Supreme Court Issues Guidance on Disclosure of Opinions in Registration Statements

In a highly anticipated opinion issued earlier this week in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. ___ (2015), the U.S. Supreme Court disposed of a split amongst circuits and set forth a new test as to when a statement of opinion in a registration statement may be actionable as a material omission under Section 11 of the Securities Act of 1933. The test does not create a bright line and leaves substantial room for disagreement.

Section 11 creates a private right of action based upon a registration statement that contains untrue statements of material facts or fails to state facts necessary to make the statements contained therein not misleading. Unlike Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, scienter is not required for liability under Section 11. The Court separately analyzed the circumstances under which a statement of opinion may be actionable first as an untrue statement of material fact, then as a material omission.

Turning first to the circumstances under which a statement of opinion in a registration statement may be actionable under Section 11 as an untrue statement of material fact, the Court identified two such circumstances: (i) if the speaker does not in fact hold the stated belief; or (ii) if the facts supplied by the speaker in support of the stated belief are themselves untrue.

In determining the circumstances under which a statement of opinion may be actionable because of the omission to state a material fact necessary to make the opinion not misleading, the Court noted that "a statement of opinion is not misleading just because external facts show the opinion to be incorrect." Slip op. at 11. In enunciating the test for when an omission makes a statement of opinion misleading, the Court observed that a reader would reasonably believe not just that the issuer believes the stated opinion, but also that the stated opinion "fairly aligns with the information in the issuer's possession at the time." *Id.* at 12. The Court then stated the test:

> [I]f 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, the § 11's omissions clause creates liability.

Id. The Court stressed that a statement of opinion is not necessarily misleading merely because the issuer is aware of some facts that cut against the opinion. *Id.* at 13. Only if the withheld facts would lead a reasonable investor to disregard the stated opinion would the issuer be liable for failing to disclose those facts.

The Court then went on to discuss the plaintiff's burden to plead a Section 11 violation based upon a statement of opinion that omits to state material facts that cut against the opinion:

> 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.

Id. at 18.

Issuers can breathe a sigh of relief as a result of the Court's rejection of the Sixth Circuit's view that issuers can be held liable under Section 11 for sincerely held opinions that turn out to be false. When disclosing opinions in registration statements, issuers should consider enhancing their disclosures to identify the factual basis for the opinions to protect themselves from Section 11 claims should their opinions prove to be false. Fortunately, the Court made clear that reasonable investors should not expect every fact known to an issuer to support its opinions, and that such statements should be read in light of all its surrounding text, including hedges and disclaimers.

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