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ARTICLES

Did the Supreme Court's *Omnicare* Decision Create a Distinction Without a Difference?

By Aaron T. Morris

In the year following the Supreme Court's decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), which clarified the circumstances under which an opinion may give rise to liability under the Securities Act, much has been written about the "new" standards for such claims. In the decision, the Court confirmed that a mistaken opinion cannot be considered a misstatement so long as it was honestly held (as multiple circuits had already held), but the Court also held that an opinion might create liability (under an omission theory) if a company fails to disclose facts about the *basis* for the opinion that conflict with a reasonable investor's expectations. The latter part of the decision received attention for seemingly creating a second avenue of opinion liability (some even suggested that this second avenue would create fact issues precluding dismissal at the pleading stage).

Yet, in this context, the Court's distinction between a misstatement claim and an omission claim is tenuous, even in theory; in practice, this article argues that *Omnicare* will have (and has had) little effect on the outcome of securities litigation. Here's why: both theories will ultimately turn on the strength of the same allegations—facts alleged to demonstrate some problem with the opinion. Before *Omnicare*, courts considered those facts with an eye toward whether they created doubt about the speaker's true belief. Now, *Omnicare* instructs courts to also consider whether the facts would conflict with a reasonable investor's understanding of the opinion if read "fairly and in context." Both are especially difficult standards, susceptible only to circumstantial evidence, and the underlying allegations are likely to be the same. In other words, the allegations tending to show that a speaker could not have believed an opinion are likely to be the same that a plaintiff will use to show that a hypothetical investor would have been misled. For that reason, we should not expect to see an omission theory prevail where a misstatement theory could not, nor a change in the scope of liability for an opinion.

The Supreme Court's Decision

The *Omnicare* case arose from a company's opinion (in a registration statement) that its customer and supplier contracts were "legally and economically valid" and "in compliance" with applicable law. The plaintiffs brought claims under section 11 of the Securities Act, which provides that an issuer (and certain employees and advisors) may be liable for a registration statement that contains "an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

The Court began its decision by distinguishing opinion from fact:

> [A] statement of fact ("the coffee is hot") expresses certainty about a thing, whereas a statement of opinion ("I think the coffee is hot") does not. . . . And Congress effectively

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> incorporated just that distinction in [section] 11's first part by exposing issuers to liability not for untrue statements full stop (which would have included ones of opinion), *but only for untrue statements of fact*.

Applying that principle, the Court held 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." But the Court noted that an opinion does convey one ancillary fact: "that the speaker actually holds the stated belief." Thus, the Court held that an issuer may be liable for a pure opinion as a misstatement only if it was not sincerely held.

In contrast to the first part of the Court's decision—which narrowly defined when an opinion qualifies as a *misstatement*—the second part considered whether an honest opinion may nonetheless be misleading in light of what the company *did not say*. In that regard, the Court held that an issuer may be liable under section 11's omission provision if it concealed facts that conflict with a reasonable investor's understanding about the opinion:

> [A] reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion—or, otherwise put, about the speaker's basis for holding that view. And if the real facts are otherwise, but not provided, the opinion statement will mislead its audience. . . . Thus, *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.

While the Court acknowledged a theory of liability based on the failure to disclose facts about an opinion, it raised the pleading bar substantially with several limitations:

- First, the Court made clear that liability for an opinion requires more than an allegation that the company concealed "some fact cutting the other way." In the Court's view, a "reasonable investor does not expect *every* fact known to an issuer supports its opinion."
- Second, the Court stated that whether an opinion is misleading "always depends on context," including any "hedges, disclaimers, and apparently conflicting information."
- Third, the Court cautioned that a plaintiff "cannot just say that the issuer failed to reveal its basis"; rather, a plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."

Why *Omnicare* Will Not Increase the Scope of Liability for Opinions

Despite the attention garnered by *Omnicare*, we should not expect much change in the outcome of securities litigation. Although the Court articulated two seemingly independent theories of

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liability, both will be based on the same circumstantial evidence and will be exceptionally difficult to plead and prove. In understanding why, a good place to start is the Court's own hypothetical intended to illuminate the role of an omission claim:

> Suppose [a] CEO, in claiming that her company's TV had the highest resolution available on the market, had failed to review any of her competitors' product specifications. Or suppose she had recently received information from industry analysts indicating that a new product had surpassed her company's on this metric. The CEO may still honestly believe in her TV's superiority. But under [section] 11's omission provision, that subjective belief, in the absence of the expected inquiry or in the face of known contradictory evidence, would not insulate her from liability.

But this fact pattern is not new to securities litigators. Before *Omnicare*, plaintiffs were already trying to plead misstatement claims with circumstantial evidence of the kind the Court imagines above. While the CEO in the Court's example "may" honestly believe her opinion, a plaintiff will almost certainly allege that she did not by pointing to the specifications she "failed to review" or the contradictory information she "recently received." Although plaintiffs may well craft omission claims after *Omnicare* with these same facts, the Court's hypo begs the question of how defendants were "insulated" before (at least from litigation). For example, in a pre-*Omnicare* case arising from Facebook's initial public offering (IPO), the plaintiffs alleged that the company did not believe its opinion that an increase in mobile usage among customers "may negatively affect [Facebook's] revenue" because it allegedly "discovered that mobile usage was impacting its revenues *before* its IPO" and had already "cut its revenue projections." *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487 (S.D.N.Y. 2013). In light of those allegations, Judge Sweet of the Southern District of New York upheld the claims on the basis that the company could not have believed that revenues "may" decrease if they, in fact, already had.

However, while it is true that plaintiffs were bringing misstatement claims before *Omnicare*based on circumstantial allegations about an opinion, they were never easy claims to plead. The *Facebook* case is perhaps an exceptional circumstance: There, the court acknowledged that the opinion at issue was perhaps "more" than an opinion because it warned of something that "may occur when that event had already occurred." In a typical opinion case pre-*Omnicare*, plaintiffs were limited to mustering enough purely circumstantial allegations to cast doubt on the speaker's veracity—a task that proved easier said than done. For example, in one case, the plaintiffs tried to show that an analyst's opinions were dishonest by alleging that he was pressured by his firm into issuing overly optimistic reports. *In re Salomon Analyst Level 3 Litig.*, 350 F. Supp. 2d 477 (S.D.N.Y. 2004). The court noted that the allegations painted a "disturbing picture" of the atmosphere at the firm that—if true—could demonstrate a "motive for analysts to issue research reports that were more positive than their truly held opinions." Such evidence, the court reasoned, could be introduced "at trial or in a summary judgment motion" to support a claim that the opinions were dishonest. Nonetheless, the court dismissed the case, finding that allegations about "undisclosed motivations that might lead someone to misrepresent his true

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opinion" were insufficient to pass the pleading stage, without additional allegations focused on the particular speaker.

Against this backdrop, this article suggests that *Omnicare* effects little change in the scope of liability for an opinion. Courts were already assessing—in connection with misstatement claims—the kind of circumstantial allegations that *Omnicare* envisioned supporting an omission theory. And while *Omnicare* may have repurposed those allegations into a theory with different analytical underpinnings, the new framework is equally dependent on context and, ultimately, the strength of circumstantial evidence (after all, there will never be direct evidence of a "reasonable investor's" expectations). It's no surprise that the Supreme Court described an omission theory as "no small task for an investor." These claims were not easy to win before *Omnicare*, and with the same underlying allegations, we should not expect omission claims to gain any more traction than misstatement claims did.

The early decisions applying *Omnicare* support this prediction. For example, Judge Kaplan of the Southern District of New York dismissed claims under both theories based on an insurer's opinion that its reserves were sufficient. *City of Westland Police & Fire Ret. Sys. v. MetLife, Inc.*, No. 12-CV-0256 LAK, 2015 WL 5311196 (S.D.N.Y. Sept. 11, 2015). The plaintiff alleged that the company must have discovered a problem with its reserves after a cross-check of its records against a government database, but the court discredited those allegations because the plaintiffs could not explain how the cross-check would have revealed a shortfall. Accordingly, as to the misstatement claim, the court found that the cross-check allegations did not plausibly suggest that the company disbelieved its opinion about reserves. Likewise, as to the omission claim, Judge Kaplan held that the company had not improperly concealed facts about the cross-check because it would not have revealed a shortfall in reserves, and the plaintiff failed to allege any other facts that "did not fairly align" with the company's opinion.

In another case, Judge Nathan of the Southern District of New York upheld claims under both theories involving an opinion that the company was in compliance with all laws and regulations. *In re BioScrip, Inc. Securities Litig.*, 95 F. Supp. 3d 711 (S.D.N.Y. 2015). The plaintiffs claimed that the opinion was inconsistent with a civil investigative demand (CID) received by the company, which suggested wrongdoing within the company at the time the opinions were expressed. As to the misstatement claim, the court held that the company's knowledge of the CID created an "inference" that the company "could not have believed the veracity of its legal compliance statements." Likewise, as to the omission claim, the court held that the opinions "could have led a reasonable investor to conclude that [the company] was not presently involved in a wide-ranging investigation into its sales practices"—an inference that was contradicted by the CID.

Most recently, the Second Circuit considered a case that had been dismissed under a misstatement theory before *Omnicare* was decided. *Tongue v. Sanofi*, No. 15-588-CV, 2016 WL 851797 (2d Cir. Mar. 4, 2016). In that case, the plaintiffs based their claims on an opinion about the company's high likelihood of obtaining Food and Drug Administration (FDA) approval for a

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new drug, despite alleged concerns regarding the use of single-blind rather than double-blind studies. The district court had previously determined that the allegations did "not come close" to demonstrating that the company did not believe its opinion because the company's "substantial investment of money and personnel" in the single-blind study was "hard to square with the premise that defendants understood that the study design was fatally flawed." *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510 (S.D.N.Y. 2015). Following the *Omnicare* decision, the Second Circuit considered the plaintiffs' allegations under an omission theory and affirmed dismissal. Although the FDA had expressed "interim, albeit repeated" concerns that were not fully disclosed to investors, the court noted that a reasonable investor would have expected such a dialogue to take place between the company and the FDA. The court determined that the company's opinion "fairly aligned" with the information available at the time and that investors were not entitled to "so much information as might have been desired to make their own determination about the likelihood of FDA approval." Thus, under either theory, circumstantial allegations about the FDA's displeasure with the single-blind study were not enough to state a claim based on the opinion.

Conclusion

Omnicare's confirmation of the already high bar to plead a misstatement based on an opinion was a welcome development for the defense bar; the other part of the decision received mixed reviews from both sides. Yet, in practice, both theories will turn on the same circumstantial allegations about the opinion at issue and will be equally difficult to plead and prove. For that reason, we should not expect a significant change in the outcome of securities litigation after *Omnicare*, and we have not seen much change in the cases decided thus far. While plaintiffs are likely to formulate claims under both theories—which courts will continue to analyze separately—the net effect of *Omnicare*'s omission theory on the scope of liability for an opinion under the federal securities laws appears to be nil.

Keywords: litigation, securities, *Omnicare*, misstatement, omission

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