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ANTIFRAUD

The Supreme Court's Decision in *Omnicare*: The View From Two Years Out

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Over the last quarter century, the Supreme Court has issued several landmark securities decisions, making it more difficult for plaintiffs to lodge fraud claims against companies and secondary actors. These include *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (no aiding and abetting liability in suits brought by private parties against secondary actors); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007) (tightening pleading standards for scienter); and *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008) (declining to imply a private right of action for deceptive conduct cast as a ''scheme'' to defraud). Almost exactly two years ago, in *Omnicare Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), the defense bar achieved another significant victory when the Court addressed the standards for pleading falsity of an opinion claim under Section 11 of the Securities Act.

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Given that our firm represented the prevailing party in the Supreme Court, we have kept abreast of lower court interpretations of *Omnicare* and are currently involved in several matters raising questions about its application. As one would have anticipated, its scope has been expanded beyond Section 11 of the Securities Act and numerous courts have dismissed opinion allegations under the antifraud provisions on the basis of *Omnicare*. The decision has not slowed the filing of securities class action lawsuits, however, and a growing target of these lawsuits is the life sciences industry, where a company's opinion statements regarding, for example, the approval and efficacy of new drugs, is at issue. We discuss these developments below.

The *Omnicare* Decision

Prior to *Omnicare*, courts were divided on the issue of misleading opinions in securities cases. The Sixth Circuit held, in the decision reviewed in *Omnicare*, that it was sufficient to allege that the stated beliefs were objectively false, even if genuinely believed to be true, because Section 11 claims premised on misstatements of fact do not require a showing of scienter. *Indiana State District Council of Laborers v. Omnicare*, 719 F.3d 498 (6th Cir. 2013). This differed from tests employed in the Second, Third and Ninth Circuits where, notwithstand-

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ing the lack of a scienter requirement, allegedly false statements of opinion had to be both objectively and subjectively inaccurate. *See, e.g.*, *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011) (''when a plaintiff asserts a claim . . . based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed.''); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (opinions can ''give rise to a claim under section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading'').

In *Omnicare*, the Supreme Court established three clear alternative standards for pleading the falsity of opinion statements. First, for a statement of opinion to itself be a false statement of fact, it must be the case that ''the speaker did not hold the belief she professed.'' 135 S. Ct. at 1327 (''[A] sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong.''). Second, a statement of opinion can contain within it an embedded statement of fact, in which case the plaintiff must allege that ''the supporting fact supplied [is] untrue.'' *Id*. Third, an opinion statement can be misleading for failing to include certain facts, but the Court explained that proceeding on such a theory would be ''no small task'' for a plaintiff. *Id*. at 1332. Specifically, the plaintiff would need to plead ''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 to a reasonable person reading the statement fairly and in context.'' *Id*.

Opinion Statements *Post-Omnicare*

Many courts have used the *Omnicare* framework to dismiss claims founded on opinion statements. For example, in *In re Investment Technology Group, Inc. Securities Litigation*, ___ F. Supp. 3d ___, No. 15 Civ. 6369 (JFK), 2017 WL 1498055 (S.D.N.Y. Apr. 26, 2017), the court rejected the allegation that statements of opinion in a company's SEC filings were misleading. The court ruled that the plaintiff organization ''[d]id not allege that Defendants subjectively disbelieved their own opinion, nor does it allege that they embedded an untrue fact.'' *Id*. at *16; *see also In re Deutsche Bank AG Securities Litigation*, No. 09 CV 1714 (DAB), 2016 WL 4083429, at *25 (S.D.N.Y. July 25, 2016) (dismissing complaint and concluding that a reasonable investor ''does not expect that every fact known to an issuer supports its opinion statement'') (citing *Omnicare*) (internal quotation marks omitted); *Southeastern Pennsylvania Transportation Authority v. Orrstown Financial Services, Inc.*, No. 1:12-cv-00993, 2016 WL 7117455, at *14 (M.D. Pa. Dec. 7, 2016) (no reasonable inference defendant did not hold the challenged opinion). Of course, some opinion statements have survived motions to dismiss or for summary judgment. In *SEC v. Thompson*, ___F. Supp. 3d ___, No. 14-cv-9126 (KBF), 2017 WL 874973 (S.D.N.Y. Mar. 2, 2017), the court rejected arguments premised on *Omnicare*, finding, inter alia, that a fact conveyed in an opinion statement in a newsletter, that investors would have the opportunity to invest in an initial public offering, was contrary to the actual situation. *Id*. at *18.

Courts have made explicit that *Omnicare* applies beyond the scope of Section 11. Both the Second Circuit in *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016), and the Ninth Circuit in *City of Dearborn Heights Act 345 Police & Fire Retirement System v. Align Technology*, 856 F.3d 605 (9th Cir. 2017), applied *Omnicare's* reasoning to claims under Section 10(b) of the Exchange Act and Rule 10b-5 claims, which unlike Section 11 claims require proof of scienter. But see *Firefighters Pension & Relief Fund of the City of New Orleans v. Bulmahn*, Civil Action No. 13-3935, c/w 13-6083, 13-6084, 13-6233, 2015 WL 7454598 (E.D. La. 2015) (declining to apply *Omnicare* to defendants' forward-looking statements of opinion in a 10(b) case). In *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 645 F. App'x 72, 76 n.3 (2d Cir. 2016) (summary order), cert. denied, ___ U.S. ___, 137 S. Ct. 186 (2016), the Second Circuit assumed arguendo that *Omnicare* applied to securities fraud claims lodged under Section 18 of the Exchange Act providing for civil liability for misleading statements made in documents filed with the SEC. The District of Minnesota has applied *Omnicare* to Section 14(e), holding that plaintiffs failed to sufficiently allege that the proxy statement's opinion that the merger was fair to stockholders was false or misleading. *Ridler v. Hutchinson Tech. Inc.*, 216 F. Supp. 3d 982 (D. Minn. 2016). In *SEC v. Goldstone*, a New Mexico district court applied *Omnicare* to Section 17(a) claims brought by the SEC for misstatements in offering materials. No. Civ. 12-0257 JB/GBW, 2015 WL 5138242, at *254 (D.N.M. Aug. 22, 2015).

The Effect of *Omnicare* on Securities Litigation Against Life Sciences Companies

Securities class action filings increased in 2016 and appear to be on a similar pace for 2017. Many plaintiff firms have turned their attention to biotechnology, pharmaceutical and other health-related companies. According to Cornerstone Research, ''[i]n 2015 and 2016, biotechnology, pharmaceuticals, and healthcare filings were larger than the average filing.'' Moreover, the eighty filings against health firms in 2016 more than doubled the 1997-2015 historical average and represented an 86 percent increase over 2015 filings. *See* Cornerstone Research, Securities Class Action Filings, 2016 Year in Review at 30, 38, available at https://www.cornerstone.com/Publications/Reports/Securities-Class-Action-Filings-2016-YIR. *See also* Kevin M. LaCroix, *The D&O Diary* (July 5, 2017) (''As has been the case for many years, companies in the life sciences experienced the highest number of securities suit filings in the 2017's first half.''). To the extent these lawsuits raise opinion claims, they often concern misrepresentations allegedly made during product development, and those allegedly made after product development and FDA approval.

In this sector too, a significant number of cases were dismissed on the basis of *Omnicare*. In the seminal case of *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016), for example, the Second Circuit observed that sophisticated investors are expected to understand how the regulatory process works. In that case, plaintiffs alleged that

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Sanofi failed to disclose the FDA's warnings that a single-blind study might not be sufficient to obtain agency approval. Because the plaintiffs regularly invested in medical companies, the court of appeals held that they could be expected to understand the give and take of the FDA approval process. *Id*. at 211. More fundamentally, the court recognized that because the company's statements aligned with much of the information regarding its dealings with the FDA, the FDA's warnings about the sufficiency of single-blind studies were simply ''some fact cutting the other way,'' and did not have to be disclosed. *Id*. at 212 (quoting *Omnicare*, 135 S. Ct. at 1329); *see also Gillis v. QRX Pharma Ltd.*, 197 F. Supp. 3d 557, 577-578 (S.D.N.Y. 2016) (optimistic statements that company was ''encouraged'' by FDA feedback and ''confident'' of drug approval not actionable since no evidence company didn't believe them); *Vallabhaneni v. Endocyte, Inc.*, No. 1:14-cv-01048-TWP-MJD, 2016 WL 51260, at *11-14 (S.D. Ind. Jan. 4, 2016) (rejecting claim that company concealed FDA criticism of Phase 2 trials, since this was merely part of an ongoing dialogue with the agency). Nonetheless, where plaintiffs made specific credible allegations that the opinions expressed either were not subjectively believed or omitted facts that would have caused a reasonable investor to question the opinion, they have survived motions to dismiss. See *In re Iso Ray, Inc. Securities Litigation*, 189 F. Supp. 3d 1057, 1071 (E.D. Wash. 2016) (press release touting ''outstanding patient outcomes'' from use of a drug actionable where omitted facts ''conflict[ed] with what a reasonable investor would take'' from the statement) (internal quotation marks omitted); *Todd v. STAAR Surgical Co.*, No. CV-14-05263-MWF-RZ, 2016 WL 6699284, at *9-10 (C.D. Cal. Apr. 4, 2016) (plaintiffs adequately pled that legal compliance opinion was misleading when company failed to disclose FDA letters concerning manufacturing violations).

The Takeaway

Omnicare has brought clarity to an area of the law where courts differed regarding the proper standards for evaluating opinion claims. It is another weapon in the significant arsenal available to defend securities class action lawsuits, but its application will obviously depend on the specific disclosure at issue. As to opinion statements, in particular, other significant defenses include (1) that the particular opinions are forward looking statements protected by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-5(c)(1); (2) are mere puffery; or (3) were otherwise immaterial. And, for claims under Section 10(b) in particular, the heightened pleading standards attendant to pleading a fraud claim can be particularly potent when one is confronting the nuances frequently contained in statements of opinion.

As the Supreme Court noted in *Omnicare*, ''an investor reads each statement within such a document . . . in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information.'' 135 S. Ct. at 1330. Accordingly, companies may want to consider, among other things, noting that they are offering opinions as opposed to facts; inserting in their statements tailored risk factor disclosures; or adding disclaimers or hedges that could provide additional context. They should also recognize that in several jurisdictions *Omnicare* extends well beyond registration statements to statements of opinion in all public statements.

Issuers, therefore, should continue to exercise judgment when expressing optimistic views about future developments. However, the decisional law over the last two years, following the *Omnicare* decision, demonstrates that the additional protections for statements of opinion in *Omnicare*, combined with the traditional defenses for forward looking statements, serve as a potent bulwark against claims that such statements contravene the securities laws.