C L I F F O R D

C H A N C E

Client briefing

March 2015

U.S. Supreme Court Clarifies When Opinions Can Be Actionable Under Federal Securities Laws

Court finds the Securities Act of 1933 is not "an invitation to Monday morning quarterback an issuer's opinions" but leaves open the possibility of liability for opinions.

In a highly anticipated decision, the Supreme Court addressed when, and under what circumstances, opinions of issuers may be actionable under federal securities laws. In a case captioned *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, the Supreme Court reviewed a Sixth Circuit decision involving claims brought under Section 11 of the Securities Act of 1933 (the "Securities Act"). The case challenges two opinions Omnicare included in a registration statement: "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," and "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements[.]" Plaintiffs argued that these legal compliance opinions were actionable because the federal government later pressed lawsuits against Omnicare based on allegations of kickbacks from drug manufacturers. The district court dismissed Plaintiffs' Section 11 claims, and the Sixth Circuit reversed, rejecting the Second Circuit's requirement in *Fait v. Regions Financial Corp*., 655 F.3d 105 (2d Cir. 2011) that an opinion can only be actionable under Section 11 if "the statement was both objectively false and disbelieved by the defendant at the time it was expressed."

The Supreme Court decided that the inquiry as to whether an opinion can be actionable under Section 11 involves two separate questions: (1) "when an opinion itself constitutes a factual statement," and (2) "when an opinion may be rendered misleading by the omission of discrete factual representations." This is because the federal securities laws make actionable both untrue statements of material fact *and* omissions of material fact that are necessary to make a statement not misleading.

As to the first inquiry, the Supreme Court made clear that "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong," and noted that "the provision is not ... an invitation to Monday morning quarterback an issuer's opinions." Instead, a statement of belief or opinion supplies the requisite misstated fact only if the speakers do not hold the belief they profess to hold or a statement of fact embedded in the opinion is untrue.

As to the second inquiry—whether an opinion can be actionable if it omits information that makes it misleading—the Court's analysis was more complex. The Court did not foreclose the possibility that sincerely held opinions could be actionable under the Securities Act under a "misleading-by-omission" theory. Instead, the Court held 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," then the opinion is actionable under Section 11.

In so holding, the Court provided a number of guideposts for litigants. First, the Court noted that an opinion "is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way." Any opinion should be viewed in context, taking into account a variety of factors, including (1) the type of document in which the opinion appears, (2) the surrounding "text, including hedges, disclaimers, and apparently conflicting information," and (3) the customs and practices of the relevant industry.

Second, a plaintiff cannot adequately plead an actionable opinion by omission without identifying at least one fact left out of the disclosure at issue—neither the conclusory allegation that a defendant "omitted to state facts necessary to make the statements made not misleading," nor that the defendant "lacked 'reasonable grounds for the belief'" underlying the opinion, will suffice to state a claim. Rather, a plaintiff "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."

Rejecting Omnicare's plea that inquiring into an issuer's basis for holding an opinion will be "hopelessly amorphous," and will threaten "massive" liability, the Court responded that any such concern was a problem for Congress, not the Court. Citing to the common law tort of misrepresentation, the Court concluded that "requiring courts to view statements of opinion from an ordinary investor's perspective" demands nothing "complicated or unmanageable." The Court vacated and remanded for resolution consistent with its decision.

The plaintiff and the defense bars are both claiming victory in the wake of the Court's *Omnicare* ruling. Certainly, there is comfort for issuers that they will not be subject to Section 11 liability simply because their opinions prove erroneous in hindsight. However, the Court's newly articulated standard for challenging opinions under a "misleading-by-omission" theory is likely to open the door to a new spate of Section 11 litigation. How district courts will apply the Court's standard of viewing challenged opinions "in context," in resolving motions to dismiss remains to be seen.

Authors

Robert Houck
Partner

T: +1 212 878 3224
E: robert.houck
@cliffordchance.com

Polly Snyder
Counsel

T: +1 202 912 5025
E: polly.snyder
@cliffordchance.com

Jamie Hoxie
Associate

T: +1 212 878 4922
E: jamie.hoxie
@cliffordchance.com