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News & Analysis

Securities Litigation: When Can Statements of Opinion be Misleading?

Rule 10b-5: Misleading Statements and Omissions

The core of any 10b-5 claim is the collection of fact statements (or omissions) alleged to be false or misleading. How these statements are characterized can be dispositive. If the defendants can persuade the court to treat the allegedly false statements as opinions and not statements of fact that usually ends the case. After all, how can an "opinion" be a fact, much less false?

There has typically been one way around this: showing that the opinion was deceptive because it was not sincerely held. For example, if the CEO publicly expresses boundless optimism for the company, but privately admits to confidants that its stock is a dog, that "opinion" can potentially support a claim for fraud. Even if the CEO's statements of optimism did not contain any actual facts ("we're poised for fantastic success!"), purchasers of the stock were presumably entitled to rely on the fact that the CEO's enthusiasm was, at least, genuine. But from a plaintiff's perspective, pre-discovery, it is difficult to plausibly allege what a speaker really believes, and a smart corporate executive knows better than to put "our stock is a dog" in writing.

On July 13, 2020, the Second Circuit decided *Abramson v. Newlink Genetics Corp.*, 965 F.3d 165 (2d Cir 2020). *Abramson* opens a new approach for 10b-5 plaintiffs based on a five year old Securities Act case decided by the Supreme Court, *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175 (2015). Because the Second Circuit discussed and applied the *Omnicare* framework in a new context it is worth looking back at that case.

Omnicare and the Securities Act

In *Omnicare*, the Supreme Court considered statements of opinion in the context of a claim under Section 11 of the Securities Act. That section creates a private right of action for purchasers of securities when the registration statement contains false statements. The Supreme Court confirmed the insincerity of an opinion as a basis for liability. But the Court also endorsed a different approach to imposing liability for statements of opinion. It recognized that people, at least in theory, form opinions based on facts, and that a statement of opinion can reasonably imply that the speaker has at least made an inquiry into the facts:

> **[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.**

In the example the Court gave, the statement "we believe our conduct is lawful" suggests that there has been some meaningful legal analysis, and that the opinion "fairly aligns" with the results of that analysis. If there has been no inquiry, or if there has been and the advice of counsel was to the contrary, sticking "it is my opinion that…" in front of the statement will not insulate the speaker from liability.

Omnicare dealt with registration statements under the Securities Act, but given the similarity between liability under Section 11 of the Securities Act and Rule 10b-5 of the Exchange Act it potentially gave the misleading omissions prong of 10b-5 new force: if an opinion fairly implies certain facts, omitting material context to the contrary could be actionable. Indeed, the Second Circuit had occasion to examine *Omnicare* in the 10b-5 context shortly after it was decided, in *Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016). However, in *Tongue*, the Court concluded that *Omnicare* could not rescue the opinion statements at issue given their nature and context.

Omnicare, Abramson and Rule 10b-5

Now, however, we have *Abramson*, a case involving claims under 10b-5 for statements by a pharmaceutical company about a developmental drug. The Court of Appeals concluded that the trial court (correctly) dismissed a number of claims based on language that was "puffery." But the trial court also dismissed claims based on optimistic statements about the results of clinical trials that it had characterized as opinion. Applying *Omnicare*, the Second Circuit concluded that these statements could form the basis for a 10b-5 claim.

The Court noted that, previously,

> **a district court's characterization of a statement as one of opinion rather than one of fact was all but fatal to the plaintiff's Rule 10b-5 claim. Plaintiffs challenging**

a statement of opinion had to plead "that the statement was both objectively false and disbelieved by the defendant at the time it was expressed."

The Court concluded, however, that following *Omnicare* "plaintiffs can allege that a statement of opinion, without providing critical context, implied facts that can be proven false."

Further, the Court observed that the Supreme Court had eroded the formerly critical distinction between statements of fact and of opinion and that it therefore "need not decide whether the district court's classification and methodology for winnowing statements of fact from those of opinion ran afoul of *Omnicare*. By increasing the ability of plaintiffs to plead material omissions with respect to statements of opinion … Omnicare reduced the significance of district courts' classification of statements as those of fact or opinion." The *Abramson* plaintiffs would therefore have their opportunity to prove their case regardless of whether the statements were opinion or not.

Curiously, the *Abramson* panel did not reference the Second Circuit's earlier decision in *Tongue v. Sanofi*. Although the two can be read consistently, the *Abramson* decision lays out a more plaintiff-friendly approach with a more robust reading of the pleading opportunity provided by *Omnicare*.

Lessons for Plaintiffs

For 10b-5 plaintiffs, the *Abramson* decision puts teeth in *Omnicare*. *Abramson* tells District Courts they need no longer carefully parse every allegedly false statement in a complaint and place it in a "fact" bucket or an "opinion" bucket. (The "puffery" bucket appears to be intact and very desirable for defendants.) Plaintiffs can now look with somewhat more optimism at press releases, investor calls and interviews with senior executives and find a place in their complaints for statements prefaced by "I think" or "we believe."

Lessons for Securities Issuers

For issuers of securities and their investor relations departments, *Omnicare* and *Abramson* deserve careful attention. Previously, statements of opinion were practically impervious to attack in a 10b-5 action. A plaintiff would have to plausibly allege that the opinion was not genuinely held and that the underlying fact was untrue—a nearly insurmountable pleading burden as the Second Circuit noted. *Abramson*, following *Omnicare*, gives plaintiffs a much broader range of statements to examine and a roadmap for getting their complaints past a motion to dismiss. This is especially relevant given the consequences of a plaintiff overcoming a motion to dismiss—once the automatic stay of the PSLRA disappears costs of defense mount very quickly even in an otherwise weak case.

Corporate officers who speak on behalf of the company should receive training on how to express opinions with appropriate care. Drafters of corporate disclosures should be attentive to the bases for any opinions expressed.

This may be of special relevance to pharmaceutical companies and other companies whose products have long development times with blockbuster potential, but which are subject to unpredictable external contingencies. The financial press inevitably wants to know about the prospects for success, and the company of course wants to express optimism. *Abramson* counsels caution. Companies should be vigilant to ensure that statements of opinion are consistent with the information available to them and do not imply the existence of facts the company does not have or investigations the company has not done.

Finally, while this may be most relevant to public companies, issuers of exempt securities should also take note. Rule 10b-5 applies to them, too, and appropriately disciplined public statements can help keep them out of trouble.

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