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Supreme Court Considers Statements of Opinion as a Basis for Liability under Section 11 of the Securities Act

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In Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U.S. ___, 2015 WL 1291916 (U.S. Mar. 24, 2015), the Supreme Court considered the question of whether and how statements of opinion may be actionable under Section 11 of the Securities Act of 1933. Section 11 allows purchasers of a security to bring a claim against the issuer and persons who signed a registration statement in the event that the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

Unlike claims that are brought under Section 10(b) of the Securities Exchange Act of 1934, a plaintiff bringing a claim under Section 11 of the Securities Act need not establish that that defendant acted with intent to deceive (*scienter*). Strict liability attaches for the misstatement or omission although a defendant, other than the issuer, may avoid liability "if he had, after reasonable investigation, reasonable ground to believe and did believe, at the time such part of the registration statement became effective, that the statements therein were true and that there was no omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

The case arose out of a filing by Omnicare, a provider of pharmacy services for residents of nursing homes, of a registration statement for a common stock offering. The registration statement contained, among other things, analysis of the effects of various federal and state laws on Omnicare's business model and expressed Omnicare's view of its compliance with legal requirements:

> We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.
>
> We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.

After the filing of the registration statement the federal government asserted claims against Omnicare that it had received payments from drug manufacturers in violation of anti-kickback laws. Purchasers in the common stock offering brought suit on the basis that Omnicare had made materially false

representations about legal compliance and omitted to state material facts necessary to make its representations not misleading.

The Sixth Circuit Court of Appeals acknowledged that the two statements cited above expressed Omnicare's "opinion" of legal compliance rather than "hard facts". It nonetheless held that, in light of the strict liability nature of Section 11, the purchasers had to allege only that the stated belief was objectively false i.e. they did not need to contend that anyone at Omnicare disbelieved the opinion at the time it was expressed. In effect, a statement of opinion that ultimately turns out to be incorrect may count as an "untrue statement of a material fact" under Section 11 even if the opinion was honestly believed when it was expressed.

The Court analyzed the issue presented in two stages: (a) can an opinion itself constitute a factual misstatement; and (b) can an opinion be rendered misleading by the omission of discrete factual representations.

The Court determined that the standard applied by the Sixth Circuit Court of Appeals wrongly conflated facts and opinions. Using the dictionary definitions, a fact is "a thing done or existing" whereas an opinion is "a belief" or a "sentiment which the mind forms of persons or things." A statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. Significantly, Section 11 imposes liability not for "untrue statements" (which would include opinions) but only for "untrue statements of fact."

The Court, however, acknowledged that statements of opinion always imply one statement of fact, namely, that the speaker actually holds the stated belief. In addition, other statements of opinion often contain embedded statements of fact. In the example given in the opinion, the statement "I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access" affirms the speaker's state of mind but also conveys an underlying fact, namely, that the company uses a patented technology. Statements of this kind can be read as affirming not only the speaker's opinion but also the accuracy of the fact given to support or explain it.

Accordingly, statements of opinion can be actionable under Section 11 (assuming materiality) if (a) the speaker does not hold the belief expressed or (b) the fact articulated to support the opinion is untrue.

The Court next considered whether the omission of a fact can make a statement of opinion misleading. It rejected the argument that pure statements of opinion convey nothing more than the speaker's own mindset and that therefore no liability could attach to such statements as long as the speaker actually believed the opinion expressed. In the Court's view, an opinion may, depending on the circumstances, convey to an investor facts about the speaker's basis for holding that opinion.

For example, if an issuer makes the statement that it believes its conduct is lawful, a reasonable investor could expect that the issuer has consulted a lawyer or did not make the statement in the face of contrary legal advice. A reasonable investor expects "not just that the issuer believes the opinion…but that it fairly aligns with the information in the issuer's possession at the time" and even conveys information about the inquiry that supports the opinion. Accordingly, "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 omissions clause creates liability." When making statements of opinion, an issuer should consider

the foundation a reasonable would expect an issuer to have before making the statement. A reader of registration statement expects more than off-the-cuff remarks of the kind that are made in everyday life.

The Court emphasized that an investor cannot state a claim under Section 11 by alleging only that an opinion was wrong. The complaint must call into question the issuer's basis for offering the opinion and identify particular 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." On the other hand, to avoid exposure for omissions under Section 11,"an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief."

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