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EXPERT ANALYSIS

Supreme Court Provides Insight On Actionability of Future Claims Predicated on Statements of Opinion

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In a 9-0 ruling the U. S. Supreme Court vacated the decision of the 6th U.S. Circuit Court of Appeals regarding its interpretation of the actionability of statements of opinion rendered in securities registration statements.

In Omnicare v. Laborers District Council Construction Industry Pension Fund, 135 S. Ct. 1318 (2015), the Supreme Court held that a statement of opinion does not constitute an untrue statement of fact simply because the stated opinion ultimately proves incorrect. Rather, the court acknowledged that a statement of opinion admits the possibility of error. Thus, an opinion is not necessarily an untrue statement of fact even if the opinion later turns out to have been wrong.

The Supreme Court noted that opinion statements are not wholly immune from liability if the opinion expressed was not sincerely held. Opinion statements can also give rise to false-statement liability if they contain embedded statements of untrue facts.

The Supreme Court's decision was rendered specific to registration statements under the Securities Act of 1933. However, it is reasonable to conclude that the court's reasoning will carry significant weight moving forward in assessing the viability of claims predicated on statements of opinion under a multitude of securities laws.

Omnicare concerns the issue of civil liability for false registration statements pursuant to 15 U.S.C.S. § 77k. Under that provision, persons may be held liable "in case any part of the registration statement, when such part became effective, 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."

Omnicare is a pharmacy services company that filed a registration statement in connection with a public offering of common stock. The registration statement contained two statements in which the company opined as to its perceived compliance with federal and state laws. In particular, the registration statement said, "We believe our contract arrangements with other health care providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws."

The registration statement further stated, "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the health care system and the patients that we serve."



An opinion is not necessarily an untrue statement of fact even if the opinion later turns out to have been wrong, the Supreme Court said.

In a separate action, the federal government sued Omnicare for allegedly receiving kickbacks from pharmaceutical manufacturers. Using that criminal action as its focal point, various pension funds that purchased Omnicare stock brought a civil action against the company in federal court under the Securities Act of 1933.

The basis of the civil suit was that Omnicare's legal compliance statements constituted an untrue statement of material fact and that Omnicare omitted to state material facts necessary to make those statements not misleading.

Omnicare moved to dismiss the claims brought by the pension funds. The U.S. District Court for the Eastern District of Kentucky found that the pension funds failed to state a viable claim under the Securities Act because they had not alleged that Omnicare's officers knew they were violating the law.

The 6th Circuit reversed. While acknowledging that the statements expressed opinions, the appellate court held that no showing of subjective disbelief was required. In the view of the 6th Circuit, the pension funds' allegations that Omnicare's legal compliance opinions were objectively false sufficed to support their claim.

But the Supreme Court found that the 6th Circuit applied the wrong standard. The Supreme Court disagreed with the proposition that a statement of opinion that is ultimately found incorrect — even if believed at the time made — could constitute an untrue statement of material fact. The Supreme Court further disagreed that an issuer's statement that "we believe we are following the law" conveys that "we in fact are following the law," which is "materially false" no matter what the issuer thinks, if instead it is violating an anti-kickback law.

The Supreme Court concluded that this argument wrongly conflates facts and opinions. In citing to standard dictionary definitions, the court noted that a statement of fact expresses certainty about a thing whereas a statement of opinion does not. The court explained that "although a plaintiff could later prove that opinion erroneous, the words 'I believe' themselves admitted that possibility, thus precluding liability for an untrue statement of fact."

Thus, in terms of actionability, the Supreme Court highlighted the important distinction between expressing a view as opposed to a certainty.

Notwithstanding, the court noted that the Securities Act's false-statement provision could apply to expressions of opinion wherein the speaker actually does not hold the stated belief. Statements about legal compliance would falsely describe the speaker's state of mind if she thought her company was, in fact, breaking the law.

The court also noted that some sentences that begin with opinion words often contain embedded statements of fact. The court cautioned as to situations in which a statement may be read to affirm not only the speaker's state of mind but also an underlying fact.

In the Omnicare case, the court found that the pension funds could not avail themselves of any of those methods of demonstrating liability. Rather, the funds objected to two sentences that were determined to be pure statements of opinion. In simplest terms, Omnicare opined that it believed it was obeying the law, and the pension funds did not contest that such opinion was honestly held. Rather, the complaint explicitly excluded any allegations sounding in fraud or deception. What was instead claimed was that Omnicare's belief turned out to be wrong.

The court noted that:

That allegation alone will not give rise to liability ... because, as we have shown, a sincere statement of pure opinion is not an "untrue statement of material fact," regardless of whether an investor can ultimately prove the belief wrong. That clause, limited as it is to factual statements, does not allow investors to second-guess inherently subjective and uncertain assessments. In other words, the provision is not, as the Court of Appeals and the funds would have it, an invitation to Monday morning quarterback an issuer's opinions.

Regarding omissions to state necessary facts, the Supreme Court noted that 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, such omissions could create liability.

Nonetheless, the Supreme Court noted that an opinion statement is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way. "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," the court said.

Therefore, whether an omission makes an expression of opinion misleading always depends on context. Ultimately, 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. That is no small task for an investor."

Accordingly, on remand, the pension funds could not proceed without identifying one or more facts left out of Omnicare's registration statements and furthermore must demonstrate that the omitted fact would have been material to a reasonable investor.

As noted, the Supreme Court's decision specifically relates to registration statements under the Securities Act of 1933. However, the Supreme Court has now offered extensive guidance as to the actionability of statements of opinion. It is now likely that the Supreme Court's reasoning in this respect could serve as a guidepost to future claims predicated on statements of opinion under a multitude of securities laws.

The Supreme Court disagreed that an issuer's statement that "we believe we are following the law" conveys that "we in fact are following the law."



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