

New York Supreme Court: No Duty to Update Business Issues That Were Not Discussed in the Registration Statement

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On May 6, 2020, a New York state court dismissed a securities fraud action alleging claims under Sections 11 and 12(a)(2) of the Securities Act of 1933. [Hoffman v. AT&T](#), 2020 WL 2236189 (N.Y. Sup. Ct. 2020) (Ostrager, J.). The court held that defendants had no duty to update the Registration Statement to address declines in subscriptions for one of the company's business services, because the Registration Statement made no specific representations concerning that business service.

The court stated that “[g]enerally, Section 11 liability is judged from the effective date of the Registration Statement.” However, the court noted that “Item 512(a) of Regulation S-K requires an issuer to file a post-effective amendment in specified circumstances,” including when “facts or events arising after the effective date of the registration statement . . . represent a fundamental change in the information set forth in the registration statement.” *Id.* (quoting 17 C.F.R. § 229.512(a)(1)(ii)).

In the case before it, the court found that “no duty to issue a post-effective amendment was triggered.” First, the court explained that “the text of the Registration Statement itself does not contain any reference to” the relevant business service. Rather, “[t]he only references to [the business service] that were part of the Registration Statement were a few references to a ‘strong’ launch contained in [two SEC filings] that were incorporated by reference.” The court agreed with defendants that “there can be no duty to update information that was not contained in the Registration Statement in the first place.”

Second, the court held that “even if there was a duty to make a post-effective amendment about a topic that was not explicitly set forth in the Registration Statement, the changes plaintiff alleges to [the business service] do not represent a ‘fundamental change’ within the meaning of the Securities Act.” The court noted that “[t]he SEC has provided examples of ‘fundamental changes’ that trigger a duty to issue a post-effective amendment.” These include “major changes in the issuer’s operations, such as significant acquisitions or dispositions, and any change in the business or operations of the registrant that would necessitate a restatement of the financial statements.” The court explained that the changes to the subscribership of the business service at issue did “not constitute a fundamental change” under the guidance provided by the SEC, as subscribers to that service “represented less than 1%” of subscribers to the company’s subscription-based services, which, in turn, represented “only one part of [the company’s] overall business.”

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