

Corporate & Financial Weekly Digest

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Fact Inquiry Necessary to Determinate Which Sales of Securities Were "By Means Of" Misstatements

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The U.S. Bankruptcy Court for the District of Massachusetts recently denied a motion for summary judgment on the issue of damages by investors in Access Cardiosystems, Inc. against one of the defendants, Randall Fincke. The investors had asserted claims against Mr. Fincke under the Massachusetts version of the Uniform Securities Act, Section 410(a)(2) of the Massachusetts General Laws, which creates “civil liability for sales [of securities] by means of fraud or misrepresentation.” Section 410(a)(2) is almost identical to Section 12(2) of the Securities Act of 1933 and, in reaching its decision, the court relied upon both federal case law as well as case law from other states interpreting the Uniform Securities Act.

In 2009, the court ruled that Mr. Fincke made a material misstatement in a business plan when he stated that Access had been advised by its patent counsel that its product did not infringe on any patents known to counsel without having sought or received any such advice. Following this decision on liability, four of Access’s individual investors moved for summary judgment on the issue of damages, seeking to rescind all of their investment transactions and recover their total investment in the company.

The court found that rescission was not an available remedy because the investors no longer owned the securities and therefore could not tender those securities. However, as the court pointed out, the practical effect of its ruling that the investors could not rescind the transaction was minimal, since the calculation of damages would be based on the amount that would have been “recoverable upon a tender” of the securities. The court held that summary judgment on the issue of damages was inappropriate because there were genuine issues of disputed fact as to which transactions, if any, involved the sale of securities “by means of” the misstatements contained in the business plan. In reaching this conclusion, the court explained that although Section 410(a)(2) does not require a plaintiff to prove reliance or loss causation, the investor must nevertheless prove that each sale of securities for which it seeks damages was made in connection with the misrepresentation. (*In re Access Cardiosystems, Inc.*, 2010 WL 4053614 (Bkrcty. D. Mass. Oct. 14, 2010))