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8th Circuit Finds No Affirmative Reporting Obligation in Standard Indenture Covenant

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The U.S. Court of Appeals for the Eighth Circuit recently joined a growing number of courts holding that an issuer does not breach its obligations under an indenture when it fails to timely make SEC filings. The indenture provisions in these cases were based on common industry forms. Going forward, lawyers and clients ought to be cognizant that commonly used industry forms of indentures may not provide any indenture remedy for untimely SEC filings.

In *UnitedHealth Group, Inc. v. Wilmington Trust Co.*,[1] the indenture required that the issuer "shall cause copies of all current, quarterly, and annual financial reports . . . which the Company is then required to file with the Securities and Exchange Commission . . . to be filed with the trustee . . . within 15 days of filing with the Commission." Due to an ongoing stock options backdating investigation, the issuer did not file a Form 10-Q on schedule, though it did file supplemental 12b-25 notices of late filing containing substantially the information that would have been in the 10-Q. The indenture trustee, acting on behalf of bondholders, asserted that the issuer's delinquency constituted a breach under the indenture agreement, the Trust Indenture Act (TIA) and implied covenants of good faith and fair dealing. UnitedHealth requested a declaratory judgment that it had committed no such breach. The district court granted summary judgment in favor of UnitedHealth, finding no breach of the indenture.

On appeal to the Eighth Circuit, the court held that the language of the indenture stopped short of actually requiring the issuer to comply with securities law reporting requirements. The dispute turned on the phrase "which the Company is then required to file with the [SEC]" within the specific indenture provision at issue. The indenture trustee argued that this wording created a regulatory compliance covenant in addition to a requirement that the issuer transmit the filed reports to the trustee. The court found the language grammatically unambiguous, however, and sided with the issuer. According to the Eighth Circuit, the indenture merely required the company to transmit to the trustee copies of whatever reports the issuer **actually** files with the SEC; the issuer had fulfilled that requirement, the court indicated, even if the SEC could quibble with its regulatory compliance.

Similarly, the court found no breach under the TIA. Although the TIA imposes a statutory obligation to provide copies of SEC reports to the indenture trustee, the court found that the TIA did not expressly adopt the SEC's filing requirements as its own. The TIA "imposes no new obligations or duties" and was even less burdensome than the indenture agreement's requirements in that the TIA did not provide an exact time limit for fulfilling the ministerial obligation. The court further rejected the trustee's arguments that in a world of electronic filing and freely available regulatory information, the TIA and the indenture would be meaningless without an affirmative reporting obligation. Because the TIA and the form upon which the indenture was based predated electronic SEC filing, however, the court found no credence in the argument that it should be read to account for new advances in information availability

In response to the trustee's arguments that the issuer had breached an implied covenant of good faith and fair dealing, the court focused on whether the trustee and the bondholders suffered any actual harm. Although it did not timely file its 10-Q, the issuer had filed various 12b-25 notices of late filing that offered accurate estimates regarding its financial condition. Those estimates were within one percent of the amounts set forth in the certified 10-Q that the issuer filed late. Because no actual harm had occurred and the issuer had taken "all reasonable and necessary steps to provide its noteholders with as much information as possible and as accurately as possible," the court found no breach of the covenant of good faith and fair dealing.

Although the Eighth Circuit's opinion in *UnitedHealth* is the first reported appellate ruling on the issue, three lower federal courts have previously reached the same conclusion in other cases, all of them interpreting nearly identical language under similar circumstances.[2] Federal district courts in the Northern District of California and the Northern and Southern Districts of Texas, each interpreting New York law, found that the language in their particular indenture agreements (all based on common forms) did not create an affirmative compliance requirement.[3] The Eighth Circuit in *UnitedHealth* cited these earlier cases and expressly adopted their reasoning.[4] Also the *UnitedHealth* court expressly rejected the reasoning of *Bank of New York v. BearingPoint, Inc.*, where a New York state trial court had found that the issuer was in breach of the indenture covenant and concluded that not requiring compliance would "make SEC filings optional."[5] Notably, each of the district courts addressing the issue since *BearingPoint* have similarly rejected this reasoning in favor of strict contract interpretation.[6]

Taken collectively, these federal court decisions suggest that *BearingPoint* is not considered persuasive authority, at least in jurisdictions outside New York. Under the *UnitedHealth* reasoning, something more than a mere regulatory failing will be necessary to assert a breach of the indenture where the indenture does not itself impose a regulatory compliance covenant. Contextual arguments for implying such obligation will not be implied over the indenture's actual wording.

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[1] *UnitedHealth Group, Inc. v. Wilmington Trust Co.*, 548 F.3d 1124 (8th Cir. 2008).

[2] *See Finisar Corp. v. U.S. Bank Trust Nat'l Assoc.*, No. C 07-4052 JF (PVT), 2008 WL 3916050 at *6 (N.D. Cal. Aug. 25, 2008) (finding no default under indenture where issuer filed copies of its reports with the trustee within fifteen days of actually filing with the SEC); *Affiliated Computer Servs., Inc. v. Wilmington Trust Co.*, No. 3:06-CV-1770-D, 2008 WL 373162 at *8 (N.D. Tex. Feb. 12, 2008) ("Because ACS filed its belated form 10-K and 10-Q with Wilmington within 15 days after filing them with the SEC, ACS is entitled to judgment declaring that it is not in breach of § 4.03(a) of the Indenture."); *Cyberonics, Inc. v. Wells Fargo Bank Nat'l Assoc.*, No. H-07-121, 2007 WL 1729977 at *4 (S.D. Tex. June 13, 2007) ("The phrase 'which the Company is required to file with the SEC pursuant to…the Exchange Act' is a modifier of the types of reports that Cyberonics is required to deliver to Wells Fargo, not an additional obligation.").

[3] *Id.*

[4] *See UnitedHealth*, 548 F.3d at 1130 (citing to and adopting the reasoning of *Finisar*, *Affiliated Computer Services*, and *Cyberonics*).

[5] *Bank of N.Y. v. BearingPoint, Inc.*, No. 600169/06, 2006 WL 2670143 at *7 (N.Y. Sup. Ct. Sep. 1, 2006).

[6] *See UnitedHealth*, 548 F.3d at 1130 ("The *Finisar, Affiliated Computer Services*, and *Cyberonics* courts all considered and rejected *BearingPoint*, as did the district court in this case.").