Goodmans LLP Update

Corporate Securities Law

May 10, 2016

Ontario Superior Court Rules that Underwriters Are Not "Experts" Attracting Statutory Secondary Market Liability

Underwriters should not be considered "experts" under the statutory secondary market liability regime. In *LBP Holdings v. Allied Nevada Gold Corp.*, Justice Belobaba of the Ontario Superior Court of Justice denied a motion to add the underwriters of a secondary public offering (the "**Offering**") as defendants to a proposed securities class-action proceeding, concluding the claim was not legally tenable.

Background

The plaintiff alleged that the prospectus (the "**Prospectus**") that qualified the Offering of Allied Nevada's securities contained misrepresentations. Shortly after the plaintiff filed the initial notice and statement of claim naming Allied Nevada and two of its former executives as defendants under the proceeding, Allied Nevada filed for protection under U.S. bankruptcy law, prompting the plaintiff to identify other possible defendants.

Part XXIII.1 of the *Securities Act* (Ontario) (OSA) defines "expert" as "a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization." Experts may have liability for secondary market liability where: (i) the misrepresentation is also contained in a report, statement or opinion made by the expert; (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert; and (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Although the OSA does not explicitly include underwriters in the enumerated list of "experts," the plaintiff sought to characterize the underwriters as "experts" for the purpose of exposing them to potential secondary market liability for Allied Nevada's alleged misrepresentations.

Underwriters Are Not Experts For the Purposes of Attracting Liability

The plaintiff submitted that because the definition of "expert" lists examples "without limitation," the legislation does not preclude underwriters from being "experts." Justice Belobaba recognized that underwriters have "professional expertise in the capital markets," but he rejected the plaintiff's argument that such expertise exposes them to liability as "experts" for the following reasons:

- The terms "underwriter" and "expert" are defined separately and differently in the OSA. The definition of "underwriter" focuses primarily on the underwriter's role in the distribution of securities, a role that is limited to the primary market. In contrast, the definition of "expert" speaks to membership in a self-regulating or self-licensing profession that can give authority to a statement made in a professional capacity. While underwriters have "professional expertise" in the capital markets, Justice Belobaba ruled that, given the nature of their function, they do not satisfy the particular requirements of the definition of "expert" in Part XXIII.1.
- Invoking the doctrine of implied exclusion, Justice Belobaba held that the legislature "obviously and expressly" exposed underwriters to primary market liability for misrepresentations in a prospectus, but intentionally excluded them from the list of potential defendants for secondary market liability set out in Part XXIII.1.

- Even if underwriters could be considered "experts" for the purposes of Part XXIII.1, the underwriters could only be liable if the alleged misrepresentation was also stated in a "report, statement or opinion made by the expert." The only statement made by the underwriters in this case was the underwriters' certificate contained in the Prospectus, which assures investors that to the "best of our knowledge" the "prospectus constitutes full, true and plain disclosure of all material facts relating to the securities offered by this prospectus." The underwriters' certificate did not itself repeat any alleged misrepresentation made in the Prospectus. In other words, the statutory liability of an expert only applies where a misrepresentation is found in *both* the expert's "report, statement or opinion" *and* in the liability document.

Limitations For Secondary Market Liability Are Meaningful

The Court's decision - which also included a finding that the claim against the underwriters for primary market liability was untenable because the 180-day statutory limitation period had expired - serves to reinforce the restrictions on potential sources of recovery for plaintiffs in securities class actions while establishing boundaries for the statutory liability of underwriters.

Please contact any member of our Corporate Securities Group to discuss this decision.