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Lawyers Weigh In On High Court's Omnicare Decision

Law360, New York (March 24, 2015, 6:07 PM ET) -- On Tuesday, the Supreme Court reversed and remanded a Sixth Circuit ruling that executives can be held responsible for opinions expressed to investors that later turned out to be false. Here, attorneys tell Law360 why the decision in Omnicare Inc. et al. v. Laborers District Council Construction Industry Pension Fund et al. is significant.

Ross A. Albert, Morris Manning & Martin LLP
"The primary significance of today's Omnicare decision is that the Supreme Court resolved a circuit split, holding that securities fraud could not be established for pure statements of opinion that turned out be false, but were sincerely believed by the speakers to be true. In the second and likely more significant part of the opinion, the court further held, however, that liability may be established if material facts are omitted from offering documents that would raise questions about the validity of the stated opinions. The court left the ultimate outcome of this case to be determined by the lower courts and both sides have already declared the opinion a victory."

George W. "Tres" Arnett, McCarter & English LLP
"The court's holding in Omnicare means that officers and directors who sign off on a company's Section 11 registration statement with the SEC cannot have empty heads and pure hearts, but rather, a reasonable basis for any opinions or beliefs they express. The opinion is a victory for issuers of securities. However, companies and their counsel will still find it difficult to file successful motions to dismiss when those opinions turn out not to be true, because the 'reasonableness' of the opinion will be a fact question not susceptible to a successful motion."

Barry Barnett, Susman Godfrey LLP
"Omnicare offers more to plaintiffs than defendants. It makes clear that the mere fact a public disclosure expresses an opinion will not preclude liability under federal securities laws and that those laws cover not only lying about an opinion but also falsely implying that an opinion has rigor behind it. The ruling also saves false-opinion Securities Act claims from the tough pleading standards of the [Private Securities Litigation Reform Act], the majority having rejected Justice [Antonin] Scalia's desire to import a scienter requirement into the section 11 analysis. Omnicare will in short give new life to securities cases involving false opinions."

Michael Celio, Keker & Van Nest LLP
"Omnicare is 'a tale of two theories' for the defense bar. On the one hand it strongly reaffirms a core defense theory: that sincerely held opinions do not violate the securities laws simply because they later prove incorrect. This holding is especially powerful in a Section 11 case because no showing of intent is required. But at the same time, Omnicare's focus on an omissions theory that the lower courts did not address creates uncertainty going forward. In practice, the difference between a misstatement and an omission can prove slippery. A wave of omissions case is on the horizon."

Stefan Dandelles, Kaufman Dolowich & Voluck
"The Omnicare decision is a victory for issuers of securities as it is a departure from the standard adopted by the Sixth Circuit that a plaintiff need only allege and prove that the stated belief was 'objectively false.' [The high court] created a new legal standard for liability under Section 11 of the Securities Act of 1933 with respect to opinions expressed in registration statements. The court held that under Section 11, a plaintiff must allege and prove the statement of opinion was wrong as a matter of fact, and that the defendant did not believe it to be true at the time the statement was made. However, an issuer can still be held liable if it omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion."

Jordan Eth, Morrison & Foerster LLP
"The Supreme Court's decision does not change the law in any fundamental way. Before Omnicare, most courts held that statements of opinion needed to have a reasonable basis. That remains so after Omnicare. Only now, Omnicare underscores that companies and their executives may enhance their protections from liability by identifying the actual basis for their beliefs and by adding appropriate caveats and qualifiers."

Nick Even, Haynes and Boone LLP
"As to whether a 'believed' opinion may be an actionable misstatement under Section 11 when incorrect, the court's ruling was unavoidable. Some commentators opined the court would affirm the Sixth Circuit. Were they misrepresenting something then, simply because they are wrong now? Of course not, unless they secretly thought the contrary. As for omissions and opinions under Section 11, because Omnicare's inquiry involves the speaker's 'basis,' the 'foundation' a reasonable investor 'would expect an issuer to have,' and 'reading the statement fairly and in context,' there will be considerable room for future disagreement. But the confirmation that alleged omissions must be both specific and material is helpful to issuers."

Brian T. Glennon, Latham & Watkins LLP
"For anyone who has been following the Omnicare case, it comes as no surprise that the Supreme Court vacated the Sixth Circuit's decision. Although the opinion leaves unresolved some important questions regarding when an omission can give rise to liability under Section 11 — issues that certainly will be the focus of future litigation in the lower courts — overall the standards, analyses and conclusions articulated by the court seem favorable to the defense bar."

Barbara Hart, Lowey Dannenberg Cohen & Hart PC
"Today's decision leaves a lot of room for abuse where important information is framed as opinions in offering documents. At the pleading it will be quite difficult to allege that the opinion was falsely stated. Where a company is charged with knowing its current affairs and the law is strict liability and expression about its belief as to its current affairs (be they compliance matters or otherwise) should be sufficient if ultimately that 'opinion' is false as demonstrated by subsequent events. The Supreme Court left room for opinions to be actionable as false and as false due to omissions making them false, however, to the extent the opinion diverged from the Court of Appeals decision in this matter the decision has created ambiguity and invited abuse."

Daniel Lewis, Shearman & Sterling LLP
"The court's decision reflects the common sense view that a company should not be subjected to securities class action lawsuits when genuinely held opinions turn out to be wrong. Rather than requiring plaintiffs to demonstrate that an opinion was both wrong and not genuinely held, however, the court's majority permits claims that a company omitted information a reasonable investor would consider important regarding the opinion's basis. This may invite uncertainty and the need for close

case-by-case analysis. That said, the court's majority provided important limits, including that such claims will survive only if supported by 'particular (and material) facts.'"

Daniel Marx, Foley Hoag LLP
"In Omnicare, the Court essentially split Section 11 in two. One part is straightforward: consistent with Virginia Bankshares, an incorrect but sincere opinion statement is not actionable. The other part, however, is more of a muddle: an issuer may now be liable for a misleading omission if a reasonable investor would assume that an opinion statement was based on some critical fact (e.g., the issuer conducted an adequate inquiry or consulted counsel) that turned out to be untrue and was not disclosed. As the concurrences suggest, further factual and legal development in the lower courts may have yielded a clearer decision on this novel issue."

Joe Masterson, Quarles & Brady LLP
"Some of the key questions concern what an issuer is understood to be saying when it makes a statement of opinion. If the issuer's president and 60 percent of the directors sincerely believe opinion X to be true while the general counsel and the remaining directors do not, can it say 'We believe X is true'? Even if the opinion is unanimously held, how much subjective confidence (slight preponderance v. near certainty) is required? Related but even more critical may be how the lower courts apply the principle that even a sincere opinion may [be] misleading based on the implied level of inquiry or knowledge on which it is based. The due diligence defense already protect officers and directors (but not issuers) from careful but erroneous statements in most contexts: how much institutional certainty statements of opinion are held to imply may determine how often Omnicare may allow issuers to avoid liability."

William G. Passannante, Anderson Kill PC
"The Supreme Court's opinion in Omnicare is welcome news for directors and officers. While not an unadulterated victory for the issuer because the case was remanded not dismissed, the court reversed the 6th Circuit's more lenient approach which had found that objectively false statements of opinion can lead to liability, as opposed to requiring that a plaintiff allege that the speakers knew the statement was false. Thus, the court narrowed liability under Section 11 of the Securities Exchange Act. This result may support the general trend in D&O liability insurance toward somewhat more limited liability and downward pressure on premiums."

Veronica E. Rendon, Arnold & Porter LLP
"Today's decision properly disposes of a split in the circuits and clarifies that statements of opinion are generally not actionable. This important decision will likely not prevent all section 11 opinion and 'soft information' suits [from being] eliminated but will likely deter their filing and certainly will make rich fodder for defendants to seek dismissal early on in these types of cases."

Trace Schmeltz, Barnes & Thornburg LLP
"The Omnicare decision today supports well-established and common principles in securities fraud jurisprudence that, quite frankly, the Sixth Circuit just got wrong. By clarifying that an opinion is not a statement of fact and, thus, is only actionable if the speaker did not actually hold that opinion, the Supreme Court hewed closely to the text of Section 11. The only 'new' aspect of the Supreme Court's decision is the concept that there may be a cause of action if a fact is omitted that materially bears on the issuer's opinion. It seems to me that, for this later point, the devil will be in the details — we will need to see complaints alleging facts known to, but omitted by, issuers that would alter how an investor views the issuer's opinion. In other words, it will take time for courts to flesh out what is and is not actionable."

Daniel Sommers, Cohen Milstein Sellers & Toll PLLC
"Today the Supreme Court reaffirmed the principle that when issuers communicate what appear to be opinions in registration statements, they must include all important facts — good and bad — that investors need in order to make a prudent investment decision. This ruling is good news for investors and is consistent with the investor protection function of the 1933 Act."

Steven J. Toll, Cohen Milstein Sellers & Toll PLLC
"Omnicare is an important decision for investors because it requires issuers to have a reasonable basis for information that is contained in registration statements. If they wish to avoid liability, issuers must make an effort to confirm that their opinions are well-founded."

Josh Yount, Mayer Brown LLP
"Providing important guidance on a frequently litigated issue that had divided lower courts, today's Supreme Court decision in [Omnicare] addresses the circumstances in which statements of opinion can be the basis for claims under Section 11 of the Securities Act. Agreeing with the defendant, the court held that an opinion can create liability as an 'untrue statement of fact' only if the speaker did not honestly hold the opinion. Overall, the Omnicare decision helpfully restricts the kind of unrestrained opinion litigation that the court of appeals decision below would have fostered."

--Editing by Emily Kokoll.
