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Litigation Alert

Supreme Court Clarifies Scope of Section 11 Liability for "False Opinions" in *Omnicare* Decision

On Tuesday, March 24, 2015, the US Supreme Court issued a decision providing guidance on the scope of liability for "false opinions" in offering materials under Section 11 of the Securities Act of 1933. In *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, the Supreme Court clarified that Section 11 does not provide strict liability for sincerely held statements of pure opinion and that a plaintiff must plead more than simply that an opinion turned out in retrospect to be incorrect. However, the Supreme Court stopped short of providing absolute immunity for opinions and held that defendants may face claims for opinion statements where a plaintiff establishes that the opinion was not sincerely or reasonably held at the time or where the opinion includes embedded facts that are false. In addition, the Supreme Court held that opinions may serve as the basis for actionable omission claims under Section 11, where the omitted information is material and renders the opinion misleading. This decision will have important implications for issuers when considering if and how to disclose opinions in their offering materials.

Section 11 is often used by plaintiffs as it creates a near presumption of strict liability for material misstatements in offering materials. Once a plaintiff proves that a registration statement or prospectus contains a material misrepresentation or omission, the issuer and its directors and underwriters as well as accountants and certain other professionals are strictly liable to purchasers, subject to certain affirmative defenses and statutory standing requirements. Unlike Section 10(b) liability, Section 11 does not require the plaintiff to plead scienter, loss causation or reliance.

In Section 11 cases involving statements of pure fact, liability often can therefore be relatively straightforward. Cases can be difficult to dismiss at the pleading stage since no questions of scienter are raised. However, when the misstatement involves a "false opinion" or "soft information," the analysis is more complicated since the statement can be either objectively false (the content of the opinion was not true) or subjectively false (the person making it did not actually believe the opinion was true), or both objectively and subjectively false.

Prior to *Omnicare*, the Circuits were split regarding whether both subjective and objective falsity was required in a Section 11 case. The Sixth Circuit held in the underlying *Omnicare* decision that a plaintiff need only show objective falsity. This raised a very serious concern regarding hindsight liability, even for opinions that were sincerely held. In contrast, the Second, Third and Ninth Circuits all required both objective and subjective falsity in order to establish Section 11 liability. Plaintiffs in these circuits raised concerns and argued that subjective falsity is inherently difficult to prove.

The Supreme Court's decision in *Omnicare* appears to be an attempt to address concerns raised by both sides and to strike a balance. In doing so, the Supreme Court rejected the Sixth Circuit's position that objective falsity is sufficient to establish liability for a statement of opinion under Section 11. The Supreme Court found that because a statement of pure opinion is expressing only a view and not a certainty, as long as the opinion was sincere it was not a misstatement of fact regardless if the opinion held was ultimately incorrect. In other words, as long as a statement of pure opinion is sincerely held, it cannot create Section 11 liability as an affirmative misstatement. The Supreme Court acknowledged that holding otherwise would be "an invitation to Monday morning quarterback an issuer's opinions."

However, the Supreme Court declined to extend this immunity to opinions under an omission theory of liability. The Supreme Court held that, in some circumstances, a statement of opinion may convey facts about how the speaker formed the opinion or about the basis for holding the view. And if the real facts are different from the conveyed facts, then the opinion could be misleading and create omission liability. The Supreme Court noted that Omnicare's statement of opinion, "[W]e believe our conduct is lawful," could convey that some meaningful legal inquiry was taken to determine whether the conduct was lawful, such as consulting a lawyer. And if no meaningful inquiry was taken or if the inquiry in fact suggested the conduct was unlawful, then the opinion as stated could be misleading if those facts were not disclosed. Thus, the Supreme Court shifted the focus away from the subjective truth of the statement to the reasonableness and context of the stated opinion.

The Supreme Court, however, cautioned that 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." Accordingly, plaintiffs will face a difficult burden in bringing Section 11 claims based upon statements of opinion.

In *Omnicare,* the Supreme Court ultimately remanded the case to the lower court for a determination of whether plaintiffs adequately stated a viable omission claim, but instructed the lower court that it must consider the hedges, disclaimers and qualifications included in the registration statement as well as the information counter to the company's opinion disclosed. In light of Omnicare's disclosure of State enforcement actions and concerns raised by the federal government concerning legal compliance it is unlikely that the lower court will find an actionable and material omission in this case notwithstanding allegations that Omnicare omitted information regarding a purported warning from an attorney.

The decision provides important guidance for companies to avoid liability with respect to opinions disclosed in offering materials:

First, statements of opinion should be clearly identified as such by using language such as "we believe" or "we think." However, as noted by the Court, such phrases are not "magic words" to avoid liability and companies need to be aware that such statements can still be found actionable depending on the context and any relevant undisclosed facts.

Second, statements of opinion should not include any embedded or implied untrue factual statements. In the example given by the Supreme Court, "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access," the statement is an opinion but it contains an embedded fact (the ownership of patented technology) that would lead to strict liability if untrue.

Finally, a company should consider disclosing any relevant counter-facts to balance the opinion provided. As noted by the Supreme Court, opinions can be actionable if the plaintiff is able to establish facts that would effectively contradict the basis of the opinion and those facts were not disclosed. Ensuring that any opinions have reasonable basis and any relevant counter-facts are disclosed will go a long way in helping to avoid liability.

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