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Supreme Court Sets Standard for Section 11 Opinion Statement Liability in *Omnicare* Ruling

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In its much-anticipated decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* ("*Omnicare*"), No. 13-435 (Mar. 24, 2015), the United States Supreme Court held that an honestly-held statement of opinion is not actionable as a misstatement of fact under Section 11 of the Securities Act of 1933, regardless of whether the opinion could be characterized as "objectively false." Recognizing a different form of opinion liability, however, the Court held that a valid Section 11 claim may exist if the omission of material facts relating specifically to the basis for the opinion renders the opinion statement misleading. This latter ruling may, at least until more guidance is provided, invite more Securities Act claims attacking statements of opinion, particularly in jurisdictions, including the Second and Ninth Circuits, where proof of subjective falsity previously was required for all forms of opinion liability.

A. Background

Omnicare, Inc. ("Omnicare") is the nation's largest provider of pharmacy services for nursing home residents.[i] Plaintiffs' Section 11 claims are based on alleged misstatements and omissions in the registration statement filed in connection with Omnicare's public offering of common stock that took place on December 15, 2005.

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Specifically, Plaintiffs criticize two statements in Omnicare's registration statement: (i) "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"; and (ii) "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."[ii] Plaintiffs allege that "Omnicare was engaged in a variety of illegal activities including kickback arrangements with pharmaceutical manufacturers and submission of false claims to Medicare and Medicaid" and that, as a result, the statements of opinion regarding Omnicare's legal compliance were materially false and misleading.[iii]

The district court dismissed Plaintiffs' Section 11 claims, holding that "statements regarding a company's belief as to its legal compliance are considered 'soft' information," and are only actionable if the speaker "knew [they] were untrue at the time."[iv] The Sixth Circuit reversed, holding that Plaintiffs were not required to allege that Omnicare disbelieved the opinions at the time they were expressed (i.e., "subjective falsity") to state a Section 11 claim, but rather needed to allege only that the speaker's stated belief was "objectively false."[v]

B. The *Omnicare* Decision

Justice Kagan delivered the opinion of the Court and, in contrast to the lower courts, separately considered Plaintiffs' claims under Section 11's "misstatement" and "omission" prongs.[vi] As detailed below, while the Court held that the "untrue statement of a material fact" prong of Section 11 does not allow investors to challenge sincerely-held statements of pure opinion on the basis that they are "objectively false,"[vii] a claim will be viable under Section 11's "omission" prong if an investor can "identify particular (and material) facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."[viii] The Sixth Circuit's decision was thus vacated, and the case was remanded for consideration of Plaintiffs' omission claim under the standard articulated by the Court.

I. Honestly Held Pure Statements of Opinion Cannot Be Challenged as Material Misstatements of Fact Under Section 11

Plaintiffs expressly disclaimed any argument that Omnicare's statements of opinion regarding legal compliance were not honestly held. The issue under Section 11's misstatement prong thus was whether an honestly-held statement of opinion could be actionable on the grounds that it was "objectively false." The Court held it could not be, rejecting the Sixth Circuit's holding to the contrary.[ix]

The Court observed that the difference between "fact" and "opinion" is "ingrained in our everyday ways of speaking and thinking," and that Section 11 "effectively incorporated just that distinction" by exposing issuers to liability not merely for "untrue statements" (which would have included statements of opinion), "but only for 'untrue

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statement[s] of . . . *fact*.'"[x] The Court noted that the only fact explicitly affirmed in every statement of opinion is that "the speaker actually holds the stated belief."[xi] Thus, if the speaker honestly holds his or her stated opinion (which was conceded in *Omnicare*), the fact that the speaker's belief turns out to be wrong is not enough to allege an "untrue statement of a material fact" under Section 11. As the Court put it, "[t]hat clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments."[xii]

II. The Court Opens the Door to Section 11 Omission Claims Challenging Statements of Opinion, but with Important Limits

The Court then considered an issue not addressed by the lower courts in *Omnicare*: when, if ever, the omission of a fact can make a statement of opinion, even if honestly held, actionable under Section 11. The Court held that, as applied to statements of opinion, Section 11's omission clause requires considering the foundation a reasonable investor would expect the issuer to have had before stating the opinion in question.[xiii] As the Court explained: "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed an opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience."[xiv] Thus, "if 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," Section 11's omission clause could create liability.[xv] Under this standard, a viable Section 11 omission claim can be stated if the investor can "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."[xvi]

The Court observed that meeting that standard would be "no small task for an investor,"[xvii] and stressed that its holding does not permit plaintiffs to bring omission claims "by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion."[xviii] The Court further stated that issuers are not required to disclose every fact that cuts against the opinion statement, stating that "[r]easonable investors understand that opinions sometimes rest on a weighing of competing facts."[xix] Ultimately, the Court noted, "whether an omission makes an expression of opinion misleading always depends on context."[xx] The Court recognized that its holding would require lower courts to make fact-specific determinations as to what a "reasonable person . . . would naturally understand a statement to convey beyond its literal meaning,"[xxi] but noted that "courts have for decades engaged in just that inquiry."[xxii] The Court accordingly vacated the Sixth Circuit's decision and remanded for consideration of whether Plaintiffs had stated a viable omission claim under the standard articulated by the Court.[xxiii]

C. Significance of *Omnicare*

From the defense perspective, while the Court's repudiation of the Sixth Circuit's "objective falsity" standard for Section 11 material misstatement claims is an important victory, the Court's omissions analysis could invite more Securities Act claims attacking statements of opinion. Issuers frequently offer statements of opinion concerning "inherently subjective and uncertain assessments," including, for example, with respect to matters required by GAAP (such as goodwill calculations, reserves or loss contingencies). In the wake of *Omnicare*, an issuer cannot be confident that Section 11 challenges to such opinions will be subject to dismissal simply because the plaintiff is unable to adequately allege subjective falsity. Accordingly, issuers may need to consider, among other things, whether or the extent to which statements of opinion can or should be coupled with appropriate caveats (beyond those that inhere in the very nature of an opinion) or with an elucidation of the rationale or basis underlying the opinion. And with relatively little guidance from the Supreme Court on how to apply a context-specific standard, the outcomes in Section 11 cases challenging statements of opinion on an omission theory can be expected to vary depending upon the judge. Having said that, the Supreme Court's admonition that going the omissions route will be "no small task for investors," and its seeming requirement of a tight and specifically pleaded nexus between the opinion and a truly important omitted fact regarding its basis, bear emphasis. Properly construed, we believe the Court's decision should allow potential opinion liability based on omissions in a relatively narrow set of cases rather than open the floodgates to opinion-focused claims.

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This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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[i] Plaintiffs filed their original complaint in February 2006 as a putative class action alleging violations of § 10(b), Rule 10b-5 and § 20(a) of the Securities and Exchange Act of 1934. *See Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d 935, 939 (6th Cir. 2009). Plaintiffs later amended the complaint to add a § 11 claim. On October 12, 2007, the district court granted Omnicare's motion to dismiss the original complaint in its entirety. *See Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 527 F. Supp. 2d 698 (E.D. Ky. 2007), *aff'd in part, rev'd in part*, 583 F.3d 935 (6th Cir. 2009). On October 21, 2009, the Sixth Circuit affirmed the district court judgment regarding all claims except the § 11 claim, which was remanded to the district court for further analysis. *See Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 583 F.3d at 947. Plaintiffs were then granted leave to amend the complaint to assert the § 11 claims at issue in *Omnicare*.

[ii] *Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, No. 13-435, 575 U.S. ___, 2015 WL 1291916, at *4 (Mar. 24, 2015).

[iii] *Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 501 (6th Cir. 2013) *cert. granted sub nom. Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 134 S. Ct. 1490, 188 L. Ed. 2d 374 (2014) and *vacated and remanded sub nom. Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, No. 13-435, 2015 WL 1291916 (Mar. 24, 2015).

[iv] *Ind. State Dist. Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, No. CIV.A. 2006-26 WOB, 2012 WL 462551, at *4-5 (E.D. Ky. Feb. 13, 2012) *aff'd in part, rev'd in part and remanded*, 719 F.3d 498 (6th Cir. 2013) *vacated and remanded sub nom. Omnicare, Inc. v. Laborers Dist. Council Const. Indust. Pension Fund*, No. 13-435, 2015 WL 1291916 (Mar. 24, 2015).

[v] *Omnicare*, 719 F.3d at 506.

[vi] Section 11 provides in relevant part: "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . [may] sue." 15 U.S.C. §77k(a).

[vii] *Omnicare*, 2015 WL 1291916, at *7.

[viii] *Id.* at *10.

[ix] As the Sixth Circuit itself recognized, its decision in this regard was in conflict with decisions from the Second and Ninth Circuits. *See Fait v. Regions Fin. Corp.,* 655 F.3d 105 (2d Cir. 2011); *Rubke v. Capitol Bancorp Ltd.,* 551 F.3d 1156 (9th Cir. 2009).

[x] *Omnicare*, 2015 WL 1291916, at *10 (emphasis in original).

[xi] *Id.* at *6. The Court did recognize, however, that a statement of opinion can also contain embedded statements of fact. The Court illustrated this point in the following example: "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access." In that example, the Court stated, whether the TVs actually did use a patented technology was a statement of fact that, if material, could be actionable under Section 11's misstatement prong. The Court stressed, however, that the statements at issue in *Omnicare* contained no embedded facts and were pure statements of opinion. *See id.* at *6-7.

[xii] *Id.* at *7.

[xiii] *Id.* at *8, 10.

[xiv] *Id.* at *8.

[xv] *Id.*

[xvi] *Omnicare*, 2015 WL 1291916, at *10.

[xvii] *Id.*

[xviii] *Id.*

[xix] *Id.* at *8.

[xx] *Id.* at *9.

[xxi] *Id.* at *10.

[xxii] *Omnicare*, 2015 WL 1291916, at *11.

[xxiii] *Id.* Although Omnicare's registration statement contained some caveats accompanying its legal compliance opinion statements, Plaintiffs contended that one of Omnicare's attorneys had warned that a particular contract carried a heightened risk of liability. *Id.* at *4. The Court instructed that, on remand, the lower court would need to determine whether the complaint adequately alleged that the registration statement omitted a fact that would have been material to a reasonable investor and, if so, whether that omission rendered Omnicare's legal compliance opinions misleading, taking into account such things as the statements' context. *Id.* at *12.