves a two-part (and different) inquiry. Once a trend becomes known, management must make two assessments:

> (1) Is the known trend…likely to come to fruition? If management determines that it is not reasonably likely to occur, no disclosure is required.
>
> (2) If management cannot make that determination, it must evaluate objectively the consequence of the known trend…on the assumption that it will come to fruition. Disclosure is then required unless management determines that a material effect of the registrant's financial condition or results of operations is not reasonably likely to occur. Exchange Act Release No. 6835."

As the Second Circuit observed, "according to the SEC, this disclosure standard is unique to Item 303 and '[t]he probability/magnitude test for materiality approved by the Supreme Court in [*Basic*] is inapposite.'" While that may be true for the SEC's determination of a violation of Item 303, however, the fact remains that a private plaintiff must satisfy *Basic's* test for materiality. Thus, under the Second Circuit's holding, a plaintiff must first prove the duty to disclose under Item 303 by reference to the SEC's more demanding standard, and then allege that the omitted information was material under Basic's probability/magnitude test.

The Second Circuit noted its disagreement with the Ninth Circuit's decision in *NVIDIA*, but could not reconcile that decision with both the Ninth Circuit's and Second Circuit's prior decisions recognizing potential liability under Section 12(a)(2) for violations of Item 303. After all, the Court reasoned, the text of Section 10(b) and Section 12(a)(2) contain identical prohibitions on material omissions.

With respect to Morgan Stanley's 10-Qs in 2007, the Second Circuit found that while there was some discussion of the adverse trends that eventually caused the material losses on the long position trade, there was no discussion, as required by Item 303, of its impact on the company's financial condition. The Court cautioned, however, that the proprietary details of Morgan Stanley's long position trade could have remained confidential; all that Morgan Stanley needed to disclose was the adverse trend in the mortgage market and the fact that there may be a material adverse effect on its financial condition.

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The Court nonetheless concluded that the plaintiffs' Item 303 claims failed because there were no plausible scienter allegations that Morgan Stanley intentionally or recklessly omitted the required disclosure. The allegations were that Morgan Stanley was very concerned and assessing and trying to limit the exposure in 2007, but the complaint was silent about when management came to the conclusion that the pessimistic assessments of the market were likely to come to fruition. As such, there could be no strong inference of scienter as to the matter omitted.

Practice Takeaways

- The Second Circuit's decision creates Section 10(b) and Rule 10b-5 liability for violations of Item 303 disclosure in periodic reports, at least until a contrary opinion comes from the Supreme Court. At the very least, that potential exposure places a much higher premium on a searching inquiry among management to identify and assess all relevant "trends" and "uncertainties" that might have a material adverse impact.
- *Stratte-McClure* is not all bad news. The SEC's demanding standard for Item 303 disclosure does not require a prophylactic list of all trends and potential uncertainties in the issuer's business. Clearly there must be a reasoned conclusion that an adverse trend or factor is likely to come to fruition and materially impact the issuer's financial condition, which as demonstrated in the case of Morgan Stanley's wrestling with the fast moving subprime meltdown, is an often difficult thing to conclude. Dire warnings without a reasoned basis are not helpful to investors.
- The disclosure required by Item 303 does not require the disclosure of proprietary or confidential information about the issuer's business. If any disclosure is required under Item 303, it must simply track the language of the rule and connect the trend or uncertainty, should it come to fruition, to the potential material adverse financial impact.

SEC Cracks Down on Agreements Requiring In-House Reporting of Fraud

The SEC recently announced that it had made good on its prior promises to take a hard look at employment agreements and policies that attempt to keep securities fraud complaints in-house. In *KBR, Inc.*, Exchange Act Release No. 74619 (April 1, 2015), the SEC announced an enforcement action and settlement with KBR, Inc. in which KBR agreed to amend its employee Confidentiality Statement to provide further disclosures to employees regarding their right to communicate directly with government agencies, notify KBR employees who had signed the Statement in the past of the amended policy, and pay a $130,000 civil penalty.

The SEC concluded that KBR's Confidentiality Statement violated SEC Rule 21F-17, adopted by the SEC after the Dodd-Frank Wall Street Reform and Consumer Protection Act. SEC Rule 21F-17 provides that "[n]o person may take any action to impede an individual from communicating directly with the Commission staff about a possible securities law violation, including enforcing, or threatening to enforce, a confidentiality agreement . . . with respect to such communications."

According to the SEC Order, under its compliance program, KBR required that employees who were interviewed as part of the company's internal investigations to sign a Confidentiality Statement at the start of any company interview. Covered investigations included investigations into internal reports of potential illegal or unethical conduct, including potential securities violations. The KBR Confidentiality Statement provided in part:

> I understand that in order to protect the integrity of this review, I am prohibited from discussing any particulars regarding this interview and the subject matter discussed during the interview, without the prior authorization of the Law Department. I understand that the unauthorized disclosure of information may be grounds for disciplinary action up to and including termination of employment.

The SEC found that although it was not aware of any instance in which a KBR employee was actually prevented from communicating directly with the SEC, the Confidentiality Statement "impedes such communications by prohibiting employees from discussing the substance of their interview without clearance from KBR's law department under penalty of disciplinary action including termination of employment," thereby undermining the purpose of Rule 21F to "encourage[] individuals to report to the Commission."

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As part of the enforcement action, KBR agreed to amend its Confidentiality Statement to include this provision:

> Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need the prior authorization of the Law Department to make any such reports or disclosures and I am not required to notify the company that I have made such reports or disclosures.

Additionally, KBR agreed to contact KBR employees who signed the Confidentiality Statement from August 21, 2011 to the present informing them of the SEC Order and including a statement that they need not seek permission from KBR's General Counsel before communicating with any governmental agency. The SEC also assessed a civil penalty of $130,000.

In a press release announcing the decision, Sean McKessy, Chief of the SEC's Office of the Whistleblower, stated: "KBR changed its agreements to make clear that its current and former employees will not have to fear termination or retribution or seek approval from company lawyers before contacting us. . . . Other employers should similarly review and amend existing and historical agreements that in word or effect stop their employees from reporting potential violations to the SEC."

This appears to be the next step in the SEC Whistleblower Division's initiative to crack down on agreements that it views as violating SEC Rule 21F-17. In widely reported remarks before the Georgetown University Law Center Corporate Counsel Institute last spring, McKessy indicated that the agency was "actively looking for examples of confidentiality agreements, separation agreements, employee agreements that . . . in substance say 'as a prerequisite to get this benefit you agree you're not going to come to the Commission or you're not going to report anything to a regulator.'" And just this past February, it was reported that the SEC had delivered official letters to several companies seeking several years' worth of their employee agreements, including nondisclosure and separation agreements. In recent months, there have been similar actions regarding agreements or policies by the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB).

Practice Takeaways

- Companies should review their existing employment policies and employment agreements, including confidentiality, non-disclosure and separation agreements, for any provisions that might be viewed as prohibiting, impeding or discouraging employees from communicating with law enforcement agencies.
- Companies should consider including language in their agreements and policies specifying that the reporting of potential violations law or regulations to government agencies is not prohibited, and indicating that no prior employer notice or approval is required.
- Companies should be careful to conduct internal investigations in a manner that will not be seen after-the fact as limiting, discouraging or impeding employees from communicating with or cooperating with law enforcement agencies.

Chief Justice Leo Strine Offers M&A "Checklist"

Delaware Supreme Court Chief Justice Leo E. Strine, Jr., the legendary, prolific author of lengthy and witty corporate law opinions, recently released a working paper on his observed best practices in documenting and negotiating an M&A deal.[3]

While Justice Strine correctly notes that even the best record and a thorough exercise of due care are unlikely to eliminate litigation risk of an objecting shareholder — and the shareholder plaintiffs' bar — such good habits will result in better decision-making by directors and will significantly reduce the "litigation target zone" for plaintiffs' lawyers.

The Chief Justice's words of advice are principally directed to legal and financial advisors of target companies and their boards, but they apply equally to the directors themselves and are based on years of observation. Justice Strine's thoughts are condensed and summarized below:

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[3] A copy of this paper, which will also appear in the forthcoming edition of *The Business Lawyer*, Volume 70, May 2015, can be found here.

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- The Business Judgment Rule is your friend — avoid the easy, but costly, mistakes described below that weaken or eliminate the BJR's protections.
- Establish a protocol where management is required to advise the board of any consideration of selling the company *before* any discussion with potential buyers. This helps avoid the immediate conflicts created by management getting ahead of the board and outside advisers.
- Don't ignore or try to "rationalize" conflicts of interest, even if seemingly innocuous. No two deals are the same and different directors and managers may have understandably different needs and interests. Acknowledge and document those differences and make sure each interest has separate, independent advisors, both financial and legal. Only with such advisors can independent directors effectively check the interests of the other constituents, usually management.
- Beware of the investment bank's pitch. Bankers will typically, and appropriately, describe their vast experience and great results achieved for prior clients. This has a tendency to set directors' expectations in a different (perhaps higher) place than reality will eventually show. This may tempt the board to go with the most bullish pitch. Remember, however, that the ultimate work product will be a caveat-laden and terse fairness opinion that may sound very different from the pitch on day one. Worse, a large gap between the original projections in a pitch and the ultimate price can offer a plaintiff lawyer lots of fodder for arguing that the board sold the shareholders out in the end.
- Make a thorough and clear written record, and do not strip out the advisors' advice. Not only does this help prove the thoroughness of your actions during the process, it has the practical impact of helping you remember what happened. Too many cases are lost because directors and their advisors testify (many months or years later) inconsistently with one another because they simply cannot recall what happened. The advisors' knee jerk instinct to sanitize the record does the client a disservice.
- Have a consistent approach to minute taking. Whether long form or short form is used, be accurate as to each subject, and don't have different professionals draft different sections of the minutes. Differences in the amount of detail devoted to different subjects can be seized upon by a good plaintiff lawyer, to suggest that some of the topics were given short shrift by the board during that meeting.
- Use "redlining" to your advantage. Insist that the bankers and lawyers revisions to board books, draft agreements and the like be redlined. It allows you to zero in on the changes and the important issues (in what are sometimes very large and technical documents), and helps identify areas of inconsistency in the record.
- Document changes to the football field — and if only a subset of the valuation methods are what the bankers ultimately advise, then document that too. This will help you remember why one of the other methodologies that may be helpful to plaintiff's case was appropriately discarded.
- Insist on receiving written materials well in advance of board meetings. Too often advisors are reluctant to allow directors to take home draft agreements and the like for security and confidentiality reasons. These are complicated documents that need to be studied, marked up and reflected upon in order for a director to be able to effectively ask questions and make well informed decisions about then. It is a potential disaster to try to read them for the first time at the meetings and that fact may help a plaintiff make his case.
- Finally, there are downsides to only providing the materials electronically. Many of today's directors are of a generation that is less tech savvy and it may be hard for them to mark up and make margin notes on an iPad. There are also more distractions on an iPad that are unrelated to the draft merger agreement. The metadata on the device may also be able to tell a plaintiff lawyer how much (or how little) time the director spent reviewing the materials and how much time she spent watching Netflix.

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Delaware Supreme Court Denies Damages Based on Implied Duty of Good Faith

A $15 million dollar award based on a breach of implied covenant of good faith and fair dealing was reversed because the express contract terms governed. "When a buyer and seller negotiate a detailed contract, Delaware law requires that the contract's express terms be honored, and prevents a party who has after-the-fact regrets from using the implied covenant of good faith and fair dealing to obtain in court what it could not get at the bargaining table."[4]

Northpointe, a management owned investment advisor, is a former affiliate of Nationwide. Nationwide owned 65% of Northpointe, until Nationwide encouraged the firm's executives to buy out the firm. Northpointe executives did so, paying $25 million dollars in September, 2007 for Nationwide's interest. Eighty percent of Northpointe's business was managing institutional investment accounts. The remaining twenty percent was providing sub-advisory services for seven Nationwide funds. The purchase agreement contained a termination provision relating to the seven funds, requiring Nationwide to pay a termination fee of up to $3.5 million if Nationwide terminated Northpointe within three years of the sale, except if the termination was for poor performance. Another provision prohibited Nationwide from replacing Northpointe as advisor to the largest of the seven funds.

Within months of purchasing Northpointe, Nationwide withdrew significant assets from the largest of the seven funds and within fourteen months of the purchase, Nationwide had closed most of the funds. Nationwide also established a fund which directly competed with the largest fund, but capped its fees at 12-15 basis points lower than Northpointe. Nationwide claimed an exemption from paying termination fees on account of Northpointe's poor performance.

Nothpointe sued, claiming that Nationwide breached its implied covenant of good faith and fair dealing by:

- Secretly creating a competing fund that made it impossible for Northpointe to compete;
- Redeeming money from the large fund and placing it in the Nationwide competing fund; and
- "Disingenuously" claiming that it did not owe termination fees.

The trial court awarded Northpointe $15.1 million dollars, or nearly 60% of the purchase amount, based on a discounted cash flow analysis.

The Delaware Supreme Court reversed, finding that the termination fee and replacement provisions of the purchase contract governed the parties' rights, and that reliance on an implied covenant of good faith and fair dealing was unwarranted. Specifically, the Supreme Court ruled that:

- Nothing in the contract prohibited Nationwide from establishing a competing fund;
- Nationwide was prohibited from replacing Northpointe as advisor to the large fund, not from withdrawing money; and
- Nationwide could terminate all of the funds for a maximum fee of $3.5 million.

In making its ruling, the Supreme Court relied on and amplified certain principles of contract law to reach its result:

- *An implied covenant of good faith and fair dealing can only fill in unanticipated gaps in the parties' contracts and does not apply when the contract addresses the issue* - and because the contract provided for the termination of Northpointe, the contract governed;

[4] *Nationwide v. Northpoint*, C.A. No. 441 (Del. S. Ct. 2015), available here.

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- *A trial court cannot rewrite a contract and should not do so where the parties could have provided for an occurrence* - and because the parties did not prohibit withdrawals from the large fund, but only prohibited replacing Northpointe, taking the money out was not a breach.
- *A trial court can only imply terms when it is clear from the contract that the parties would have agreed to the omitted terms* - and because the contract did not have any non-compete provisions, there was no implied promise not to compete.
- *A trial court must respect the parties economic allocation and not imply a different bargain* - and because the contract capped termination fees at $3.5 million, the trial court could not award five times that amount based on an implied promise.

By reversing, the Delaware Supreme Court sent a strong message to litigants - their contracts will be enforced as written, and a trial court's ability to rewrite will be applied sparingly, if at all.

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