Supreme Court Decides Omnicare

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When an Opinion May Be Considered a Statement of Fact

Overview

On March 24, 2015, the Supreme Court issued its ruling in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, resolving a split among the circuits as to how opinions included in registration statements under the Securities Act of 1933 can be actionable as misstatements of facts. Specifically, in reversing an outlier Sixth Circuit decision, the Court (divided on rationale but not result), held that statements of opinion may not be considered untrue statements of fact, but that they could be actionable if those opinions, in context, omit material facts about how the issuer arrived at its conclusions. The Court continued that if a reasonable investor would be misled by an opinion that omits a material fact relevant to the opinion, then the issuer could incur liability for a material misstatement of fact under § 11 of the Securities Act.

The Case

Omnicare, a pharmaceutical services company, stated in a registration statement:

- We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.
- We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

These statements were followed by disclosures about pending enforcement actions against pharmaceutical manufacturers that paid pharmacies for distributing their products. The original plaintiff—a pension fund—purchased Omnicare securities and later sued Omnicare when it was discovered that payments received from drug manufacturers may have violated anti-kickback statutes. Its theory of liability was that the two statements of belief were "materially false" because Omnicare later turned out to be breaking anti-kickback statutes.

The district court granted Omnicare's motion to dismiss the complaint, but the Sixth Circuit reversed, stating that the pension fund only needed to show that the statements were "objectively false" to be actionable under § 11. The Supreme Court granted certiorari to determine how opinions should be evaluated under § 11.

The Holding

Section 11 of the Securities Act provides that issuers are liable for their registration statements that either "contain an untrue statement of a material fact" or "omit to state a material fact . . . necessary to make the statements therein not misleading." The Court readily dispensed with the idea that a statement of opinion that later turns out to be incorrect, as above, could amount to an untrue statement of fact, particularly because the statements were prefaced by the language "we believe." Because a statement of opinion necessarily includes uncertainty, it cannot, contrary to the Sixth Circuit Court's analysis, be construed as a statement of fact.

The Court acknowledged, however, that simply tagging a statement with a disclaimer that it represents merely an opinion represented an overly broad exculpation (accepted by the other Circuits) and adopted an "omissions analysis." An opinion, the Court continued, could still create liability under § 11 if it omits material facts about the issuer's knowledge about or inquiry into a particular statement and those

omissions would cause a reasonable investor to be misled. This does not mean that every statement must disclose all information about how the opinion was formed, nor does it mean that the statement must be read in isolation. The context of the statement should be included when evaluating whether a reasonable investor would be misled by a material omission. And because the Sixth Circuit had not evaluated the case under omissions analysis framed in this way, the case was remanded to ask and answer whether the pension fund had asserted a properly supported claim.

Takeaways

Omnicare creates both clarity and murkiness when it comes to treatment of "opinions" or "forward looking statements" under § 11. It confirms the position that honestly held opinions cannot be construed as misstatements of fact and provides guidance for how registration statements should be drafted. However, allowing for examination of the objective reasonableness of a stated opinion, in the light of the potential of misleading an investor, opens opportunities for litigation and likely fact-intensive inquiries on a case-by-case basis. Plaintiff class action lawyers are already reevaluating their strategies for § 11 claims under the omissions theory and focusing on what basis issuers formed their opinions as a path of recourse. *Omnicare* may have the result of increasing the cost of preparing registration statements since counsel for both issuers and underwriters will have to struggle with appropriate back-up support for obvious statements of opinion or expectation.

Epilogue

Following the *Omnicare* decision, on March 30, 2015 the Supreme Court vacated a Second Circuit decision affirming a dismissal of a class action securities, and remanded it for further consideration of the facts disclosed in connection with certain opinions expressed by the issuer (*Freidus v. ING Group N.V.*).

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