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UNFAIR DISMISSAL OF MERITORIOUS ODYSSEY HEALTHCARE SECURITIES FRAUD CLASS ACTION ILLUSTRATES NEED FOR CONGRESS TO CLARIFY THE DURA SUPREME COURT DECISION AND PROVIDE RELIEF FROM PSLRA'S STAY ON DISCOVERY

[See Westlaw: In re Odyssey, a § 10(b) action against officers of a company that operated hospices, a court in the Northern District of Texas held that plaintiff investors had not adequately pleaded loss causation. 424 F.Supp.2d at 887-88.]

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During 2003, Dallas-based Odyssey HealthCare (the nation's second largest for-profit chain of hospices) put out information touting its management prowess and successful expansion of operations as the reasons behind results that led the industry. In reality, although the company did well in 2002, the profitability of its operations was declining in 2003. To provide the appearance of continued revenues and earnings growth from operations, the company allegedly cut costs by providing care below industry standards including assigning unusually high case loads per care giver, maintaining inadequate drug inventories and not providing required bereavement counseling (among other problems) for patients as mandated by Medicare. Medicare was also billed for care never provided by Odyssey, a relatively small company in which senior executives had a "hands on" management style and would have been aware of the Medicare fraud and inadequate care.

Nevertheless, in statements to investors and securities analysts, senior management projected earnings per share growth in the 30 percent range during the class period, elevating share price. Meanwhile, the Chairman/CEO and the President and Senior Vice President started selling their stock shares, reaping more than \$24 million in returns from alleged illegal insider trading.

Eventually, a whistleblower within Odyssey filed a federal False Claims Act lawsuit alleging Medicare fraud and the U.S. Department of Justice (DOJ) launched an investigation. Odyssey was forced to halt these practices and on one day issued news of the DOJ investigation, revised the company's earnings projections and announced the resignation of the Chairman & CEO. Share price dropped by over 20 percent on the day of the release and by a total of 48 percent in following days.

The class action, led by the Massachusetts Laborers Annuity Fund and the Alaska Electrical Pension Fund, was filed in the U.S. District Court for the Northern District of Texas in 2004 and alleged that management knew its previously reported results actually stemmed from Medicare fraud. First, plaintiffs sought relief from the automatic stay of discovery required by the Private Securities Litigation Reform Act of 1995 (PSLRA) until the motion to dismiss the case is resolved. Plaintiffs argued that management had already copied the needed files and delivered them to DOJ, so that providing the records would not be an undue burden on the company. The judge denied the request. Yet, the reason Congress adopted the PSLRA stay on discovery was to relieve companies from

the burden and expense of copying and delivering files in frivolous lawsuits. In this instance, Odyssey was admittedly already under DOJ investigation for fraud and the class action clearly was not frivolous.

Nevertheless, the court eventually dismissed the case with prejudice, citing the *Dura* Supreme Court decision and arguing that plaintiffs had failed to show a causal link between disclosure of the fraud investigation and the stock price decline. The reason? The court treated that news as separate from the two other related developments (revised earnings estimates, and the departure of senior executives) made the same day, finding that it could not be determined which announced development caused the stock to plummet. The judge also said the earnings warning fell under the PSLRA's "safe harbor" provision, anyway.

Although the defrauded Odyssey investors were denied their day in court, in 2006 the company did repay the federal government \$13 million to resolve the Medicare fraud case. And, as of March, 2009, media reports indicate Odyssey is once again under investigation for Medicare and Medicaid fraud.

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