Client Alert

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Context, Reasons, Hedges, and Disclaimers: The Supreme Court's Ruling in *Omnicare* May Shape Whether and How Companies Express Opinions

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The Supreme Court's decision yesterday in *Omnicare Inc. v. The Laborers District Council Construction Industry Pension Fund*, No. 13-435 (U.S. March 23, 2015) articulated the standard of liability for statements of opinion. At its core, the decision endorses the uncontroversial notion that public companies must have a reasonable basis supporting any opinions they disclose. What constitutes a reasonable basis will depend on what a reasonable investor would expect, unless the opinion is accompanied by disclosure of the actual basis for the expressed opinion.

Strictly speaking, the *Omnicare* ruling addresses the standard of liability for statements of opinion published in registration statements that are filed in connection with a public offering of securities. The ruling, however, might have some spillover effect that shapes whether and how public companies and those that speak on their behalf express opinions in other types of investor communications. To minimize the risk of liability, *Omnicare* hints of a new best practice: either don't opine (which may not be practical in many cases), or accompany any volunteered opinion with the actual reasons supporting it, and appropriate context, including "hedges, disclaimers, or qualifications."[1] More disclosure, not less, may be the order of the day.

CONTEXT FOR THE OPINION

In *Omnicare*, the Supreme Court addressed the standard of civil liability under Section 11 of the Securities Act for statements of opinion. Section 11 applies to statements contained in registration statements that are issued in connection with initial public offerings and other registered securities offerings.

The plaintiffs alleged that Omnicare violated Section 11 when it expressed its belief, in connection with its public offering of common stock, that the company complied with legal requirements. For example, Omnicare stated: "We believe our contract arrangements . . . are in compliance with applicable federal and state laws."[2] After those statements were published, the federal government filed civil complaints alleging that Omnicare received payments that violated anti-kickback laws. According to the plaintiffs, Omnicare's statements were materially misleading because Omnicare did not disclose that it was violating the law. To support that claim, the plaintiffs alleged that one of Omnicare's attorneys had warned that a particular contract carried a risk of liability under the anti-kickback laws. The district court granted Omnicare's motion to dismiss. The Sixth Circuit Court of Appeals reversed. The Supreme Court, in turn, granted review to consider how Section 11 pertains to statements of opinion, which the Court helpfully defined as a "sentiment" that does not "imply definiteness or . . . certainty," as contrasted with a "statement of fact," which "expresses certainty about a thing," is "determinate," and "verifiable."[3]

[1] Slip op. at 20.

[2] *Id.* at 3.

[3] *Id.* at 6.

THE OPINION

The Court's opinion in *Omnicare* hinges on the text of the statute. The Court explained that an investor may pursue a claim under Section 11 if a registration statement contains either (1) an "untrue statement of material fact"—what *Omnicare* calls the "false-statement provision"—or (2) "omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading"—what *Omnicare* calls the "omissions provision."[4] Because Section 11 is a "strict liability statute," a plaintiff can recover damages under either of these provisions for proving falsity without having to prove that the defendant intended to defraud investors.

The Court squarely ruled that "a statement of opinion is not misleading just because external facts show the opinion to be incorrect," casting aside the ruling of the Sixth Circuit in the decision under review.[5] More is required. Under *Omnicare*, liability for statements of opinion will arise under Section 11 in the following circumstances:

First, a statement of opinion is actionable under the false-statement provision of Section 11 if the statement is not sincerely believed. That is because a statement of opinion (an assertion like "we believe X") conveys the fact that the speakers actually hold the stated belief. If that is not actually the case, then the statement is false.[6]

Second, a statement of opinion is actionable under the false-statement provision of Section 11 if the opinion contains an "embedded statements of fact."[7] For example: "We believe X because of Y fact." If Y is untrue, then there may be liability because the supporting fact supplied is untrue.

Finally, a statement of opinion is actionable under the omission provision even when it is literally accurate and sincerely held if the 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."[8] As previewed in our previous client alert on the case, this third liability hook was pressed by the Solicitor General, who participated in the case as amicus on behalf of the United States, and is the aspect of the *Omnicare* decision that forges some new ground.

THE REASONS SUPPORTING THE OPINION

Justice Kagan, writing for the Court, reasoned that opinion liability under the omissions clause makes sense: "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."[9] Relying on common law tort principles, the Court's decision points out that "an expression of an opinion may carry with it an implied assertion, not only that the speaker knows no facts which would preclude such an opinion, but that he

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[4] *Id.* at 2, 7, 10.

[5] *Id.* at 11.

[6] *See id.* at 6–8.

[7] *Id.* at 8.

[8] *Id.* at 12.

[9] *Id.* at 11.

does know facts which justify it."[10] That implied assertion, according to the Court, requires a speaker to have a reasonable basis for an expressed opinion (or an express disclosure that the opinion lacks a reasonable basis).

That is not to say that any undisclosed fact will trigger liability for a statement of opinion. An opinion statement "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way."[11] That is so, the decision posits, given that "[r]easonable 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."[12] The Court went on to emphasize that a "reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement."[13]

The Court brushed aside Omnicare's argument that companies will avoid expressing opinions because, according to Omnicare, "any inquiry into the issuer's basis for holding an opinion would be 'hopelessly amorphous,' threatening 'unpredictable' and 'possibly massive liability.'"[14] For one thing, the scope of liability, the Court explained, reflects a "policy" decision that is better left to Congress, which extended omissions liability to "all statements"—not just statements of fact.[15] And, in any event, "market-based forces push back against any inclination to underdisclose," the Court assured.[16]

The Court was also not persuaded that the floodgates would open to more shareholder lawsuits. Establishing liability for an opinion under the omissions theory will be "no small task for an investor," Justice Kagan wrote.[17] An investor cannot come to court and "just say that an issuer failed to reveal its basis" for an opinion.[18] Instead, an investor will have to "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 at statement at issue misleading to a reasonable person reading the statement fairly and in context."[19]

HEDGES AND DISCLAIMERS

The Court volunteered guidance on how to "avoid exposure for omissions" under Section 11.[20] An issuer "need only divulge an opinion's basis, or else make clear the real tentativeness of its belief."[21] That may be done by "including hedges, disclaimers, and apparently conflicting information" that could be taken into account by an investor.[22] The decision thereby highlights the importance of "context" as providing the "broader frame" by which

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[10] *Id.* at 15 (citations omitted).

[11] *Id.* at 13.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 17.

[15] *Id.*

[16] *Id.* at 19.

[17] *Id.* at 18.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 19.

[21] *Id.*

[22] *Id.* at 14.

liability must be assessed by lower courts. That analytical approach echoes the “holistic” type of analysis that the Court has previously mandated in other recent securities cases.[23]

The Supreme Court remanded to the lower courts to consider whether Omnicare’s statements of opinion were misleading, especially in light of context, including, among other factors, the status and expertise of the attorney who allegedly warned Omnicare about the risk of liability under the anti-kickback statutes, the disclaimers and other information that Omnicare disclosed about its legal compliance, and Omnicare’s express cautions that the federal government had expressed significant concerns about some manufacturers’ conduct.[24] How the lower courts ultimately resolve these issues in the case may help define the limits or extent of liability for similar statements of opinion.

DIFFERING OPINIONS

Although all of the Justices concurred in the judgment vacating the Sixth Court of Appeals ruling in favor of the plaintiffs, two wrote separate opinions. Justice Scalia would have limited liability to statements of opinion that were not sincerely held. The “objective test” adopted by the Court, Justice Scalia wrote, is “inconsistent with the common law and common intuitions about statements of opinion” and “invites roundabout attacks upon expressions of opinion.”[25] He added that the Court’s decision “produces a far broader field of misrepresentation”[26] that will invite more second guessing in hindsight by disgruntled investors. Justice Thomas filed a separate concurring opinion expressing his view that the Court should not have reached the omissions theory because it was not addressed by the lower courts.

KEY TAKEAWAYS

The *Omnicare* decision will affect whether and how opinions are communicated in registration statements. It may also shape, to some extent, how courts approach liability even for statements alleged to be misleading where a material fact is omitted from other investor communications. That is because the statutory language at issue in *Omnicare* is similar to more than a dozen other federal securities laws provisions. One key difference, however, is that civil liability under other statutes like Section 10(b) of the Securities Exchange Act of 1934—the federal securities statute most frequently invoked by private plaintiffs—requires proof of scienter, unlike Section 11. That means that, with respect to opinion statements made outside of registration statements, plaintiffs must show not only a material misstatement or omission, but also that a defendant did not believe his or her opinion and intended to deceive investors, a high hurdle for plaintiffs to overcome.

Going forward, public companies, their speakers, and the gatekeepers who advise them (including in-house and external counsel) should give special consideration to expressions of opinion that are communicated to the investing public. A prudent approach would be to accompany statements of opinion with the actual basis for the belief, the reasons for that belief, and qualifications of the opinion, including caveats or statements of tentativeness. In addition, documents supporting the basis for every statement of opinion should be verified, preserved, and readily accessible if litigation is filed. Indeed, doing so can significantly help bolster the defense of claims relating to all types of public statements, not just statements of opinion.

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[23] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007).

[24] Slip op. at 3.

[25] Slip op. at 6 (Scalia, J., concurring).

[26] Slip op. at 3 (Scalia, J., concurring).

For better or worse, more disclosure may be the best defense to those who might “Monday morning quarterback an issuer’s opinions,” as the Court described, particularly with regard to “inherently subjective and uncertain assessments.”[27] Given that it is plaintiffs’ lawyers who tend to play that role, redoubled diligence and caution in expressing various types of qualitative statements about a company’s business may be the surest way for issuers and insiders to minimize the risk of securities liability going forward.

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[27] Slip op. at 9.