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# 3 Top Considerations After Omnicare

*Law360, New York (April 28, 2015, 10:22 AM ET) --*

In Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund, 575 U. S. ____ (2015), the U.S. Supreme Court clarified issuer liability under §11 of the Securities Act. Section 11 provides that issuers are liable for registration statements that contain "an untrue statement of a material fact or omit to state a material fact required ... to make the statements therein not misleading." While the court's opinion applies in the context of publicly registered offerings, there are some important take-home messages for private placements too. Here are the three top considerations for issuers in light of Omnicare.

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**1. The Focus is Less on the Factual Truth of an Issuer's Opinion and More About the Content, Sincerity and Basis of the Opinion**

The court held that an issuer is not liable under §11 merely because a sincerely held opinion turns out to be factually wrong. Now, this shouldn't be news, but it actually is! And it's very good news.

The issuer, Omnicare, opined that it was in compliance with federal and state laws. Citing lawsuits filed by the federal government against Omnicare, the plaintiffs asserted that this opinion was materially false. The court held this was not enough to subject the issuer to liability. What mattered to the court was not whether the opinion was objectively true, but whether the opinion was honestly held.

Every opinion given includes the inherently factual content that the opinion is honestly held but the remaining content of an opinion is, in the court's opinion, just that: nonfactual. Moreover, if an opinion statement contains embedded facts, then an issuer can be liable if those embedded facts are untrue and material. After noting that the plaintiffs failed to allege either of these cases, the court turned to a discussion of potential liability related to factual statements and omissions supporting the opinion provided.

The court remanded Omnicare with instructions to determine whether the issuer misstated or omitted material facts about the basis of its opinion. The court concluded 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 §11's omissions clause creates liability."

According to the court, if an issuer says “we believe our conduct is lawful,” reasonable investors will likely expect that “such an assertion rest[s] on some meaningful legal inquiry ....” On remand, the plaintiff will have the burden to identify some set of facts that demonstrates that “Omnicare lacked the basis for making [its legal compliance opinion] that a reasonable investor would expect.”

**2. Future Litigation is Likely to be About the Extent and Sufficiency of the Issuer’s Basis for its Opinions**

In light of the Omnicare decision, it seems that §11’s omissions clause will be doing the heavy lifting for the government and plaintiffs going forward when it comes to statements of opinion because opinions have been given such broad protection. The court points out that a reasonable investor is right to expect “not just that the issuer believes [its opinions] (however irrationally), but that [those opinions] fairly [align] with the information in the issuer’s possession at the time.” It is unclear how a plaintiff could prove an issuer does not sincerely (however irrationally) hold its opinions absent a smoking gun email to the effect of, “we’re telling investors we believe [X] and we know [X] is not true.”

In Omnicare, the plaintiffs failed to allege that the issuer did not sincerely hold its opinion. Although future plaintiffs may not make this mistake, it seems like it would be much easier for these plaintiffs to find material errors in facts that underlie the issuer’s basis for its opinions. A misstatements or omissions inquiry regarding facts supporting an opinion, at the very least, does not require delving into the murky depths of an issuer’s state of mind.

**3. Issuers Should Think About Omnicare’s Implications Outside of the Context of §11**

The reasoning in Omnicare could apply to private as well as public deals. So, all counsel involved in securities matters should be mindful of the decision and mindful of its protections and pitfalls. It is very good that the court embraced the common-sense proposition that opinions aren’t actionable just because they are wrong. It is equally important to take from this opinion the point forcefully made here by the court that while lawyers are entitled to their opinions, they are not entitled to their facts.

While this part of the opinion is hardly startling, it is nonetheless vitally important to remember that incorrect facts can mislead and become the basis of a successful suit. Opinion is fine, disingenuous facts are not. Opinions should be backed by facts and issuers should ensure those facts are right through meaningful inquiry. We always try to do that; this is a good reminder that we always must.

**Takeaways From the Omnicare Decision**

The lesson is that when giving an opinion, be able to back it up. Although opinions that turn out to be factually wrong are not enough to cause issuer liability, an opinion given without an adequate basis can cause trouble. Being able to show the meaningful inquiry behind an opinion could go a long way toward mitigating potential liability.

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