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NEWS

Is your offer document misleading or deceptive?

There is significant uncertainty when it comes to determining whether an offer document is misleading or deceptive.

In this article, partner Selina Nutley looks at what is involved in determining whether an offer document might breach the misleading or deceptive conduct provisions of the law. Selina confirms you need to ask what the product is and who the investor is.

BACKGROUND

If you are involved in preparing a prospectus or PDS, you have the benefit of a statutory defence if 'reasonable steps' have been taken to ensure the document is not defective. However, if you are involved in preparing an information memorandum (IM) you do not have the benefit of the 'reasonable steps' defence.

Conducting due diligence on IMs records a system of inquiry aimed at identifying potential misrepresentations and misleading statements as well as any omissions. This gives wholesale product issuers some comfort they have gathered adequate information to avoid omissions and the statements contained in the IM have been subjected to formal verification.

THE OBJECTIVES OF THE TARGET AUDIENCE

Although the misleading or deceptive conduct test is objective, that is, it is not necessary to prove someone was actually misled or deceived, the objectives of the target audience are still relevant in determining whether the document contravenes the test. The 2012 Federal Court Camelot Derivatives case said:

Once the relevant section or sections of the public, by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested, is identified, then the matter is to be considered by reference to all who come within it, including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, and men and women of various ages pursuing a variety of vocations.

THE TYPICAL RETAIL CLIENT

If the product is a retail product, the Administrative Appeals Tribunal has provided some guidance about the 'typical retail client' in the 2008 Shakespeare Capital case, stating:

The [hypothetical retail person] will typically be reasonably intelligent; at a minimum, the decision-maker should not assume the retail investor is obtuse, unusually stupid, or prone to behave like a "moron in a hurry": ...While not expert in matters of finance, the retail client will exercise ordinary common sense and be reasonably diligent and reflective when deciding whether to make an investment. He or she may be less interested in technical details than regulators sometimes assume. The retail client can read what is plainly explained without drawing unlikely or off-beat conclusions. He or she has a reasonable tolerance for risk, especially where the investment opportunity in question involves financing property development. I do not suggest the individual will be incautious, but he or she is unlikely to approach a document with the lawyer's forensic eye for nuance and heightened sensitivity to risks, both real and imagined.

THE AUDIENCE

Lastly, when considering whether Fortescue Metal's announcement about the Chinese joint venture was misleading, the High Court made the following comments when finding it was not misleading or deceptive:

Fortescue's remarks were not directed to the public as a whole. They were directed to a section of the public. It comprised superannuation funds, other large institutions, other wealthy investors, stock brokers and other financial advisers, specialised financial journalists, as well as smaller investors reliant on advice. This was not a naïve audience. It was not an audience in whom the adjectives "Western Australian", "mining" and "Chinese" would excite a sudden certainty about the imminent creation of wealth beyond the dreams of avarice. It was an audience conscious of the difficulties of creating infrastructure for mining projects in the harsh conditions of Western Australia. It was an audience conscious of their vast expense. It was an audience conscious of the problems of doing so in cooperation with a Chinese group described in the ASX announcement as China's largest construction group. And it would have learned—not from the announcement itself but from the simultaneous media release—that CREC was "a State-owned enterprise in China", the state in question being the People's Republic of China. The audience was sufficiently tough, shrewd and sceptical to know something of the difficulties of "forcing" a builder to build and finance anything...

CONCLUSION

In summary, it can be difficult to say with any certainty whether ASIC will consider an offer document is misleading or deceptive and another thing entirely whether the courts will hold the same view.

Our **Funds Management team** can help out: we conduct reviews of offer documents with a view to complying with the most recent commentary about what is misleading or deceptive.

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