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COMMENTARY

Supreme Court Clarifies Liability Standard for Opinions Expressed in Registration Statements

On March 24, 2015, the United States Supreme Court clarified the circumstances under which a company can be liable under § 11 of the Securities Act for statements of opinion contained in a registration statement. The Court held that a company is not liable for stating an opinion that turns out to be incorrect, as long as the opinion was honestly believed. The Court also held, however, that liability may result if the company omitted material facts about the company's inquiry into, or knowledge concerning, the statement of opinion, and those facts conflict with what a reasonable investor would understand as the basis of the statement when reading it. The Supreme Court's decision provided guidance regarding pleading standards in this area that should help companies seeking dismissal.

The ruling in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* steered a middle ground between the views of the parties in the case. The plaintiff investors had argued that the company should be "strictly liable" whenever an opinion about a material fact turned out to be incorrect. The defendant company, on the other hand, had asserted that it should be immunized from liability for any statement of opinion unless it could be shown that the opinion was not genuinely believed.

Background

The Securities Act of 1933 requires that issuers of securities file a registration statement that provides "full and fair disclosure of information" relevant to the offering.[1] Section 11 of the Act provides that issuers and certain others can be liable to purchasers in the offering if the registration statement contains "an untrue statement of a material fact" or omits to state a material fact that is "necessary to make the statements therein not misleading."[2] Unlike liability to purchasers of securities in the open market, liability for false statements in a registration statement does not require proof that the defendant acted with intent to deceive.[3]

Omnicare, a provider of pharmacy services for residents of nursing homes, issued securities pursuant to a registration statement that contained analyses of the effects of various state and federal laws on its business practices, including its acceptance of rebates from

pharmaceutical manufacturers. The registration statement contained the following statements of opinion:

- "We believe our contract arrangements with other health-care providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws;" and
- "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements …."[4]

The company included several caveats to these statements, including mention of several state-initiated enforcement actions against pharmaceutical manufacturers for offering payments to pharmacies that dispensed their products, and warned that laws relating to that practice might "be interpreted in the future in a manner inconsistent with our interpretation and application."[5] It also warned that the federal government had expressed "significant concerns" about some manufacturers' rebates to pharmacies and stated that its business might suffer "if these price concessions were no longer provided."[6]

When the federal government later sued Omnicare over its receipt of payments from drug manufacturers, company stockholders filed a lawsuit under § 11, claiming that the registration statement contained materially false statements about legal compliance because the company's practices violated anti-kickback laws. The plaintiffs also claimed that the registration statement omitted material facts, including that one of Omnicare's attorneys had warned that a particular contract carried a "heightened risk" of liability under anti-kickback laws.[7] Plaintiffs claimed that none of the company's officers and directors possessed reasonable grounds to believe that the opinions offered in the registration statement were true and complete.[8]

The district court granted Omnicare's motion to dismiss the complaint on the basis that a statement of opinion concerning its legal compliance could be actionable only if those making the statement knew it to be untrue—in other words, knew that the company was in fact violating the law. The Sixth Circuit Court of Appeals reversed, concluding that if a matter stated as an opinion was "objectively false," liability could exist even if the opinion was genuinely believed at the time it was made.[9] The Supreme Court granted *certiorari* "to consider how § 11 pertains to statements of opinion."[10]

The Court's Analysis

The Court divided its analysis in two parts, following the two-prong structure of § 11, which creates liability for both false statements of material facts and omissions to state material facts.

With respect to the first prong, the Court explained that, when an issuer states an opinion or belief, the critical inquiry is whether the issuer actually held the belief, not whether the belief turned out to be correct or even whether it was objectively reasonable. Thus, if an issuer says, "We believe we are in compliance with the law regarding *X*," the issuer cannot be liable under the false statements prong unless it can be shown that the issuer did not genuinely believe that it was in compliance. The fact that the government later took an opposing view, or that a judge or jury later ruled against the issuer, does not make its statement of opinion false. The statement of opinion can only be false if the person making the statement does not actually hold the opinion. Thus Omnicare could not be liable because "a sincere statement of pure opinion" cannot be "an untrue statement of material fact," even if the belief turns out to be wrong.[11]

The "omissions" prong of § 11, however, proved more problematic. The Court concluded that even a sincere statement of opinion can be *misleading* if it omits material facts that a reasonable investor would infer from the statement. For example, when a company makes the statement, "We believe we are in compliance with the law regarding *X*," a reasonable investor would infer that the company had consulted counsel. If it turns out that the company had not consulted counsel, or that counsel had been consulted and had advised that the company was in violation of the law, such an omission would make the statement of belief misleading.

At the same time, the Court made clear that not all facts that might be contrary to a statement of belief would need to be disclosed in order to avoid liability. The Court observed that if a single junior attorney believed the issuer was not in compliance, but several more senior attorneys disagreed, the omission of the views of the junior attorney would not create a problem. Section 11, the Court observed, "creates liability only for the omission of material facts that cannot be squared with" a fair reading of a statement of opinion.[12] Finally, the Court emphasized that in order to survive a motion to dismiss on an

omission theory, it is not enough to make general allegations, such as that the issuer failed to reveal the basis for its opinion or failed to disclose facts that undercut it. The 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. That is no small task for an investor."[13]

What *Omnicare* Means for Issuers

Omnicare provides issuers with the assurance that they will not be held liable for an opinion that is genuinely and reasonably held, even if the opinion turns out to be wrong. Even if an opinion is genuinely believed but not reasonably held, a company will not be liable unless it omitted material information on the basis for that opinion. Moreover, the Court's language suggests that issuers should be able to defeat such claims at the pleading stage of litigation unless the plaintiff can present specific examples of important facts, the concealment of which made the opinion misleading. These protections are vital to public companies and should enable them to provide valuable insights to their investors concerning their view of market trends and relationships with suppliers, customers, and business partners.

At the same time, the Court did not give issuers carte blanche to make misleading statements by dressing them up in the language of opinions. Companies would be well advised to ensure that statements of belief reflect sound business judgments, arrived at through a deliberative process that is reasonable under the circumstances.

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Endnotes

1 *Pinter v. Dahl,* 486 U.S. 622, 646 (1988).

2 15 U.S.C. § 77k(a).

3 *Herman & MacLean v. Huddleston,* 459 U.S. 375, 381-82 (1983).

4 *Omnicare,* slip op. at 3.

5 *Id.*

6 *Id.*

7 *Id.* at 3-4.

8 *Id.* at 4.

9 719 F.3d 498, 506.

10 Slip op. at 4.

11 *Id.* at 9.

12 *Id.* at 14.

13 *Id.* at 18.