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Supreme Court Decides When A Statement Of Opinion Can Trigger Section 11 Liability

Omnicare held that a company cannot be liable for an honestly-held opinion simply because it turned out to be objectively false, but left open the possibility of Section 11 liability for material omissions.

The *Omnicare* Litigation

The *Omnicare* case involved a registration statement issued by Omnicare in connection with its December 2005 public offering of common stock. The registration statement contained statements expressing Omnicare's belief that its contractual arrangements complied with "applicable state and federal laws" and were "legally and economically valid arrangements." Pension funds that purchased Omnicare stock in the public offering subsequently brought suit against the company for violations of Section 11 of the Securities Act of 1933, alleging that the "legal compliance" statements in Omnicare's registration statement were materially false and/or misleading because the company was allegedly engaged in various illegal activities.

Section 11 creates a private right of action for an investor who purchases securities pursuant to a registration statement that either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact ... necessary to make the statements therein not misleading."¹ The statute imposes liability for issuing a registration statement containing a material misrepresentation or omission, subject to certain statutory defenses, regardless of whether the issuer intended to deceive or defraud investors.²

In February 2012, the US District Court for the Eastern District of Kentucky dismissed the pension funds' claims with prejudice, holding that the plaintiffs failed to plead an "untrue statement of material fact" under Section 11 because there was no allegation that Omnicare disbelieved the legal compliance statements at the time they were made.³ The US Court of Appeals for the Sixth Circuit reversed.⁴ The Sixth Circuit held that, to state a Section 11 claim based on a statement of opinion, a plaintiff need only allege that the stated opinion was "objectively false." In March 2014, the Supreme Court granted certiorari to address whether, for purposes of a Section 11 claim, a plaintiff may plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong (as the Sixth Circuit concluded), or whether the plaintiff must also allege that the speaker's actual opinion was different from the one expressed (as the Second, Third and Ninth Circuits had held).⁵

The Supreme Court's Decision

Yesterday, in an opinion authored by Justice Kagan, the Supreme Court vacated the Sixth Circuit's decision. Justice Scalia issued a separate opinion concurring in part and concurring in the judgment. Justice Thomas issued an opinion concurring in the judgment. The Court analyzed Section 11 liability for

opinion statements under its two potential bases for liability: (1) the prohibition on making an untrue statement of material fact; and (2) the prohibition on omitting a material fact necessary to make a statement not misleading. The Court unanimously rejected the Sixth Circuit's ruling that a Section 11 claim may be founded solely on allegations that an issuer's genuinely-held statement of opinion was objectively false, and held that the *Omnicare* plaintiffs failed to state a claim under the first category (*i.e.*, for false-statement liability). The Court, however, remanded the case for further proceedings on whether the plaintiffs adequately pleaded a viable claim under Section 11's omissions clause (the second category).

No False-Statement Liability For An Honestly-Held But Wrong Opinion

The Supreme Court first held that, contrary to the Sixth Circuit's holding, Section 11 liability for an untrue statement of fact does not arise simply because a defendant offers an opinion in a registration statement that later proves to be wrong. As the Court explained, unlike a statement of fact (which "expresses certainty about a thing"), a statement of opinion inherently "admits the possibility of error" and "conveys only an uncertain view as to that thing." An opinion statement thus cannot be an "untrue statement of fact" simply because the opinion turns out to be incorrect.

The Court explained that there are two ways in which an opinion statement might give rise to liability under Section 11 as an untrue statement of material fact. First, an opinion statement may give rise to false-statement liability under Section 11 "if the opinion expressed was not sincerely held," because an opinion statement "explicitly affirms one fact: that the speaker actually holds the stated belief."⁶ Second, an opinion statement may also give rise to false-statement liability if it contains "embedded statements of untrue facts."⁷ The Court held that the *Omnicare* plaintiffs could not avail themselves of either of these avenues, however, because the challenged statements were "pure statements of opinion" as to which *Omnicare's* sincerity was not contested.⁸ As the Court explained, "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong."⁹

"No Small Task" To Plead An Omissions Claim For An Opinion Statement

The Supreme Court left open the possibility that *Omnicare's* legal compliance statements could give rise to liability under Section 11's omissions clause. As the Court explained: "[I]f a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then [Section] 11's omissions clause creates liability."¹⁰ For example, the Court explained that, even if literally true, an issuer's statement that "we believe our conduct is lawful" *could* be "misleadingly incomplete" if it made the statement without having consulted a lawyer or in the face of its lawyers' contrary advice, because a reasonable investor may expect such an assertion to "rest on some meaningful legal inquiry."¹¹

In remanding the case for a determination of whether the plaintiffs adequately alleged a viable omissions claim, the Court emphasized that stating a claim under such a theory "is no small task for an investor."¹² The Court made clear that it would not be enough for the plaintiffs to merely recite the conclusory allegations that *Omnicare* "omitted to state facts necessary to make the statements made not misleading" and/or lacked "reasonable grounds for the belief." Rather, a plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion – facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have – whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."¹³ Moreover, the Court emphasized that whether an omission makes an expression of opinion misleading "always depends on context" and may not be "viewed in a vacuum."¹⁴ The requisite analysis must take into account the full context of the statement, including the facts that the company *did* provide, as well as any hedges,

disclaimers or qualifications included in its registration statement. A reasonable investor also “takes into account the customs and practices of the relevant industry,” and understands that “opinions sometimes rest on a weighing of competing facts; indeed the presence of such facts is one reason why an issuer might frame a statement as an opinion, thus conveying uncertainty.”¹⁵ Accordingly, a reasonable investor “does not expect that every fact known to an issuer supports its opinion statement” or is reflected in the regulatory filing.¹⁶

Implications Of *Omnicare*

The Supreme Court’s highly anticipated *Omnicare* decision provides much-needed clarification as to when a statement of opinion can give rise to Section 11 liability and, to the relief of securities issuers, when it cannot. The ruling forecloses plaintiffs from bringing Section 11 claims based solely on opinion statements that later turn out to be wrong, and the Court made clear that Section 11’s false-statement prohibition “does not allow investors to second-guess inherently subjective and uncertain assessments,” and is not “an invitation to Monday morning quarterback an issuer’s opinions.”¹⁷ The Court also emphasized the rigorous pleading requirements for stating an opinion-based Section 11 claim under an omissions theory.¹⁸

At the same time, the Court did not directly address important issues regarding how the *Omnicare* analysis will be applied:

- The Court’s opinion provides relatively little guidance as to when an omission may give rise to Section 11 liability. The Court stated that “to avoid exposure for omissions under [Section] 11, an issuer need only divulge an opinion’s basis, or else make clear the real tentativeness of its belief”¹⁹ – but left it to the lower courts to determine the extent to which the basis of an opinion should be disclosed to accord with a reasonable investor’s expectations, and what more an issuer should say about the “tentativeness” of the belief beyond the inherent uncertainty conveyed by stating the view in the form of an opinion.
- The Court also did not address whether and how its analysis applies outside of Section 11. Much of the *Omnicare* decision has the potential to be equally applicable to other statutes requiring false or misleading misrepresentations or omissions.²⁰

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Endnotes

¹ 15 U.S.C. § 77k(a).

² *Omnicare, Inc. v. Laborers Dist. Council Constr. Industry Pension Fund*, No. 14-435, slip. op. at 2 (U.S. Mar. 24, 2015).

³ *Indiana State District Council of Laborers v. Omnicare, Inc.*, No. 2006-26 (WOB), 2012 WL 462551, at *4–*5 (E.D. Ky. Feb. 13, 2013).

⁴ *Indiana State District Council of Laborers v. Omnicare Inc.*, 719 F.3d 498 (6th Cir. 2013).

⁵ See *Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011); *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993).

⁶ *Omnicare, Inc.*, slip. op. at 7-8.

⁷ *Id.* at 8-9.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² *Id.* at 18.

¹³ *Id.*

¹⁴ *Id.* at 14.

¹⁵ *Id.* at 13.

¹⁶ *Id.* (emphasis in original).

¹⁷ *Id.* at 9.

¹⁸ *Id.*

¹⁹ *Id.* at 19.

²⁰ The decision also does not directly address the audit opinions issued by independent accounting firms. Based on the analysis in *Omnicare*, there is a very strong argument that the falsity standard generally followed prior to *Omnicare* regarding audit opinions should continue unaffected. In particular, a number of courts have held that to establish the falsity of an audit opinion for purposes of the federal securities laws, a plaintiff must plead and prove that an auditor disbelieved its audit opinion or knew it lacked a reasonable basis for the opinion. See, e.g., *In re Puda Coal Sec. Inc. Litig.*, 30 F. Supp. 3d 230, 259 (S.D.N.Y. 2014) (holding that audit opinions “are statements of opinion to which the subjective falsity requirement applies”).