U.S. Supreme Court Clarifies Standard for Challenging an Expression of Opinion in Registration Statement

On March 24, 2015, the U.S. Supreme Court limited a securities plaintiff's ability to claim a remedy for statements of "belief" or "opinion" that turn out to be wrong. In *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Court held that statements of belief are ordinarily not "facts" that can be false, though they might be misleading if the issuer omits to disclose facts that materially contradict the opinion or suggest it was not based on sufficient inquiry. But the Court made clear that particularized and material facts establishing an inadequate basis for an opinion are essential ingredients for stating a viable claim. The Court's decision modestly changes the law by narrowing the safe harbor issuers have traditionally enjoyed for expressing opinions, while making clear that a plaintiff's burden to navigate around that harbor is substantial.

Omnicare arose out of that company's agreement to pay fines and penalties to settle state and federal claims that it made improper payments in connection with the sale of its pharmaceutical products. Purchasers of the company's stock claimed they were deceived by prospectus statements expressing Omnicare's belief that it was "in compliance" with all applicable laws about the marketing of its goods. The District Court dismissed the case, but the 6th Circuit reversed, holding that Omnicare's opinions were "false" because they ultimately turned out to be incorrect. The Appeals Court authorized the case to proceed to a trial on the plaintiffs' claim under Section 11 of the Securities Act of 1933, which imposes strict liability for false statements in a prospectus or registration statement. In an opinion authored by Justice Kagan, the Supreme Court rejected the 6th Circuit's reasoning and reversed its judgment. Justices Scalia and Thomas wrote separate opinions concurring in the full Court's judgment.

The Court distinguished between Section 11's two operative clauses. The first – which imposes liability for "untrue statement[s] of material fact" – usually cannot be violated by the disclosure of a sincerely held belief since opinions are not "facts" that can be true or false. But the second – which makes "omissions" liable if disclosure is "necessary to make statements made . . . not misleading" – *is* implicated by statements of belief. According to the Court, an expression of belief could mislead a reasonable investor if the opinion rests on inaccuracies or inadequate inquiry. A reasonable investor might "understand an opinion statement to convey facts about how the speaker has formed the opinion." If the real facts are different and not provided, an investor could be misled. Accordingly, the Court held: "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 § 11's omissions clause creates liability."

Although the Court viewed the omissions clause as a potential basis for liability, it noted that the provision is *not* "an invitation to Monday morning quarterback an issuer's opinions." To the contrary, the Court explicitly spelled out what a plaintiff must plead. "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 means that for a plaintiff to survive a motion to dismiss, a complaint must identify specific facts omitted and establish that these omitted facts would be material to a reasonable investor. Even then, the court must assess whether these omitted material facts rendered the statement of opinion misleading, taking into account the statement's context, including whatever facts the statement does provide. It is not enough for a complaint to include a conclusory allegation that an issuer lacks a reasonable basis for the stated opinion.

Omnicare treads on dangerous ground. Expressions of belief and opinion are rife in registration statements and related disclosure documents. Statements of opinion are often expressed by regulated entities about legal compliance (as in *Omnicare*), but also are made – and required to be made – in many other contexts. Issuers regularly comment – in expressions of belief or opinion – on the sufficiency of capital resources and liquidity, the risk posed by litigation, the proper accrual of contingent liabilities, the collectability of revenue, the value of assets, the validity and ownership of intellectual property, and a host of other issues material to investors. Both issuers and securities practitioners had always believed that in making such disclosures, the expression of belief on a subject was tantamount to a disclaimer that the opinion would always hold true, and provide insulation from securities law liability. The "bespeaks caution" doctrine adopted by most courts effectively codified that view.

Omnicare retreats from that doctrine by holding that "magic words" like "we believe" are not guarantees against liability. But the opinion's effect is likely to be on the margins. By authorizing claims based on expressed beliefs in very limited circumstances where an investor-plaintiff hurdles a high factual bar – notably *without* the benefit of discovery – the opinion narrows somewhat the entrance to the traditional safe harbor. *Omnicare* makes clear that the Securities Act still does not "allow investors to second-guess inherently subjective and uncertain assessments." But it urges issuers to make clear that expressed opinions are honestly held and adequately diligenced if they seek the solace of the calm waters of the safe harbor.

If you have any questions or would like to learn more about the issues raised by the Court's decision, please contact your usual Ropes & Gray advisor.