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Supreme Court Limits Liability for Opinion Statements in Registration Statements

By Susan E. Hurd

On March 24, 2015, the Supreme Court issued its long-awaited decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*.[1] Justice Kagan delivered the opinion of the Court, which resolved a Circuit split concerning whether a statement of opinion, as opposed to a statement of fact, could give rise to liability under Section 11 of the Securities Act of 1933.[2] The Supreme Court rejected the Sixth Circuit's broad view on liability, noting that Section 11 "is not, as the Court of Appeals . . . would have it, an invitation to Monday morning quarterback an issuer's opinions."[3]

This recent *Omnicare* decision is important for two reasons. First, as noted above, the Supreme Court refused to embrace a broad view of potential liability under Section 11. Second, in a decision that will prove helpful to defendants at the motion to dismiss stage, the Court provided clear instructions as to the type of facts that must be pled for Section 11 claims to survive dismissal. This aspect of the Court's ruling raised the bar for plaintiffs attempting to plead such claims. *Omnicare* directs that plaintiffs must come forward with specific facts to support an omissions theory. Conclusory allegations that merely restate the legal standard are insufficient. *Omnicare* gives defendants a road map to follow in opposing Section 11 claims based on opinion statements or mixed statements of opinion and fact.

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1 Slip op., No. 13-435 (Mar. 24, 2015).

2 Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito and Sotomayor joined in the opinion of the Court. Justice Scalia filed an opinion concurring in part and concurring in the judgment. Justice Thomas also filed a separate opinion concurring in the judgment.

3 *Omnicare*, slip op. at 9.

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Background on Section 11

Under Section 11, it is unlawful to sell securities pursuant to a registration statement if that document "contain[s] an untrue statement of material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading."[4] A purchaser of stock may seek damages for violations of Section 11 against the issuer of the stock and certain other designated parties and, unlike other provisions of the federal securities laws, the buyer need not prove that the defendants acted with an intent to deceive or defraud.[5] The Court's ruling in *Omnicare* tracked the two distinct paths for liability for the contents of a registration statement under Section 11—"one focusing on what the statement says and the other on what it leaves out."[6]

The District Court and Court of Appeals Decisions

The issue before the lower courts was whether Omnicare, a pharmacy services company, could be liable for certain statements of opinion made in the registration statement filed in connection with its public offering of stock. Plaintiffs argued that two statements in the registration statement—both of which expressed the company's belief that it was in compliance with certain legal requirements—were sufficient to state a claim under Section 11.[7]

Plaintiffs' theory was that the company's contractual arrangements violated the anti-kickback laws and, thus, these representations of legal compliance were materially false and actionable. As the Supreme Court acknowledged, plaintiffs also offered an omissions theory of liability, *i.e.*, that Omnicare had omitted material facts from its registration statement that made these representations of legal compliance misleading to investors.[8]

The District Court granted Omnicare's motion to dismiss. It held that statements of opinion are "soft information" that are actionable only if those who made them knew they were untrue at the time they were made.[9] The Court of Appeals for the Sixth Circuit disagreed and held that, even though the statements at issue were statements of opinion, not fact, plaintiffs need only allege that the stated beliefs were "objectively false" to state a claim. According to the Sixth Circuit, the plaintiffs did not have to allege that anyone at Omnicare "disbelieved" these opinions at the time they were expressed.[10]

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4 15 U.S.C. § 77k(a).

5 *Omnicare*, slip op. 2.

6 *Id.*

7 *Id.* at 2-3. Omnicare's registration statement explained that "[w]e believe our contract arrangements . . . are in compliance with applicable federal and state laws" and "[w]e believe that our contracts . . . are legally and economically valid arrangements . . . ." *Id.* at 3.

8 *Id.* at 3-4.

9 *Id.* at 4.

10 *Id.*

The Supreme Court's Analysis

As noted above, the Supreme Court's opinion tracks the distinction found within the text of Section 11—namely, that a plaintiff may have a claim based on a false statement of material fact or a claim based on an omission of fact that causes another statement to be materially misleading. The Court first addressed the issue of whether Omnicare had made any "untrue statement[s] of . . . material fact" when it offered its views on legal compliance. The Court rejected the Sixth Circuit's view that "a statement of opinion that is ultimately found [to be] incorrect—even if believed at the time made—may count as an 'untrue statement of material fact.'"[11] The Court felt that this interpretation "wrongly conflates facts and opinions."[12] This was so because a statement of fact "expresses certainty about a thing, whereas a statement of opinion . . . does not."[13] Section 11 also speaks specifically in terms of "untrue statements . . . of *fact*" and not "untrue statements" in general.[14]

The Court concluded, however, that these concepts "still leave[] some room" for the application of the false statement section of Section 11 to expressions of opinion.[15] For example, "[e]very [opinion] statement explicitly affirms one fact: that the speaker actually holds the stated belief."[16] Thus, if the speaker states a belief that he or she does not actually hold, that would be an untrue statement of fact and, thus, the first part of Section 11 "would subject the issuer to liability (assuming the misrepresentation were material)."[17] Also, sometimes a sentence that begins with opinion words like "I believe" can contain embedded statements of fact that could be actionable under Section 11. This would occur, for example, when a speaker includes statements of fact that supposedly form the basis of the belief being expressed. Section 11 liability might attach (assuming materiality) "not only if the speaker did not hold the belief she professed but also if the supporting facts she supplied were untrue."[18]

Even though liability could in theory exist under these scenarios, the Court held that the first part of Section 11 could be of no assistance to the *Omnicare* Plaintiffs because the two statements they challenged were "pure statements of opinion" and they did not contend that the stated beliefs were not honestly held.[19] Plaintiffs nevertheless argued that Omnicare should be liable because its belief in the legality of its contracts ultimately proved to be wrong, *i.e.*, the contracts violated the anti-kickback laws. But "a sincere statement of pure opinion is not an 'untrue statement of material fact'" under the first component of Section 11 because "[t]hat clause . . . does not allow investors to second-guess inherently subjective and uncertain assessments."[20]

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11 *Id.* at 6.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* at 7.

16 *Id.*

17 *Id.* at 8.

18 *Id.* at 9.

19 *Id.*

20 *Id.*

The Supreme Court then moved on to consider whether plaintiffs could state a claim as to the omissions provision of Section 11. The Court observed that all parties to the appeal had conceded that whether a statement is misleading under an omissions theory "depends on the perspective of a reasonable investor."[21] Thus, the question for the Court to decide was "when, if ever, [an] omission of a fact can make a statement of opinion like Omnicare's, even if literally accurate, misleading to an ordinary investor."[22]

The Court first rejected Omnicare's position that no such claim was possible. Omnicare had argued that no reasonable person would understand a statement of opinion to communicate anything more than the speaker's own mindset. To be sure, the Court agreed with Omnicare that a statement of opinion is not misleading simply because external facts show the opinion to be incorrect.[23] This is so because "[r]easonable investors do not understand such statements as guarantees . . . ."[24] But the Court concluded that this viewpoint could only go so far because, depending on the circumstances, a reasonable investor might understand an opinion statement to convey facts about how the speaker formed his or her opinions.[25] "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 [Section 11's] omission clause [can] create liability."[26]

The Court, however, made clear that "a[n] omission statement . . . is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way."[27] Reasonable investors understand that opinions may be based on weighing of competing facts and, thus, they "do[] not expect that *every* fact known to an issuer supports its opinion statement."[28] The Court also stressed that the "full context" in which an opinion is offered is crucial.[29] A reasonable investor is expected to read each statement in a registration statement "in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information" as well as the customs and practices of the relevant industry.[30] Therefore, an omission that might make a statement seem misleading if considered "in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame."[31]

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21 *Id.* at 10.

22 *Id.*

23 *Id.* at 11.

24 *Id.*

25 *Id.*

26 *Id.* at 12.

27 *Id.* at 13.

28 *Id.*

29 *Id.* at 14.

30 *Id.*

31 *Id.*

The Court was also clear that its ruling in *Omnicare* did not expand the scope of potential liability under Section 11. In other words, no claim can be stated "by alleging only that an opinion was wrong" because, to be actionable, the complaint "must as well call into question the issuer's basis for offering the opinion."[32] In addition, a claim based on an opinion statement will not survive dismissal simply because "the issuer failed to reveal its basis" or the plaintiff alleges in general that the issuer "lacked 'reasonable grounds for the [stated] belief.'"[33] Section 11 affords a cause of action only when the "failure to include a material fact has rendered a published statement misleading."[34] The Court stressed that conclusory assertions that merely "recit[e] the statutory language" will be insufficient.[35] And, importantly for defendants, the Court went even further and explained that "[t]he 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."[36] As the Court observed, "[t]hat is no small task for an investor."[37]

Because neither court below had considered an omissions theory in light of the proper standard, the Supreme Court returned the case to the lower courts to perform this analysis.[38] The Supreme Court did not rule specifically on the question of whether the *Omnicare* Plaintiffs had sufficiently pled a Section 11 claim for the two opinion statements at issue in the case.[39]

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32 *Id.* at 17.

33 *Id.* at 18-19.

34 *Id.* at 18.

35 *Id.* at 18-19

36 *Id.* at 18.

37 *Id.*

38 *Id.* at 20.

39 The Court did allude to certain allegations in the case, such as the claim that an attorney had warned Omnicare that one of its contracts carried a heightened risk of legal exposure under the anti-kickback laws. *Id.* The Court stated that the inquiry into the sufficiency of these allegations would entail examination of such matters as the attorney's status and expertise and other legal information available to Omnicare at the time. *Id.* This commentary suggests that the mere fact the plaintiffs had alleged that one person, even an attorney, viewed a contract as legally "risky" without more factual support would be insufficient to plead Section 11 liability under the standards set forth in the Court's opinion.

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If you have any questions or would like additional information please contact your Alston & Bird attorney or any of the following:

Lisa R. Bugni
404.881.4959
lisa.bugni@alston.com

Gidon M. Caine
650.838.2060
gidon.caine@alston.com

Craig Carpenito
212.210.9582
craig.carpenito@alston.com

Jessica Perry Corley
404.881.7374
jessica.corley@alston.com

Charles W. Cox
213.576.1048
charles.cox@alston.com

Todd R. David
404.881.7357
todd.david@alston.com

Mary C. Gill
404.881.7276
mary.gill@alston.com

Susan E. Hurd
404.881.7572
susan.hurd@alston.com

Brett D. Jaffe
212.210.9547
brett.jaffe@alston.com

John A. Jordak, Jr.
404.881.7868
john.jordak@alston.com

John L. Latham
404.881.7915
john.latham@alston.com

Robert R. Long
404.881.4760
robert.long@alston.com

Theodore J. Sawicki
404.881.7639
tod.sawicki@alston.com

Brandon R. Williams
404.881.4942
brandon.williams@alston.com

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777
BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719
CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111
DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899
LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213.576.1100
NEW YORK: 90 Park Avenue ■ 15th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444
RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260
SILICON VALLEY: 1950 University Avenue ■ 5th Floor ■ East Palo Alto, CA 94303-2282 ■ 650.838.2000 ■ Fax: 650.838.2001
WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333