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Supreme Court Clarifies Liability for Statements of Opinion in Registration Statements

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The U.S. Supreme Court ruled today that a statement of opinion in a registration statement cannot be actionable as a misstatement of fact under § 11 of the Securities Act of 1933 if the issuer actually believed the opinion expressed. However, the statement of opinion can be actionable on an omissions theory if the registration statement omits material facts about the issuer's inquiry into, or knowledge about, the statement of opinion and if those omitted facts conflict with what a reasonable investor would have expected from a contextual reading of the statement of opinion.

The Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* could lead to additional litigation about whether statements of opinion are actionable, but the Court imposed some important constraints on investors' ability to assert § 11 claims predicated on statements of opinion.

Factual Background

Omnicare is a securities class action alleging that Omnicare made material misrepresentations and omissions about its compliance with certain legal and regulatory requirements. In connection with a securities offering, Omnicare issued a registration statement that outlined various legal risk factors concerning the company's business and expressed the company's "belief" that it was in compliance with applicable law (for example, "[w]e 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 "[w]e believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements").

A securities class action was later filed against Omnicare, eventually focusing on § 11 claims challenging Omnicare's statements of "belief" about its legal compliance. Unlike the anti-fraud provisions of the Securities Exchange Act of 1934, the Securities Act does not require proof of scienter. An issuer is strictly liable under § 11 if a registration statement contains "an untrue statement of a material *fact* or omit[s] to state a material *fact* required to be stated therein or necessary to make the statements therein not misleading" (emphasis added).

Omnicare argued that its expressions of "belief" about its legal compliance were statements of opinion, which could not be *factually* false or misleading unless the speaker did not actually believe the opinion expressed. The District Court granted Omnicare's motion to dismiss, but the Court of Appeals for the Sixth Circuit reversed. The Sixth Circuit held that, because § 11 is a strict-liability statute that does not depend on the issuer's state of mind, a plaintiff can state a § 11 claim if the statement of opinion includes a material misstatement, even if the statement accurately conveyed the speaker's belief. In so holding, the Sixth Circuit disagreed with decisions from the Second and Ninth Circuits reaching the opposite conclusion.

The Supreme Court vacated the Sixth Circuit's decision and remanded for further consideration.

The Supreme Court's Decision

The Court, in an opinion by Justice Kagan joined by six other Justices, followed the language of § 11 and divided the analysis into two parts: whether Omnicare's expressions of "belief" about legal compliance constituted "untrue statement[s] of . . . material fact" and whether Omnicare "omitted to state a material fact . . . necessary to make the statements [in its registration filing] not misleading."

The Court distinguished statements of fact from statements of opinion and held that "a sincere statement of pure opinion is not an 'untrue statement' of material fact,' regardless whether an investor can ultimately prove the belief wrong." Such a statement asserts only that the speaker believes the point stated – and, if he or she actually does believe it, the statement cannot be factually false. Accordingly, the Court ruled that Omnicare's statements about its "belief" that it was complying with the law were not actionable as misstatements of fact, because plaintiffs did "not contest that Omnicare's opinion was honestly held."

But although the Court concluded that "a statement of opinion is not misleading just because external facts show the opinion to be incorrect," it held that "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the 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." Thus, depending on the statement's context, even a sincerely held opinion can be misleading if it causes the reader to believe that the speaker had a sufficient basis for his or her opinion and if the statement omits material facts that could cause the reasonable reader to reassess that belief.

For example, if an issuer expresses its belief about its legal compliance, but does so "without having consulted a lawyer," the statement "could be misleadingly incomplete. In the context of the securities market, an investor, though recognizing that legal opinions can prove wrong in the end, still likely expects such an assertion to rest on some meaningful legal inquiry – rather than, say, on mere intuition, however sincere. . . . He expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time. 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, then § 11's omissions clause creates liability."

The Court held that the context of a registration statement can create such expectations. "Registration statements as a class are formal documents . . . . Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life." A statement of opinion in a registration statement can therefore create the impression that the issuer has a basis for the statement – and it can lead to liability if no such basis exists.

The Court emphasized, however, that it was not creating broad omissions liability for all statements of opinion.

First, the Court held that, "to avoid exposure for omissions under § 11, an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief." Disclosure of that information should preclude any claim that the statement of opinion is actionable on an omissions theory.

Second, the Court stressed that "[a]n opinion statement . . . is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. Reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty." Accordingly, an omissions claim should not lie simply because some alleged (undisclosed) fact might undermine the basis for the opinion expressed.

Third, the Court emphasized that, because statements of opinions must be read contextually, investors must evaluate such statements "in light of all [their] surrounding text, including hedges, disclaimers, and apparently conflicting information. . . . So an omission that renders misleading a statement of opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame."

Fourth, an investor asserting a § 11 omissions claim based on a statement of opinion "cannot just say that the issuer failed to reveal its basis [for the opinion]. Section 11's omissions clause, after all, is not a general disclosure requirement; it affords a cause of action only when an issuer's failure to include a material fact has rendered a published statement misleading. To press such a claim, an investor must allege that kind of omission – and not merely by means of conclusory assertions. . . . The investor 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."

Omnicare's Implications

The *Omnicare* decision is not a surprise, in light of the Court's apparent discomfort at oral argument with a blanket rule that statements of opinion can never be actionable under § 11 unless the issuer did not actually hold the expressed opinion. While some litigants would surely have preferred such a bright-line rule, the Court's decision places some important restrictions on investors' ability to challenge statements of opinion under § 11.

First, an issuer need not disclose *all* facts supporting or undercutting its expressed opinion. Normal principles of materiality still apply. As the Court recognized, "[a] reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement."

Second, and relatedly, an issuer can reduce the risk of § 11 liability by "including hedges, disclaimers, and apparently conflicting information." For example, an issuer wishing to express its belief in its compliance with law can note the existence of any private or governmental litigation – and any conflicting legal decisions – on the matter at issue and can include cautionary language warning that courts or regulators could view the factual and legal issues differently than does the issuer. Most issuers already disclose pending litigation and, in some circumstances, investigations in their registration statements and other SEC filings; they also normally include risk factors about compliance with law. Any expressions of opinion about legal compliance can refer to those disclosures and risk factors. Issuers will presumably need to consider privilege issues in deciding what information to disclose about their opinions.

Third, issuers can take some comfort from the Court's unwillingness to countenance generalized, conclusory assertions about alleged omissions and lack of reasonable basis for opinions expressed. While the Court cited the general notice-pleading standard articulated in *Ashcroft v. Iqbal*, the *Omnicare* decision applies specifically in the § 11 context, so issuers will undoubtedly focus on this language if they believe that plaintiffs have not pled "particular (and material) facts going to the basis for the issuer's opinion."

Subsequent cases will explore whether and to what extent *Omnicare* applies to claims under § 10(b) of the Securities Exchange Act, which – unlike § 11 – requires plaintiffs to prove the defendants' knowledge (or at least recklessness) as to falsity. If *Omnicare* allows § 11 liability where an issuer omits material information about the basis for its opinions, must a § 10(b) plaintiff prove that the issuer acted with the requisite scienter in omitting that information?

Moreover, if *Omnicare* applies to § 10(b) cases involving opinions, investors will presumably need to satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act of 1995 (the "PSLRA") in specifying the "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." The pleading standard that *Omnicare* cited should not suffice in a PSLRA case.