Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, No. 13-435

Section 11 of the Securities Act of 1933 grants a right of action to investors who allege that they have purchased securities in reliance on a registration statement that "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Today, the Supreme Court vacated a Sixth Circuit decision that had allowed expansive liability under Section 11 for statements of opinion. The Supreme Court held that an opinion may give rise to a Section 11 claim only if the speaker does not honestly believe the opinion or did not have the basis for the opinion implied by the opinion and its context.

The plaintiffs purchased Omnicare securities during a 2005 public offering. In connection with that offering, Omnicare had filed an SEC registration statement representing, among other things, that it believed that it was complying with all applicable laws. After the federal government sued Omnicare for alleged violations of anti-kickback laws, the plaintiffs sued Omnicare and its officers and directors, alleging that the stated belief regarding legal compliance was untrue because Omnicare was in fact engaged in unlawful activities. The district court dismissed the complaint on the ground that the plaintiffs had failed to allege that Omnicare knew that its legal-compliance opinion was untrue at the time that the registration statement was filed. The Sixth Circuit reversed, holding that it was sufficient under Section 11 for the plaintiffs to allege only that the stated belief was objectively false.

In an opinion by Justice Kagan, the Supreme Court vacated and remanded the decision of the Court of Appeals, holding that the Sixth Circuit had applied the wrong standard when evaluating the complaint. In doing so, the Court concluded that statements of opinion in a registration statement are actionable as "untrue statements of material fact" under Section 11 only if the speaker does not actually hold the belief expressed. The Court also concluded that a plaintiff may not bring a Section 11 claim that an opinion misleadingly omits material facts unless the plaintiff identifies "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." The Court therefore remanded the case for application of the proper legal standard.

Justice Scalia concurred, agreeing with the majority that opinions are not actionable as untrue material facts if they were honestly held, but reasoned that the majority took too expansive a view of the material-omission provision. And Justice Thomas concurred in the judgment that honestly held opinions cannot be the basis of an "untrue material facts" claim but argued that the Court should not have considered the material-omission theory of liability, which he thought that the complaint did not adequately raise.

The decision in *Omnicare* is of obvious importance to securities issuers and others (including underwriters and auditors) that may face Section 11 claims. The decision clarifies that statements of opinion may be a basis for Section 11 liability only in limited circumstances.

Any questions about this case should be directed to Josh Yount (+1 312 701 8423) in our Chicago office.