Mirabile Dictu! "Common Stock Does not Constitute an Investment in 'Stock'"

By Keith Paul Bishop on December 9, 2011

Anyone who has picked up a prospectus or a private placement memorandum has undoubtedly seen, if not read, various legends and other warnings. Recently, I came across the following legend in an offering document:

COMMON STOCK DOES NOT CONSTITUTE AN INVESTMENT IN "STOCK" IN THE COMMON SENSE OF THE TERM. PURCHASERS SHOULD NOT PURCHASE COMMON STOCK WITH THE PURPOSE OF MAKING A PROFIT. PARTICULARITY IN LIGHT OF THE TRANSFER RESTRICTIONS AND REDEMPTION RIGHTS OF THE CORPORATION DESCRIBED IN THIS OFFERING DOCUMENT, IT IS VIRTUALLY IMPOSSIBLE FOR ANYONE TO REALIZE A PROFIT ON A PURCHASE OF COMMON STOCK OR EVEN TO RECOUP THE AMOUNT INITIALLY PAID TO ACQUIRE SUCH COMMON STOCK.

Really? Common stock does not constitute an investment in "stock"? While this may seem to be a bit of lawyerly doubletalk, the offering document relates to a very unusual, if not unique, offering. It turns out that the offeror, is the Green Bay Packers, Inc., the operator of the NFL franchise.

Whenever you are selling something denominated as "stock", it would behoove you to consider the federal and state securities laws. In this regard, at least four issues come to mind. Must the offer and sale be registered under the Securities Act of 1933 and state blue sky laws? Must officers, directors and employees who participate in the offering register as broker-dealers or agents? Must any advertising of the offering be filed with state securities administrators? Finally, must the issuer register the shares pursuant to Section 12(g) of the Securities and Exchange Act of 1934?

The Packers' offering document makes clearly discloses that the common stock being offered cannot appreciate in value and that investors won't be able to recoup their investment either through resale or liquidation. Undoubtedly, this is intended to negate the argument that the common stock constitutes an investment contract under the *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946).

Here in California, the question may be more difficult in light of the California Supreme Court's decision in *Silver Hills Country Club v. Sobieski,* 55 Cal. 2d 811 (1961) adopting the "risk capital"

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definition of a “security”. Unlike the *Howey* test, the “risk capital” test does not require an expectation of profit but instead focuses on such factors as whether the following questions:

- Are the funds being raised for a business venture or enterprise?
- Is the offering being made indiscriminately to the public?
- Are the investors substantially powerless to affect the enterprise’s success?
- Is the investor’s money at risk due to inadequate security?

While I understand that the Packers have sought no-action/interpretive advice from some state securities regulators, I don’t know whether they sought or obtained advice from California’s Commissioner of Corporations. For example, you can read the advice from the Arkansas Securities Department here.

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A note on “Mirabile dictu” - This is a Latin phrase meaning “wonderful to say”. The great Roman Poet, Publius Vergilius Maro (aka “Vergil”), used the line in *The Georgics*, a poem about farming and nature (think culture meets agriculture): “*Quin et caudicibus sectis—mirabile dictu— truditur e sicco radix oleagina ligno*.” *The Georgics* (Bk. 2, lines 30-31). In popular culture, the phrase makes an appearance in the 1973 film, *The Exorcist,* in the following interchange between the Demon and Father Karras:

Demon: Mirabile dictu, don’t you agree?
Father Damien Karras: You speak Latin?
Demon: Ego te absolvo