The Supreme Court Vacates Sixth Circuit Holding on Liability for Statements of Opinion or Belief under Section 11

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In our May 2013 Alert, we indicated that the Supreme Court likely would review the Sixth Circuit’s decision in *Indiana State Dist. Council v. Omnicare, Inc.*, 719 F.3d 498 (6th Cir. 2013) (commonly referred to as “*Omnicare II*”), in which the court rejected the pleading requirements articulated by the Second and Ninth Circuits for alleging a claim under Section 11 of the Securities Act for statements of opinion or belief. In *Omnicare II*, the Sixth Circuit held that a plaintiff need only allege facts showing that the belief was objectively wrong and not the additional requirement imposed by the other circuits of facts showing that the defendant also did not believe the statement. In *Omnicare, Inc. v. Laborers District Council Const. Industry Pension Fund*, No. 13-435 (Slip. Op., March 24, 2015), the U.S. Supreme Court vacated *Omnicare II* and set forth pleading standards for a Section 11 claim that differ for claims based upon (1) a statement of opinion alleged to misrepresent material facts or (2) a statement of opinion alleged to be misleading due to the omission of material facts.

First, the Supreme Court held that a mistaken belief or opinion is not an “untrue statement of a material fact” under Section 11. Agreeing with the Second and Ninth Circuits, the Court held that a plaintiff must allege that the opinion was mistaken and that the defendant disbelieved the statement. The Supreme Court elaborated that when a statement of opinion contains embedded statements of facts, such as the basis of the opinion, allegations of facts showing that the embedded facts are false would be sufficient to state a claim. The Court offered the example of a CEO indicating that she believed that the company’s product is the best due to the use of patented technology to which competitors do not have access. In that case, depending on the circumstances, the investor may be able to state a claim if the company does not use or possess such technology. The Supreme Court held that the plaintiff Fund did not plead such allegations and that it could not sustain a claim based upon an untrue statement of material fact.

Second, the Court did not set forth an equally clear cut standard with respect to Section 11 liability for an omission of fact necessary to make an opinion “not misleading.” The High Court initially recognized that “a statement of opinion is not misleading just because external facts show the opinion to be incorrect.” The Supreme Court, nonetheless, found that even if the defendant sincerely believed in the accuracy of a statement of opinion or belief, a plaintiff can nonetheless state a claim by alleging facts that “call into question the issuer’s basis for offering the opinion.” According to the Court, a reasonable investor would expect that when management offers an opinion in a registration statement on a material subject, that the assertion rests on “some meaningful” inquiry or “expected inquiry” or “fairly aligns with the information in the issuer’s possession at the time.” The Court’s support for this premise included a statement in a leading treatise that “the expression of 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 does know facts which justify it.” The Court ultimately formulated that standard as: “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.”
The Court did clarify that an opinion statement is not necessarily misleading when the issuer knows, but does not disclose, facts that are contrary to the opinion offered. “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.” Moreover, the Court emphasized that because “whether an omission makes an expression of opinion misleading always depends on context,” proper disclaimers or qualifications can be effective in avoiding Section 11 liability: “And 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.” (This aspect of the Court’s opinion obviously places a premium on careful drafting of statements of opinion or believe to sufficiently disclose the basis of the opinion or belief in order to minimize exposure.)

The Supreme Court remanded the case to the district court to determine the sufficiency of the Fund’s allegations of a material omission. According to the Court, that analysis “must address the statement’s context...[t]hat means the court must take into account of whatever facts Omnicare did provide about legal compliance, as well as any other hedges, disclaimers, or qualifications it included in its registration statement.”

In his concurring opinion, Justice Scalia vigorously criticized the majority's opinion regarding liability based upon omissions. Justice Scalia found that the majority had failed to articulate a meaningful pleading standard, but proffered a fact intensive analysis that permits a dissatisfied investor to “always charge” that “even though the belief rested upon an investigation the corporation thought to be adequate, the investigation was ‘not objectively adequate.’”

**Observation**

Counsel for investors and those who represent public companies both have expressed comfort in the decision. Among the significant aspects of the Court’s opinion that will be developed by lower court application are (1) whether Justice Scalia’s prediction comes to fruition and courts will examine the objective adequacy of the corporation’s investigation; and (2) whether the Court’s analysis regarding embedded facts and the factual basis of a statement of opinion will be applied beyond the relatively narrow context of Section 11 and used to analyze claims under Section 10(b) of the Securities Exchange Act.

If you have any questions or would like additional information, please contact any of our Securities and Corporate Governance Litigation attorneys.