E

n el caso que empezamos a comentar en el número anterior de Contrapartida, se lee: “(…) *When xxx hired defendant in February 2011, defendant did not complete an independent audit but relied on previous reports and defended the valuation of the assets [Id. ¶ 67]. Even after a report from zzz questioned the valuation of xxx assets, defendant represented to shareholders that the valuation was accurate and that the article was inaccurate [Id. ¶¶ 68–69].* (…)”. El problema no fue la correspondencia entre el juicio del auditor y la evidencia conocida. Sino la validez de ésta.

El juez razonó: “(…) *Taking the allegations as true, and viewing the second amended complaint as a whole, a reasonable person could conclude that defendant was aware that the financial statements and audits were misleading because defendant consistently failed to follow GAAP and GAAS principles as well as defendant’s own internal policies. Accordingly, the Court finds that plaintiffs have sufficiently pled a claim under Section 10(b) and Rule 10b-5(b)*. (…)”. En nuestro país muchos practicantes conscientemente reducen el alcance del examen. Así las cosas, no pueden pensar que sus conclusiones son acertadas. No basta decir que el dictamen corresponde con la evidencia obtenida. Hay que demostrar que ésta fue válida y suficiente.

Adviértase que “(…) *The relationship between a company and its independent auditor is not distinct from the relationship between a speaker and a speechwriter. Just as a speaker is ultimately free to say whatever he or she chooses, regardless of what the speechwriter drafted, a company is free to present whatever financial statements it chooses, regardless of an auditor’s opinion.* (…)” Ciertamente la última palabra no la tiene el auditor, sino el cliente que es el responsable de llevar contabilidad, preparar y difundir estados financieros. Además, “(…) *While auditors assist in the preparation of financial statements, they do not have ultimate authority over the statements and are therefore only secondary actors* (…)”. No faltan los casos en los que los auditores asumen el papel de preparadores, dizque para lograr que los estados financieros queden bien hechos.

“(…) *In the motion to dismiss, defendant argues that for Counts I and II, the 10(b) allegations, plaintiffs have failed to plead scienter, they have failed to plead loss causation, and the two-year statute of limitations bars the claims*. (…)” En los procesos de responsabilidad patrimonial, hay que demostrar una conducta incorrecta, un daño causado, y una relación de causa efecto entre aquella y este. Además, la demanda debe incoarse oportunamente. El juez decidió: “*For the reasons stated above, the Court GRANTS IN PART and DENIES IN PART defendant’s motion to dismiss the second amended complaint [Doc. 63]. The Court finds that plaintiffs have sufficiently pled Counts I and III in the SAC. However, the Court finds that plaintiffs have failed to plead Count II, that is, scheme liability. In addition, the Court DENIES AS MOOT defendant’s original motion to dismiss [Doc. 46].*” Ni negro ni blanco.

*Hernando Bermúdez Gómez*