

Omnicare: Supreme Court Sets Liability Tests for Issuers' Statements of Opinion in Public Offerings

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On Tuesday, March 24, 2015, the Supreme Court issued its decision in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. ____ (2015). The ruling identifies two avenues by which a company's statements of opinion in registration statements for initial public offerings can lead to liability under Section 11 of the Securities Act of 1933. First, an issuer can be liable for statements of opinion that are not genuinely believed or contain embedded statements of untrue facts. Second, an issuer can be liable if a registration statement omits specific material facts concerning a proffered opinion, as determined by the statement's context and the foundation a reasonable investor would expect an issuer to have for forming that opinion. In the future, issuers will need to carefully craft specific cautionary language accompanying any opinions in their registration statements. In addition, prior to filing the registration statement, issuers should also consider how best to memorialize the resolution of any internal diversity of views with respect to the opinion's subject matter.

Background and Procedural History

Plaintiffs in *Omnicare* challenged a registration statement by a pharmaceutical company that included management's opinions that company contracts were in compliance with federal and state law. Plaintiffs claimed the opinions were materially misleading, based on alleged kickbacks from drug manufacturers and citing subsequent lawsuits against the company by the federal government. The district court granted a motion to dismiss, finding that the statements regarding legal compliance were only false if the speakers knew they were untrue at the time.

The Sixth Circuit reversed, reasoning that because Section 11 functions as a "strict liability" statute, it was irrelevant whether or not the defendants subjectively believed the opinions when they were published. The Sixth Circuit held that even a genuinely held opinion may result in liability under Section 11 if a shareholder adequately pleads that it was material and was "objectively false." Defendants appealed to the Supreme Court.

In a 9-0 opinion by Justice Kagan,¹ the Court articulated two methods for alleging and assessing liability for opinions under Section 11: (1) where an opinion qualifies as a misstatement of fact; and (2) where an opinion is misleading due to the omission of material facts.

When is an Opinion a Misleading Statement Under Section 11?

The Court agreed with defendants that an opinion does not qualify as a misstatement simply because it is or later proves to be erroneous. Instead, for an opinion to result in liability as an untrue statement under Section 11, a plaintiff must show that the speaker did not actually believe the opinion at the time it was offered. For example, Justice Kagan noted that an executive's opinion that a company's marketing practices were lawful would be a false statement if that executive knew otherwise when he or she offered the opinion.

The Court also noted that certain statements of opinion may contain “embedded statements of fact.” Such opinions may qualify as misstatements if the embedded fact is not true – for example, if a CEO were to express an opinion attributable to a “patented technology,” where no such patented technology existed.

When Can an Opinion Lead to Liability for an Omission Under Section 11?

Turning to an issue not addressed by the Sixth Circuit, the Court held that opinions may lead to Section 11 liability if the 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.” The Court cautioned that an opinion is not misleading simply because an issuer fails to disclose some fact that cuts against the opinion. Rather, Justice Kagan instructed courts to consider “the foundation [a reasonable investor] would expect an issuer to have before making the statement.”

Omnicare offers several guideposts to issuers and shareholders alike. The Court stated it is not enough to allege in conclusory fashion that an issuer did not have reasonable grounds for its opinions. Rather, a plaintiff “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.” This, Justice Kagan stressed, “is no small task” for the plaintiff. Such analysis “must address the statement’s context,” focusing on whatever facts the issuer *did* provide as well as “any other hedges, disclaimers, or qualifications it included in its registration statement.”

The Court vacated and remanded the case for further proceedings consistent with its holdings.

Takeaways from *Omnicare*

With respect to the holding on truly believed opinions, while some commentators had predicted otherwise, the Court’s reversal of the Sixth Circuit on this ground was virtually unavoidable. A ruling that an honestly believed *opinion* could be an actionable misstatement of *fact* merely because it is ultimately incorrect would have improperly conflated those distinct concepts, with far-reaching consequences for securities litigation beyond Section 11 itself. Also, it would have had a dramatic chilling effect on issuers’ willingness to offer any opinions.

As for omissions and opinions under Section 11, because *Omnicare*’s inquiry focuses on the speaker’s “basis for offering the opinion,” the “foundation” a reasonable investor “would expect an issuer to have,” and “reading the statement fairly and in context,” there will be considerable room for future disagreement between the defense and shareholder plaintiffs’ bars. Nevertheless, the confirmation that these alleged omissions must be pled with specificity and must be material to a reasonable investor is helpful to issuers.

After *Omnicare*, it seems likely that future Section 11 complaints involving opinions will be pled strategically under an omissions theory, not as direct misstatements (absent a “smoking gun”). Companies preparing for an offering should pay close attention to any statement that may qualify as an opinion and carefully review the “hedges, disclaimers or qualifications” directly tied to that opinion in the registration statement. The Supreme Court instructed that this “context” is critical to determining whether an omission is material and misleading.

Moreover, in instances where an issuer is faced with an internal diversity of views about an opinion, the crafting of the disclosure language is not the only critical step for the company and its counsel. How those diverse views are resolved and memorialized may be critical, should a Section 11 suit concerning that opinion reach the discovery phase.

If you have questions about the case discussed above or securities litigation, please contact one of the [Securities Class Action Defense](#) attorneys listed below:

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¹ Justice Scalia concurred in part and concurred in the judgment, and Justice Thomas filed a separate concurrence in the judgment.