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When Will a Company Be Held Liable for Opinions Given During a Public Offering?

The Supreme Court of the United States has ruled on the liability of a company for opinion statements made in documents filed with the Security and Exchange Commission (the "SEC") on a public offering. While the Court's analysis is specifically restricted to the language of the U.S. *Securities Act of 1933*, 48 Stat. 74 (the "*Securities Act*"), the case may ultimately influence how Canadian Courts will assess liability for companies that make opinion statements in the context of a public offering.

The Facts

In *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 1 (2015), per Kagan J., Omnicare Inc. ("Omnicare"), a provider of pharmacy services for residents of nursing homes across the United States, filed a registration statement with the SEC in connection with a public offering of its common stock. Two sentences in the registration statement conveyed Omnicare's opinion that it was compliant with federal and state laws with respect to Omnicare's contractual arrangements with other healthcare providers. These statements were made with certain caveats. For example, Omnicare mentioned that there were several state-initiated "enforcement actions against pharmaceutical manufacturers for offering payments to pharmacists that dispensed their products".

Ultimately, the U.S. Federal Government commenced law suits against Omnicare, alleging that the company's receipt of payments from drug manufacturers violated anti-kickback laws.

The Laborers District Council Construction Industry Pension Fund (the "Fund"), pension funds that purchased Omincare

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stock in Omincare's public offering, commenced an action against Omnicare alleging that the company's opinions in its registration statement amounted to "materially false representations" about Omnicare's legal compliance with federal and state laws, contrary to section 11 of the *Securities Act*.

Under the *Securities Act*, a purchaser of securities can sue the issuer of a registration statement if that statement either "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact… necessary to make the statements therein not misleading". Thus, section 11 creates two ways to hold issuers liable for the contents of a registration statement—one focuses on what the statement says and the other on what it leaves out. In either case, the buyer of the stock need not prove that the defendant acted with an intent to deceive or defraud. In this respect, section 11 creates a strict liability test.

At issue in the *Omnicare* case was how these two forms of liability under section 11 applied to the statements of opinion regarding Omnicare's legal compliance in its registration statement.

Ultimately, Justice Kagan of the Supreme Court remanded the matter back to the lower Court to determine if Omnicare could be held liable under the second part of section 11, namely the "omissions claim". The lower Court will be required to review whether the Fund adequately alleged that Omnicare omitted a specific fact that would have been material to a reasonable investor. If so, the lower Court then had to decide whether the alleged omission rendered Omnicare's opinion statements misleading in its context.

Fact vs. Opinion in a Public Offering Statement

The U.S. Supreme Court began its analysis by assessing the first ground of liability under section 11 of the *Securities Act*, i.e. whether Omnicare's registration contained an "untrue statement of material fact". The Court held that that under this ground of liability, a statement of fact must express certainty about a thing. A statement of opinion, by comparison, does not.

In this case, Omnicare's statements about its compliance with federal and state laws were "pure statements of opinion". According to the Court, Omnicare said in its registration statement that "we believe we are obeying the law". This belief was honestly held. The fact that Omnicare's belief turned out to be wrong was not relevant under the first ground of liability in section 11. A sincere statement of pure opinion was not an "untrue statement of material fact", regardless of whether the investor could ultimately prove the belief wrong. The first part of section 11 was limited to factual statements and did not allow investors to second-guess subjective and uncertain assessments.

Liability For an Omission

However, under the second ground of liability in section 11 of the *Securities Act*, Omnicare could be held liable for its registration statement if Omnicare "omitted to state facts necessary" to make its opinion on legal compliance "not misleading".

The Court held that whether an opinion in a registration statement is "misleading" under section 11 is based on an objective standard and depends on the perspective of the "reasonable investor". That is, the Court had to decide whether the omission of a fact in a registration statement can make a statement of opinion like Omnicare's, even if literally accurate, misleading to an ordinary investor.

The Court held that a reasonable investor, depending on the circumstances, may understand an opinion statement to convey facts about how the speaker has formed the opinion, i.e. "about the speaker's basis for holding that view". If the real facts are otherwise, but not provided by the speaker, the opinion statement will be held to "mislead" its audience. The Court stated:

> 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 [section] 11's omissions clause create liability.

The Court, however, was careful to note that section 11's omission clause does not create a general disclosure requirement on the part of the stock issuer. Rather, it allows a law suit only when an issuer's failure to include a material fact has made the issuer's published statement misleading. Accordingly, the investor has to identify particular and material facts going to the basis for the issuer's opinion, i.e. "facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have". Once such facts have been identified, the onus is on the investor to show that the omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. In this case, the Fund argued that a lawyer had warned Omnicare that one its contracts carried a heightened risk of legal exposure under anti-kickback laws. Thus, the Court remanded this issue to the lower Court to decide whether the Fund adequately alleged that Omnicare had omitted this fact from the registration statement. If so, the lower Court then had to decide whether this omitted fact would have been material to a reasonable investor, i.e. "whether there is a substantial likelihood that a reasonable investor would consider it important". The Court then had to ask whether the omission rendered Omnicare's legal compliance opinions misleading because the excluded facts showed that Omnicare lacked the basis for making "those statements that a reasonable investor would expect".

The Effect of *Omnicare* in Canada

The U.S. Supreme Court's analysis in *Omnicare* could have implications for Canadian common law. While section 11 of the Securities Act, and its language, are particular to the United States, the decision invites the possibility of corporate liability on a public offering for opinion statements where material facts giving rise to those statements are not disclosed to investors. The *Omicare* case offers one approach that could be adopted by Canadian Courts in assessing material disclosure in the context of a public offering. At a minimum, the case cautions that corporations making a public offering must be careful and candid when making opinion statements, particularly with respect to legal compliance, to potential investors.