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AUDITING

BNA Insights: Whose Statement Is It Anyway? - Section 11 Claims Against Auditors After Omnicare

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Since its enactment in 1933, Section 11 of the Securities Act has been a sharp arrow in the quiver of securities plaintiffs and their counsel. Because a securities plaintiff is not required to prove intent or reliance or allege loss causation, Section 11 presents a particular danger to any defendant that participated in the registration statement process. For the independent auditor, the concern is heightened because of recent decisions that have interpreted Section 11 to extend beyond the auditor's opinion on the issuer's financial statements to errors in the financial statements themselves. These decisions, which threaten to vastly expand liability for independent auditors, are not only inconsistent with the statutory framework and more than 75 years of professional practice, but also run contrary to the Supreme Court's decision in *Omnicare*. While the only court of appeals to address the issue since *Omnicare* has rejected the reasoning behind these decisions, the battle continues on the front lines of the district courts.

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Section 11 makes issuers strictly liable for material misstatements or omissions contained in registration statements. 15 U.S.C. § 77k. Unlike Section 10(b) claimants, Section 11 plaintiffs need not establish scienter or reliance. Nor must they plead loss causation, although the absence of loss causation is an affirmative defense. 15 U.S.C. § 77k(e). Section 11 not only provides a cause of action against issuers, but also against accountants and others who ''prepared or certified any report or valuation which is used in connection with the registration statement.'' 15 U.S.C. § 77k(a)(4). Because registration statements must include balance sheets and profit and loss statements ''certified by an independent public or certified accountant'' 15 U.S.C. § 77aa(25)–(27), issuers generally include their most recent audited financial statements—and the auditor's report thereon—in their registration statements. Outside auditors are thus exposed to potential liability under Section

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11's ''prepare or certify'' prong as the makers of statements within their audit reports, which are also referred to as audit opinions.

There is a debate, however, as to whether auditors' liability under Section 11 extends further. Reasoning from the statute's use of ''certified,'' a number of courts have determined an audit opinion is a guaranty of the financial statements' accuracy, and looked beyond the report to hold that auditors are strictly liable for the issuer's misstatements in its financial statements, subject only to the auditor's ability to establish a due diligence defense. Given the fact-intensive nature of such a defense, this expansion of liability under Section 11 in many cases will cause the auditor to face the prospect of a jury trial, as summary judgment will be unobtainable. In many cases (as Congress recognized when it enacted the PSLRA), this has the practical outcome of increasing the likelihood of a settlement, regardless whether the claims have any merit. There are strong arguments that reading Section 11 to extend auditor liability to misstatements in the financial statements is at odds with SEC regulations. It also runs counter to a growing body of case law regarding auditor liability under other sections of the securities laws. Those cases recognize that the very same audit reports are statements of opinion, not guarantees.

Auditors had read the Supreme Court's holding in *Omnicare, Inc. v. Laborers District Council Construction Industries Pension Fund*, 131 S. Ct. 1318 (2015), as working in conjunction with these prior cases to foreclose the strict liability argument. Since *Omnicare*, however, some district courts have allowed Section 11 claims against auditors to proceed based on misstatements in the issuer's financial statements. This application of Section 11 significantly broadens auditors' exposure to securities litigation whenever an audit client has registered securities during the period in question. In effect, an auditor facing liability for misstatements in the issuer's financial statements becomes, subject to a due diligence defense, a guarantor of those financial statements—a responsibility that the Public Company Accounting Oversight Board's (PCAOB) standards renounce and the auditing profession has long disclaimed.

Treatment of Audit Reports in Securities Litigation

The responsibilities of outside auditors are distinct from those of company management. Management designs and maintains accounting systems and internal controls over financial reporting and, most importantly, is responsible for preparing the financial statements. AS 1001.03. Outside auditors, in turn, develop procedures for testing the results reported by, and the financial statements prepared by, management. Auditors do not duplicate the work of management, but instead rely on judgment and sampling to test transactions and reported results, with the objective of forming an opinion on whether the financial statements accurately reflect the Company's financial position. AS 1001.03. As a result of this significantly more limited role, even the most thorough audit can fail to detect even material misstatements in a company's financial statements. AS 1001.02.

The PCAOB recognizes that because ''of the nature of audit evidence and the characteristics of fraud, the auditor is able to obtain reasonable, but not absolute, assurance that material misstatements are detected.'' *Id.* That is particularly true in cases involving manipulative or fraudulent accounting treatment designed by high-level executives, who also may collude to create sophisticated schemes to conceal their misconduct. AS 2401.08–10. Auditor's opinions, therefore, are not considered guarantees of the accuracy of the company's financial statements. Instead, the opinions are exactly that—expressions of the auditor's professional opinion that the financial statements are presented in conformity with generally accepted accounting principles (GAAP). AS 1001.03. SEC Regulation S-X explicitly recognizes that ''[t]he term 'certified,' when used in regard to financial statements, means examined and reported upon with *an opinion* expressed by an independent public or certified public accountant.'' 17 C.F.R. § 210.1-02(f) (emphasis added).

In claims under Sections 10(b) and 18 of the Exchange Act, a number of courts within and outside the Second Circuit have recognized that because audit opinions are based on professional judgment, claims against auditors cannot go forward unless the plaintiffs plead facts supporting the inference that the opinion was not truly held—that is, that they were subjectively false. *See, e.g., Deephaven Private Placement Trading, Ltd.*, 454 F.3d 1168, 1174–75 (10th Cir. 2006); *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohamtsu CPA, Ltd.*, 33 F. Supp. 3d 401, 435–36 (S.D.N.Y. 2014), *aff'd*, No. 15-1813, 2016 WL 1392280 (2d Cir. Apr. 8, 2016)); *In re Longtop Fin. Tech. Ltd. Sec. Litig.*, 910 F. Supp. 2d 561, 581 (S.D.N.Y. 2012).

For a number of years, Section 11 plaintiffs seeking to recover from auditors could bypass the audit opinion by relying on errors in the underlying financial statements and Section 11's ''certification'' language. *See, e.g., Escott v. BarChris Cons. Corp.*, 283 F. Supp. 643, 683–84 (S.D.N.Y. 1968); *In re Glob. Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 348 (S.D.N.Y. 2004); *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 379 (S.D.N.Y. 2011). The landscape within the Second Circuit appeared to shift, however, with the issuance of *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d. Cir. 2011). *Fait* involved claims pursuant to Sections 11 and 12 against Regions, an issuer that had taken a $6 billion non-cash charge for impairment of goodwill and doubled its loan loss reserves from a year earlier. *Id.* at 107. The Second Circuit concluded that the estimates of goodwill and loan loss reserves were not matters of objective fact but instead Regions' opinions. *Id.* at 111–13. The court held that ''when a plaintiff asserts a claim under section 11 or 12 based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed.'' *Id.* at 110. Relying on *Fait*, auditors argued that because auditors issue statements of opinion, Section 11 claimants must plead that the auditor did not believe its opinion at the time it was made.

Plaintiffs seeking to avoid *Fait* in the audit context attacked the characterization of audit reports as opinions, arguing that reasoning undermines Section 11's provision for claims against accountants who ''prepare or certify'' any part of a registration statement. A district court in the Southern District of New York adopted this view in 2013, reasoning that ''[a]uditors may not shield

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themselves from liability under Section 11 merely by using the word 'opinion' as a disclaimer.'' *In re OSG Sec. Litig.*, 971 F. Supp. 2d 387, 399 (S.D.N.Y. 2013). The court reasoned that audit reports could not be ''subject to *Fait*'s subjective disbelief standard'' because ''it would render Section 11 meaningless to find that an accountant's liability turns on this semantic choice.'' *Id.* at 398, 399. In denying the auditors' motions to dismiss, the court expressed the view that it was ''difficult to imagine what Congress might have meant by an accountant's certification if not an audit affirming the accuracy of the documents in question.'' *Id.* at 400. Although *OSG* focused on the word ''certify'' within Section 11, the opinion failed to acknowledge the securities regulations' limitation of the term to opinions. 17 C.F.R. § 210.1-02(f).

Nor did *OSG* acknowledge its holding's potential to disrupt the increasingly robust body of case law recognizing audit reports as opinions formed through a series of professional judgments. In contrast to those decisions, *OSG* explicitly described an outside auditor's report as ''affirming the accuracy of the documents in question''—i.e., the issuer's financial statements. *Id.* at 400. A February 2015 decision from the District of New Jersey did acknowledge this divergence, but reasoned that Section 11's ''certified'' language, not found in Sections 10 or 18, justified viewing audit reports differently in the Section 11 context. *Yang v. Tibet Pharms., Inc.*, No. 14-3538, 2015 WL 730036, at *3 (D.N.J. Feb. 20, 2015).

Neither *OSG* nor *Yang* explicitly discussed that the same audit work and report are implicated in both settings, because issuers include their last audited financial statements within registration statements. The divergence between treatment of audit opinions in cases under Section 11 and those under other sections of the securities laws means that the exact same report is an opinion in one context and somehow an absolute affirmation of accuracy in another.

If audit reports are to be treated as guarantees of the underlying financial statements in the Section 11 context (subject to a due diligence defense), auditors would face increased litigation risk when their audit clients file registration statements. This increased risk would not result simply from Section 11's lower pleading standards. Instead, it would result from a court-imposed ''duty'' to affirm the accuracy of financial statements for which the auditor is not responsible. But that duty is not recognized by the Public Company Accounting Oversight Board and is explicitly disclaimed by the auditors themselves. Moreover, in light of the distinct differences between the roles of auditors and management, the duty would be difficult to satisfy.

Omnicare 's Description of Section 11 Liability for Statements of Opinion

Following *OSG* and *Yang*, audit firms understandably had a particular interest in the Supreme Court's 2015 decision in *Omnicare*, which addressed ''how § 11 pertains to statements of opinion.'' 135 S. Ct. at 1324. The registration statement at issue included two sentences regarding Omnicare's view of its compliance with certain legal requirements:

- We believe our contract arrangements . . . are in compliance with applicable federal and state laws; and
- We believe that our contracts . . . are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

Id. at 1323.

After Omnicare filed the registration statement, the federal government initiated litigation alleging the company's receipt of payments from drug manufacturers violated anti-kickback laws. The plaintiffs argued those allegations demonstrated Omnicare's statements regarding compliance had been false. *Id.* at 1324. The Supreme Court rejected the argument that ''an issuer's statement that 'we believe we are following the law' conveys that 'we in fact are following the law,' '' finding it conflated facts and opinions. *Id.* at 1325.

Omnicare did not completely close the door to Section 11 liability for opinion statements, but recognized such claims were difficult to plead. The decision established three paths by which a Section 11 plaintiff seeking to pursue a claim on the basis of statements of opinion could proceed. First, a statement would be actionable if the speaker did not actually hold the opinion she expressed. *Id.* at 1326. Second, a statement of opinion that contained an embedded statement of fact could be actionable if the supporting fact were untrue. *Id.* at 1327. Finally, Section 11 liability may obtain if an omitted fact rendered the stated opinion misleading to an ordinary investor. *Id.* at 1327–28. To pursue this third path, a plaintiff must ''identify particular (and material) facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context.'' *Id.* at 1332. The court emphasized that stating such a claim ''is no small task for an investor.'' *Id.*

Auditors found much to celebrate in *Omnicare*'s holding. The audit report statements for which auditors are sued under Section 11—opinions that audits were conducted in accordance with PCAOB standards and the company's financial statements comply with GAAP—are isomorphic to the statements at issue in *Omnicare*. Auditors reasonably argued, therefore, that their statements were likewise ''pure statements of opinion,'' *id.* at 1327, subject to claims under Section 11 only if a plaintiff could allege the opinion was not truly held, or that contradictory, material facts were known and omitted. Just one week after *Omnicare*, a court in the Southern District of New York cited the case in denying plaintiffs leave to amend a complaint brought against an outside auditor under Section 10(b). *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 96 F. Supp. 3d 325, 344–45 (S.D.N.Y. Mar. 31, 2015), *aff'd*, No. 15-1813, 2016 WL 1392280 (2d Cir. Apr. 8, 2016)). The court recognized the outside auditor's report as a statement of opinion, and noted that sincere statements of opinion are not ''untrue statement[s] of material fact regardless whether an investor can ultimately prove the belief wrong.'' *Id.* (quoting *Omnicare*, 135 S. Ct at 1328 (internal quotations omitted)). This holding applied to claims under Section 10(b), as well as to Section 18; the case did not involve claims brought under Section 11.

Post- *Omnicare* Decisions Allowing Section 11 Claims Against Auditors to Proceed

Despite this early traction, some courts evaluating Section 11 claims against auditors since *Omnicare* have rejected the ''pure opinion'' view of audit reports, and two recent decisions have revived *OSG*'s holding that an auditor can be held liable under Section 11 not just for statements in its audit report, but for errors in the audited company's financial statements. Should the reasoning of these decisions prevail, auditors risk becoming guarantors of their clients' financial statements—subject to a due diligence defense—whenever the audit client files a registration statement.

The first of these decisions, *In re Lehman Brothers Securities and ERISA Litigation*, No. 09-md-2017, 2015 WL 5514692 (S.D.N.Y. Sept. 18, 2015), involved claims against an outside auditor under Sections 10(b) and 11. For purposes of their 10(b) claim, the *Lehman Brothers* plaintiffs conceded, in the wake of *Omnicare*, that the audit report represented a statement of opinion. As to Section 11, however, the plaintiffs argued that the auditor was strictly liable (subject to a due diligence defense) because it had ''expertised'' misrepresentations made by Lehman Brothers in its financial statements by ''certifying'' them as required by Section 11. *Id.* at *11. The outside auditor, in turn, argued its opinions did not qualify as ''certifications'' within the meaning of Section 11. *Id.* The court agreed with the plaintiffs and paraphrased *OSG* to conclude ''[i]t is difficult to imagine what Congress might have meant by an accountant's certification if not auditor's opinions.'' *Id.* On this basis, the court determined the plaintiff was ''free to pursue its Section 11 claims against [the outside auditor] with respect to matters covered by its GAAP opinion.'' *Id.* The auditor, in turn, would ''remain free to raise its due diligence defense as appropriate.'' *Id.*

Under *Lehman Brothers*' reasoning, outside auditors will be unable to obtain dismissal of Section 11 claims so long as the plaintiff can point to a material misstatement in the underlying financial statements. Given that securities fraud litigation frequently involves allegations of misstated financial statements, *Lehman Brothers*' holding, if followed, would often effectively deprive the auditor in Section 11 cases of the ability to dismiss the case prior to summary judgment. And given the fact-intensive nature of the due diligence defense, this expansive interpretation of Section 11 in many cases would mean that the auditor would face a jury trial in which a bad result could mean substantial liability.

Lehman Brothers worked around *Omnicare* by focusing on Section 11's certification prong. In contrast, a second decision, *Petrobras*, reached the same outcome by reasoning that even if audit reports are statements of opinion as the term was used in *Omnicare*, the plaintiffs' Section 11 claims were adequately pled. *In re Petrobras Sec. Litig.*, No. 14-cv-9662, 2016 WL 1533553, at *3 (S.D.N.Y. Feb. 19, 2016). The *Petrobras* court found the plaintiffs had satisfied two of *Omnicare*'s three avenues for pleading a Section 11 claim. *Id.* First, the court reasoned that the auditor's opinion that Petrobras's financial statements presented the company's financial position ''fairly, in all material respects,'' contained embedded facts. *Id.* The court reasoned that because the auditor had examined evidence supporting the financial statements (although only on a test basis), the facts of the financial statements must be embedded within the audit opinion. *Id.* The court also found that the plaintiffs had stated a claim under *Omnicare*'s omissions prong because ''a reasonable person reading PwC's audit opinions fairly and in context would conclude that the financial statements and evidence reviewed by PwC were the bases of its opinions.'' *Id.* at *4. The court concluded that an auditor therefore ''opens itself to omissions liability under *Omnicare*'' by characterizing its audit reports as ''pure opinion.'' *Id.* at *4.

Petrobras's holding is difficult, if not impossible, to square with *Omnicare*. As described above, an auditor's opinion that an issuer's financial statements are presented in conformity with GAAP is indistinguishable from Omnicare's statements that it believed its contracts complied with applicable laws. Audit opinions are, just as the Court found for Omnicare's statements, ''pure statements of opinion''—not opinions containing embedded facts. *Omnicare*, 135 S. Ct at 1327. And *Petrobras*'s conclusion that a reader reviewing an auditor's GAAP opinion would conclude the opinion had a basis in the financial statements is a non sequitur. Although readers certainly would understand an auditor to have worked with the financial statements, that does not lead to the conclusion that the auditor had verified or guaranteed every item therein. In fact, audit opinions explicitly state that the auditor does not do so.

The *Petrobras* decision is noteworthy not just for its interpretation of *Omnicare*, but also because the court simultaneously dismissed claims against the outside auditor based on the same audit opinions for a failure to plead scienter under Section 10(b). *Id.* at *3. That is, the court found the plaintiffs had adequately identified ''particular (and material) facts going to the basis for [the auditor's] opinion . . . whose omission makes the opinion statement at issue misleading,'' *id.* at *4 (quoting *Omnicare*), in the context of the Section 11 claim. Yet it found in the same decision that the plaintiffs had not pled facts giving rise to a strong inference of scienter on the part of the auditor in the 10(b) context. *Id.* at *2–3. *Petrobras*, therefore, encapsulates the divergence in the case law between Sections 10(b) and 11, and the increased litigation exposure the same audit work carries in the Section 11 context.

Recent Developments In Contrast to *Lehman Brothers* and *Petrobras*

The results for auditors have not been uniformly bleak. Prior to *Lehman Brothers* and *Petrobras*, a court in the Middle District of Pennsylvania dismissed a Section 11 claim against an auditor premised on an *Omnicare* omissions theory. The court found the plaintiff's arguments regarding what the outside auditor should have known and the red flags it allegedly missed were insufficient, because they were based on hindsight rather than facts known when the opinion was issued. *Se. Penn. Trans. Authority v. Orrstown Fin.*, No. 12-cv-00993, 2015 WL 3833849, at *33–34 (M.D. Penn. June 22, 2015) (hereinafter ''*SEPTA*'').

SEPTA, however, did not rule out the possibility that an auditor could be liable for misstatements in the financial statements themselves. Instead, the court noted that because ''statements in the Offering Documents . . . did not violate Section 11,'' the outside auditor could

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not have violated Section 11 by ''approving'' such statements. *Id.* at *33. Therefore, plaintiffs who successfully have pled a material misstatement or omission in the financial statements could distinguish *SEPTA* in seeking to advance a strict liability theory on the basis of the underlying financial statements. Moreover, the *SEPTA* plaintiff was granted leave to file an amended complaint in February 2016, 2016 WL 466958 (M.D. Penn. Feb. 8, 2016), and the court has yet to rule on the outside auditor's motion to dismiss the renewed Section 11 claim pursuant to *Omnicare*.

Similar to *SEPTA*, a court in the Northern District of California dismissed claims under Sections 10(b), 11, and 12 against an outside auditor without foreclosing a strict liability theory based on the underlying financial statements. *In re Velti PLC Sec. Litig.*, No. 13-cv-03889, 2015 WL 5736589 (N.D. Cal. Oct. 10, 2015). Although *Velti* treated the audit report at issue as an opinion under *Omnicare*, the decision included a footnote rejecting the plaintiff's claim that the auditor could be liable under Section 11 for statements that ''were not contained in the . . . audit reports or the accompanying financial statements.'' *Id.* at *15 n.12. As with *SEPTA*, plaintiffs asserting liability against an auditor based on misstatements within the financial statements may argue this language supports the conclusion that auditors could be liable under Section 11 for such misstatements.

The Second Circuit Offers the Potential for a Unifying Theory

In May 2016, the Second Circuit issued a summary order that may begin to unify the case law regarding audit opinions. *In re Puda Coal Sec. Litig.*, No. 15-2100, 2016 WL 2942415, at *3 (2d Cir. May 20, 2016). *Puda Coal* affirmed a district court's grant of summary judgment to an outside auditor on claims under Section 10(b) and Section 11. *In re Puda Coal Sec. Litig.*, 30 F. Supp. 3d 230 (S.D.N.Y. 2014). Unlike *SEPTA* and *Velti*, the *Puda Coal* plaintiffs plainly had alleged material misstatements in the financial statements on which the auditor had opined. The audited company's assets had been transferred such that ''all aspects of [its] financial position . . . were entirely misstated.'' *Puda Coal*, 30 F. Supp. 3d at 236. Nonetheless, the district court found the plaintiffs had failed to raise a triable issue as to the auditor, because they had not adequately pled that the audit opinions were subjectively false. *Id.* at 259–60. The district court opinion, which pre-dated *Omnicare*, relied on *Fait* in explaining that both the Section 10(b) and Section 11 claims were governed by the proposition that ''statements that are matters of opinion must be both objectively and subjectively false at the time that they were made in order to be actionable.'' *Id.* at 246–47 (quoting *Fait*, 655 F.3d at 111).

Omnicare was decided while the *Puda Coal* appeal was pending. Before the Second Circuit, the plaintiffs argued first that the auditors were ''strictly liable under Section 11 for the misstatements in Puda's financial statements that they certified.'' *In re Puda Coal Sec. Litig.*, No. 15-2100, ECF # 103 at 45 (2d Cir. Oct. 22, 2015). On this basis, the plaintiffs argued that *Fait*'s subjective falsity requirement simply did not apply in the context of Section 11, asserting the district court had ''wrongly sought to impose what is tantamount to a scienter-like requirement for a Section 11 strict liability claim.'' *Id.* at 45–48. The plaintiffs asserted Section 11 could only be read to predicate liability on false and misleading statements contained in the underlying registration materials, and not on statements found in the auditor's report. *Id.*, No. 15-2100, ECF # 140 at 16 (2d Cir. Jan. 29, 2016). The plaintiffs also argued that, even if *Omnicare* governed, they had satisfied its embedded fact and omissions prongs. *Id.* at 20–21.

In its non-precedential but unanimous opinion, the Second Circuit stated that ''[a]udit reports, labeled 'opinions' and involving considerable subjective judgment, are statements of opinion subject to the *Omnicare* standard for Section 11 claims.'' *Puda Coal*, 2016 WL 2942415 at *3. Because there was no evidence that the outside auditor did not believe its audit opinions when issued, or had omitted material facts about the basis for its reports, the appellate court agreed the plaintiffs could not sustain a Section 11 claim. *Id.* at *6. The Second Circuit declined to allow the Section 11 claim to proceed against the auditor based on the undisputed misstatements in the issuer's financial statements. In this respect, *Puda Coal* followed and cited *Omnicare*, as well as certain other recent, favorable opinions, including *Special Situations*, which the Second Circuit had affirmed a month earlier on other grounds.

The Second Circuit's reasoning reflects that the exercise of professional judgments in independent audits leads to opinions, not guarantees. Although also recognized in the SEC regulations, 17 C.F.R. § 210.1-02(f), this fact is ignored in the series of recent decisions holding auditors liable for issuers' financial statements on a ''certification'' theory. *Lehman Brothers*, *Yang*, *OSG*, and *Petrobras* not only ignored the plain language of the audit opinions, the PCAOB standards, and the SEC regulations, but also nearly a century of practice. As a profession, accountants have not used the term ''certify'' in their opinions since 1934. Marshall A. Geiger, *Setting the Standard for the New Auditor's Report: An Analysis of Attempts to Influence the Auditing Standards Board* 14–17 (1993). In the early 1900s, auditors did ''certify'' the correctness of financial statements, but the American Institute of Accountants *required* auditors to exclude the term ''certify'' from their audit reports on public companies in 1934. *Id.* at 16–17. This change stemmed from the reality of ever larger corporations engaging in more numerous and complex transactions, meaning ''a detailed examination of substantially all the transactions [of an audit client] was no longer an economically viable undertaking.'' *Id.* at 11.

It remains to be seen how district courts within the Second Circuit will apply *Puda Coal*'s non-precedential affirmance of a summary judgment ruling at the motion-to-dismiss stage. So far, at least one district court outside the Second Circuit has applied the case's logic to dismiss a Section 11 claim against an outside auditor. *Johnson v. CBD Energy Ltd.*, No. 15-1668, 2016 WL 3654657, at *11 (S.D. Tex. July 6, 2016). The *Johnson* court held that Section 11 claims based on audit opinions must be evaluated under *Omnicare*, rejecting the plaintiffs' argument that Section 11's certification language creates an ''auditor exception'' to the *Omnicare* rule. *Id.* at *10. *Johnson* also rejected the plaintiffs' reliance on *Petrobras*'s ''embedded fact'' reasoning, after concluding that *Petrobras* was premised on a misreading of the embedded fact discussion in *Omnicare*. The court found that the opinions at issue in *Petrobras*

and *Johnson* were not accompanied by factual assertions comparable to the single, verifiable embedded fact described in *Omnicare*. *Id.* at *12. Because some claims against other defendants survived the defendants' motions to dismiss, it may be some time before we learn whether the *Johnson* plaintiffs intend to appeal this ruling to the Fifth Circuit, leading to additional appellate guidance on the scope of auditors' exposure under Section 11.

Conclusion

The lower pleading requirements required to state a Section 11 claim have always presented increased litigation exposure for participants in the registration statement process. Although *Fait* and *Omnicare* are fairly read to reduce this exposure for statements of opinion, recent decisions nonetheless extended auditors' liability beyond their reports to errors in the financial statements themselves. Time will tell if the reasoning of the recent Second Circuit decisions recognizing audit opinions are subject to *Omnicare* will prevail. For now, contrary district court interpretations reveal Section 11 continues to present heightened risks for accounting firms.

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