

Client Alert

March 2015

US Supreme Court Clarifies Standard of Liability for Opinions Set Out in Registration Statements

Last week, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Supreme Court of the United States reversed the ruling by the Sixth Circuit imposing liability on Omnicare based on two opinions set out in its registration statement that it believed its contracts with various third parties were in compliance with applicable state and federal laws. The Sixth Circuit held these opinions to be actionable misstatements because Omnicare's contracts were later proved to be unlawful. The Supreme Court reversed this decision, holding that in order for statements of opinion in a registration statement to be actionable, a plaintiff must demonstrate either that the speaker did not hold that opinion when it was made or that the opinion was not supported by the type of facts that a "reasonable investor" would expect to support that opinion. While this opinion provides a noteworthy limitation on liability for statements of opinion in registration statements, by injecting the "reasonable investor" into the analysis, it also creates some uncertainty, perhaps limiting the otherwise strong protection for statements of opinion.

Background

In its registration statement, Omnicare included an analysis of the effects of various federal and state laws on its business model, including the acceptance of rebates from pharmaceutical manufacturers. Plaintiffs challenged two sentences regarding these laws:

- "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."

The federal government later brought various lawsuits challenging these rebates, naming Omnicare as a defendant. Plaintiffs cited to these lawsuits in alleging that Omnicare's receipt of rebates from drug manufacturers violated anti-kickback laws rendering the above statements materially false.

The district court granted Omnicare's motion to dismiss finding that the above statements were "soft information" that were only actionable if the speaker knew that the statements were untrue at the time they were made. The Sixth Circuit reversed the district court, holding that the plaintiffs had to allege only that the stated belief was "objectively false," and did not need to contend that Omnicare did not believe the opinion at the time it was expressed.

Supreme Court's Decision

The Supreme Court reversed the Sixth Circuit. With respect to alleged misstatements, the Court noted that liability lies only for a misstatement of "material fact." Accordingly, statements of opinion, such as those challenged in this case, could result in liability only if "the speaker did not hold the belief she professed [or] if the supporting facts she supplied" to support that opinion were untrue. It is simply not enough, as the Sixth Circuit held, to show that the speaker's belief ultimately turned out to be wrong. Such an approach would create an "invitation to Monday morning quarterback an issuer's opinions." This

is a welcome holding for issuers offering opinions in registration statements. So long as they are expressing opinions honestly held by them and any disclosed facts underlying those opinions are accurate, no liability should attach even if those opinions turn out to be wrong.

The Court, however, did not limit its holding to alleged misstatements relating to opinions. It also analyzed whether the expression of an opinion can lead to liability for the omission of material facts. The Court held that a reasonable investor may understand an opinion to convey facts about the speaker's basis for forming or holding the expressed opinion. If the true facts regarding the basis of that opinion are different from those implied and are not disclosed, liability may still lie based on such omission. For example, the Court noted that the statement that an issuer believes its conduct is lawful implies that the issuer had consulted a lawyer on that question. If, in fact, it had not done so, that opinion statement could still be actionable based on the omission of this material fact.

The Court made clear that a reasonable investor cannot expect that every fact known to an issuer does, in fact, support its opinion. That is, if a single lawyer out of many indicated concern with the lawfulness of an act, an issuer need not necessarily disclose that fact. At the same time, investors do expect that opinions contained in registration statements do not reflect baseless, off the cuff judgments. The reasonable investor must read each statement in the context of the entire registration statement, in light of all of the surrounding text, including hedges, disclaimers, and conflicting information, and must take into account the customs and practices of the relevant industry. Liability will lie only for the omission of material facts that cannot be squared with such a fair reading of the entire document.

Conclusion

While the ruling in *Omnicare* does provide comfort to issuers with respect to "misstatement" liability related to statements of opinion, it does create some ambiguity with respect to potential "omissions." Specifically, the Court established a standard for omissions based on what a "reasonable investor" would understand; an analysis that depends greatly on the context of the statements made and the totality of the disclosures in the registration statement, and which may be prone to more variability in its application by courts.

Our teams have significant experience both advising issuers with respect to registration statements and other disclosures, and representing issuers in investigations and litigation by government regulators and private litigants. If you have any questions about the *Omnicare* decision or other disclosure issues, please do not hesitate to reach out to us or your Hunton & Williams contact.

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