Securities Law Update

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Oregon Court of Appeals Issues Decision Interpreting Antifraud Provisions of Oregon Securities Law

On February 11, the Oregon Court of Appeals issued an important decision interpreting the antifraud provisions of the Oregon Securities Law. The Court of Appeals held that ORS 59.137, which governs the private right of action for securities fraud in "open market" (as opposed to face-to-face) transactions, includes a scienter requirement, meaning that a plaintiff must prove that a defendant acted with a guilty state of mind when making an alleged misrepresentation in connection with the purchase or sale of a security.

The Court of Appeals' decision is the latest in a series of related opinions that, collectively, have largely harmonized the Oregon Securities Law with the federal Securities and Exchange Act § 10(b) and Rule 10b-5 thereunder. In *State v. Marsh & McLennan Cos., Inc.*, 353 Or 1, 292 P3d 525 (2012), the Oregon Supreme Court reversed the Court of Appeals' earlier ruling that a plaintiff must prove direct reliance on a misrepresentation to recover in an action under ORS 59.137. Instead, the Supreme Court held that, like federal securities law, ORS 59.137 incorporates the "fraud-on-the-market" presumption of reliance. On remand, the Court of Appeals has now decided an issue it had not reached in that earlier ruling — whether, due to the lack of a scienter requirement, ORS 59.137 was unconstitutional on federal preemption or dormant Commerce Clause grounds. The Court of Appeals held that ORS 59.137, like federal Rule 10b-5, *does* include a scienter requirement with respect to primary violators. Thus, the court concluded, there is no constitutional infirmity in the statute, because state and federal law are in agreement.

While the *Marsh* opinions have gone a long way toward harmonizing state and federal law, important differences still remain. Most significantly, ORS 59.137 expressly allows claims against a person who "materially aids" in a securities fraud violation, while Rule 10b-5 has been interpreted to not permit aiding and abetting liability. Ironically, under the Court of Appeals' interpretation of ORS 59.137, while a plaintiff now must show the scienter of a *primary* violator, the plaintiff need not prove that a person accused of "materially aiding" in the violation acted with a guilty state of mind. Rather, it is up to a *defendant* accused of "materially aiding" in a securities fraud violation to prove that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts on which the liability is based.

Both parties have reason to be disappointed in the decision. In holding that ORS 59.137 is constitutional, the Court of Appeals reversed a judgment in favor of Marsh. However, the inclusion of a scienter requirement in ORS 59.137 significantly raises the bar for the state to prove a claim under that statute. It remains to be seen whether either of the parties will seek further review by the Supreme Court, which could ultimately have the last word on this issue.

The Court of Appeals' latest decision in the *Marsh* case can be found here: http://www.publications.ojd.state.or.us/docs/A139453.pdf.

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