

***Bon Secours Community Investment Fund v. Network Technologies Group*, Case No.: 24-C-03-001338, 2003 MDBT 7 (Circuit Court for Baltimore City)(2003)(per Evelyn Omega Cannon)**

The Defendant Ellin & Tucker, Chartered (“E&T”) moved for dismissal of Count 1 of the complaint against it, alleging that it failed to state a claim under the Maryland Securities Act (Md. Code, Corps. & Associations, §11-101 (1999)(“the Act”). E&T served as auditor to defendant Network Technologies Group, Inc. (“NTG”) in 2000 and 2001. On March 4, 2002, NTG sold over 350,000 shares of NTG stock to Bon Secours for a purchase price of greater than \$1 million. Within four months of the transaction, plaintiff alleges that it discovered that NTG had misled investors regarding its financial condition; consequently Bon Secours lost more than \$1 million.

E&T moved to dismiss for three reasons: (1) it was not in privity with or have a direct relationship with Bon Secours; (2) it was not an investment advisor to Bon Secours; and (3) as an accounting firm, it was expressly excluded from the definition of investment advisor. Bon Secours countered that E&T was liable as an aider and abettor and as an agent of NTG.

Held: An E&T principal performed many of the functions of the Chief Financial Officer of NTG. Additionally, at this stage it is possible to infer that E&T “materially aided” in the sale because it knowingly made false statements that it knew Bon Secours would rely upon.

Synopsis: Section 11-101 (h)(2)(iii) defines when an account is, or is not, an agent; an agent would be potentially liable. An accountant is not an agent if performance of investment advisory services is solely incidental to the practice of the profession. The court distinguishes the decision of Baker, Watts v. Miles & Stockbridge, 95 Md. App. 145 (1993) because in the case at E&T was doing more than engaging in traditional advisory functions: one of its officers essentially served as chief financial officer of NTG and it also performed its audits and advised and consulted on financial projections and other financial documents, knowing that those documents were being prepared specifically for Bon Secours. Moreover, E&T was directly involved in advising NTG regarding the value of NTG and assisting it to plan a negotiation strategy for determining the purchase price of the securities to be issued by Bon Secours.