Blogs
June 04, 2015

Late last week, Judge Engelmayer in the Southern District of New York accepted a voluntary dismissal of a securities class action, but the dismissal was anything but routine.

Instead, it was accompanied by a twenty-five page opinion & order which serves as an important warning to plaintiffs' counsel in securities class action cases regarding the investigation process that often precedes securities class action complaints. In *In re Millennial Media, Inc. Securities Litigation,* the plaintiffs alleged that executives of Millennial Media, Inc. engaged in securities fraud by releasing false and misleading information that artificially inflated the stock price. In an effort to satisfy the heightened pleading requirements under federal securities law, the complaint relied upon information and direct quotes from eleven "Confidential Witnesses" or "CWs." However, the vast majority of these witnesses never spoke with plaintiffs' counsel before the complaint

was filed, though ten of the CWs had been interviewed by an investigator employed by plaintiffs' counsel. After filing the complaint, plaintiffs' counsel sent a copy of it to each CW, at which point one of them promptly requested that all attributions to him be removed. This request led to further inquiry from the Court as to the accuracy of the statements in the complaint, and revealed additional facts that the court found to be "unsettling." As discussed in the court's opinion, none of the CWs were notified that they would be quoted in the complaint or designated therein as a CW, and some of the CWs claimed to have been misquoted or misleadingly quoted. In addition, none of the CWs were told that this designation created the possibility that his or her identity would later be revealed in litigation. In fact, one CW indicated that he spoke with an investigator via telephone after drinking at a happy hour event, and that he told the investigator that he did not want his statements to be used for "anything other than your personal understanding." Nonetheless, the investigator drafted a memo summarizing the call, and plaintiffs' counsel drafted the complaint using quotes and information drawn from the investigator's memo. Judge Engelmayer noted this is not the first case in which the practice of investigators and lawyers have led to less than reliable witness statements in filings. For example, in *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 952 F. Supp. 2d 633 (S.D.N.Y. 2013), Judge Rakoff noted that after discovery in the case, many of the witnesses cited in the complaint either recanted the statements attributed to them, or denied ever making the statements in the first place. Judge Rakoff opined that the investigator's "interview practices were less rigorous than would be typical of a federal law enforcement agent," as no other staff member was present on the phone call with the witness, nor did the investigator ask the witness if he could tape-record the phone call. Courts in other jurisdictions have dealt with similar issues. Ultimately, in granting the plaintiffs' request for a voluntary dismissal, Judge Engelmayer concluded that "this case underscores why it is a best practice - if not an ethical imperative - for counsel, before designating a person as a CW in a Complaint to notify that person of counsel's intent to do so and to verify the statements that counsel propose to attribute to him or her." The decision thus serves as an important guide, and cautionary note, for matters in which parties seek to convert the results of investigative activities into advocacy-focused litigation.

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