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L'avis de la Cour suprême des États-Unis sur les avis : ils sont importants

Auteurs : Jeffrey Nadler et I. Anthony Mascarenhas

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On March 24, 2015, the U.S. Supreme Court issued its decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*[1] regarding an issuer's liability under Section 11 of the U.S. *Securities Act of 1933* (Securities Act) for statements of opinion or belief contained in a registration statement.

The *Omnicare* decision provides useful guidance in drafting disclosure documents for any securities offering in the United States, including offerings exempt from registration under Rule 144A under the Securities Act.

Background

Under Section 11 of the Securities Act, an investor acquiring securities in an offering registered under the Securities Act has a statutory right of action against the issuer and certain individuals (directors, underwriters, *etc.*) if the issuer's registration statement either (i) contains an untrue statement of a material fact (*i.e.*, a material misstatement), or (ii) omits to state a material fact required to be stated or necessary to make the statements not misleading (*i.e.*, a material omission). In asserting a claim under Section 11, an investor need not prove that the issuer intended to deceive or defraud.

Omnicare, Inc., a provider of pharmacy services for nursing home residents, filed a registration statement under the Securities Act for a public offering of shares of its common stock (Offering). The registration statement contained statements that Omnicare believes that its contracts with pharmaceutical suppliers, including its practice of accepting rebates, comply with applicable law. Omnicare qualified these statements with disclosure regarding state-initiated enforcement actions against pharmaceutical manufacturers for offering rebates. Omnicare also cautioned that applicable laws may be interpreted differently in the future.

After the Offering, the U.S. federal government sued Omnicare for allegedly receiving unlawful kickbacks from pharmaceutical manufacturers. Citing these lawsuits, certain pension funds that invested in the Offering sued Omnicare under both prongs of Section 11.

The U.S. District Court granted Omnicare's motion to dismiss on the grounds that statements of belief were actionable only if those who made them knew they were untrue (the plaintiffs in the *Omnicare* case did not allege that Omnicare's officers knew that the stated belief was untrue). The Federal Court of Appeals for the Sixth Circuit reversed that decision because Omnicare's statements of belief (or opinion) regarding compliance with applicable laws ultimately proved to be objectively false (*i.e.*, the practice was not legally compliant).

The U.S. Supreme Court Decision

The U.S. Supreme Court overturned the Sixth Circuit, separately analyzing each prong of Section 11.

Material Misstatement

The Supreme Court rejected the plaintiffs' argument that a statement of opinion that ultimately proves to be incorrect – even if sincerely held when made – may constitute an untrue statement of material fact. The Supreme Court stated that the plaintiffs' argument wrongly

conflated facts and opinions. The first prong of Section 11 exposes issuers to liability for untrue statements of material fact and not simply statements of opinion that later prove to be incorrect.

The Supreme Court acknowledged that a statement of belief or opinion can incur Section 11 liability if it is an untrue statement of material fact (*i.e.*, if the belief or opinion is not sincerely held when made), which, as mentioned above, was not claimed by the plaintiffs.

Material Omission

The Supreme Court held that determining whether or not a statement of belief or opinion is misleading, due to the omission of a material fact, is an objective inquiry that depends on the perspective of a reasonable investor. The Supreme Court rejected Omnicare's arguments that (i) no reasonable investor can understand a pure statement of opinion to convey anything more than the speaker's own mindset and (ii) as long as the opinion is sincerely held by the speaker, it cannot be misleading, regardless of any facts omitted. The Court held:

> [A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion – or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead the audience.

Consequently, it is not sufficient for the issuer to claim that it had a subjective reasonable basis for stating an opinion, because a reasonable investor may perceive that an opinion conveys or implies that there are no omitted material facts that the issuer is aware of that would make the opinion misleading. However, the Supreme Court clarified that a statement of opinion is not misleading simply because the issuer knows, but fails to disclose, some other fact cutting the other way, if such fact is not compelling. A reasonable investor should not expect an issuer to disclose every known fact supporting or rebutting an opinion. An opinion, by its nature, implies that uncertainty is involved; otherwise the opinion would be stated as a fact. The context in which the statement is made is also determinative, particularly when relevant disclaimers and caveats are included that alert investors that the opinion is qualified and not to be construed as a statement of fact.

A plaintiff seeking damages under Section 11 must do more than merely allege that an opinion is incorrect or that the issuer failed to disclose the basis for the opinion. Its pleadings must specifically identify 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 misleading to a reasonable investor reading it in context. In the words of the Supreme Court, this is "no small task".

Implications for Securities Offerings in the United States

Omnicare provides useful guidance in drafting registration statements. Opinions and beliefs, which are inherently subjective and uncertain, are sometimes included in a registration statement when a statement believed to be true cannot be made with certainty. It is wise to limit such statements. Extra care should be taken to ensure that an opinion or belief is sincerely held and the issuer has a reasonable basis to support it. A careful analysis of all material facts concerning an opinion or belief is warranted. Most important, in light of *Omnicare*, issuers, underwriters and their respective legal counsel should also discern whether any material facts exist that could question or limit an opinion or belief, or the context in which it is made, and whether a reasonable investor would find the omission of any material fact misleading.

Although the *Omnicare* decision relates to Section 11, which applies only to registration statements, it would be prudent to apply *Omnicare* when drafting disclosure documents for any securities offering in the United States, including offerings exempt from registration under Rule 144A under the Securities Act.

[1] 135 S. Ct. 1318 (U.S. 2015) [*Omnicare*]

Personnes-ressource : Jeffrey Nadler