Second Circuit Reinforces Liability Standard in Securities Cases Based on Statements of Opinion

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INTRODUCTION

The U.S. Court of Appeals for the Second Circuit reinforced the stringency of the new standard for liability in securities cases arising from allegedly misleading statements of opinion. Construing the Supreme Court's 2015 decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Second Circuit held in *Gen. Partners Glenn Tongue v. Sanofi Pharmaceuticals, Inc.* (March 4, 2016) that a statement of opinion does not become misleading based on allegedly omitted material facts unless the omitted facts *conflicted* with what a reasonable investor would have understood from the statement itself. The Second Circuit's decision helps to flesh out the evolving jurisprudence on when statements of opinion can be actionable under *Omnicare* based on an omissions theory, rather than a misrepresentation theory.

***Omnicare* and Liability for Opinions**

Before the Supreme Court decided *Omnicare* in 2015, the Second Circuit – like many other courts – had held that the securities laws do not impose liability for a statement of opinion or belief unless the statement was "both objectively false and disbelieved by the defendant at the time it was expressed." The rationale was that, if a person states an opinion or belief, rather than a hard, verifiable fact, the statement cannot be "false" unless the speaker actually disbelieves the opinion.

Omnicare altered the Second Circuit's liability standard for statements of opinion by distinguishing between liability for material misrepresentations and liability for material omissions. The Supreme Court confirmed that an expression of opinion cannot be a *misrepresentation* unless "'the speaker did not hold the belief she professed' or 'the supporting fact[s] she supplied were untrue.'" But, as the Second Circuit recognized in *Sanofi*, the Supreme Court also held that "opinions, though sincerely held and otherwise true as a matter of fact, may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor." The *Sanofi* decision addressed *Omnicare*'s new standard for liability based on alleged omissions.

Background of the *Sanofi* Case

The *Sanofi* case involved Sanofi's statements about a new "break-through" drug. Before the Food and Drug Administration (the "FDA") approved the drug in 2014, Sanofi and the drug's previous owner had expressed opinions about the timing of expected FDA approval, the drug's anticipated launch date, and the company's optimism about the drug's trial results. Although the drug received FDA approval, the approval came later than expected because of the FDA's initial concern about the use of "single-blind," rather than "double-blind," studies in the clinical trials – a concern that the FDA ultimately overcame.

Shareholders who had purchased contingent-value rights – whose value was tied to the achievement of certain milestones in the drug's development – brought securities claims, contending that Sanofi's and the predecessor owner's statements of opinion were misleading because defendants had not disclosed the FDA's concern about the use of single-blind studies. The District Court dismissed the case, holding that plaintiffs had failed to state a claim. The Second Circuit affirmed and wrote an opinion "principally to examine the impact of" *Omnicare* on the District Court's decision and on prior Second Circuit precedent (particularly the court's 2011 decision in *Fait v. Regions Financial Corp.*).

The Second Circuit's Decision

The court began by acknowledging that *Omnicare* had "altered the standard announced by this Court in *Fait*," which had held that statements of opinion or belief cannot be actionable unless the speaker actually disbelieved the expressed opinion. Under *Omnicare*, courts now must also consider whether the opinion constitutes a potentially misleading omission, which could arise if "a reasonable investor, upon hearing a statement of opinion from an issuer, '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.'" The Second Circuit held (quoting *Omnicare*) that "[t]he core inquiry is whether the omitted facts would 'conflict with what a reasonable investor would take from the statement itself.'"

Focusing on *Omnicare*'s "conflict" language, the Second Circuit held that defendants' expressions of opinion did not materially mislead investors. The court found "no plausible allegation that the FDA's interim feedback [about its preference for double-blind studies] conflicted with any reasonable interpretation of Defendants' statements about FDA approval." Although the FDA had raised issues about the testing methodology, it had also said that those issues could be overcome – as, in fact, they were. Thus, "[t]here can be no conflict inferred from a [corporate] statement of optimism consistent with the FDA's instructions as to the treatment results necessary for approval."

The Second Circuit also observed that *Omnicare* itself had rejected the argument that an opinion is misleading "'when an issuer knows, but fails to disclose, some fact cutting the other way.'" According to the Second Circuit, *Omnicare* does not require issuers "to include a fact that would have potentially undermined Defendants' optimistic projections" as long as the disclosures "'fairly align[] with the information in the issuer's possession at the time.'" "Certainly, Plaintiffs would have been interested in knowing about the FDA feedback, and perhaps would have acted otherwise had the feedback been disclosed, but *Omnicare* does not impose liability merely because an issuer failed to disclose information that ran counter to an opinion expressed in [an SEC filing]."

Nor will an issuer's statements of opinion be misleading merely because a government regulator disagrees with them. "[S]o long as Defendants conducted a 'meaningful' inquiry and in fact held th[e] view [expressed], the statements [will] not mislead in a manner that is actionable."

Implications

The *Sanofi* decision helps to clarify the post-*Omnicare* standard for omissions liability arising from allegedly misleading opinions.

First, the decision should squarely focus litigants and courts on whether allegedly omitted facts *conflicted* with how a reasonable investor would have interpreted a statement of opinion. Absent such a conflict, a statement of opinion should not be actionable on an omissions theory.

Second, the decision reinforces that an issuer need not disclose *every* fact relating to the opinion, even if some of those facts "cut[] the other way." Investors are "not entitled to so much information as might have been desired to make their own determination about" the matter as to which the issuer has expressed its opinion.

Third, the decision – like the *Omnicare* ruling – stresses "the need to examine the context of an allegedly misleading opinion." Relevant considerations can include the issuer's overall disclosures, the investors' sophistication, and the market's general awareness of the "'customs and practices of the relevant industry'" (in this case, the process for FDA approval of new drugs).

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