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U.S. Supreme Court Round-Up: Sun Capital Cert Denied, Omnicare Cert Granted and Whistle-Blower Protection Extended

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Meanwhile, with the First Circuit Court's decision firmly in place, private equity funds should consider its implications in the context of future acquisitions and their current portfolio company obligations.

Supreme Court Grants Certiorari in the Omnicare Case

Also on March 3, 2014, the Supreme Court granted certiorari in the Omnicare v. Laborers District Council Construction Industry Pension Fund case. The question under review is whether "[f]or purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, as the Sixth Circuit has concluded, or must the plaintiff also allege that the statement was subjectively false—requiring allegations that the speaker's actual opinion was different from the one expressed—as the Second, Third, and Ninth Circuits have held?" Section 11 of the Securities Act of 1933, as amended, provides a private remedy for a purchaser of securities issued under a registration statement filed with the Securities and Exchange Commission if the registration statement "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading."

The Sixth Circuit decision in Indiana State District Council of Laborers v. Omnicare created a circuit split regarding the question of what is required to demonstrate that a statement of opinion is false or misleading. As this question is central to many securities class actions, which often hinge upon the truth or falsity of opinions, not facts, it will be interesting to see what the Supreme Court will decide.

Supreme Court Extends Whistle-Blower Protection

On March 4, 2014, in Lawson v. FMR LLC, the Supreme Court extended whistle-blower protection to subcontractors of publicly held companies. In its decision, reversing a First Circuit decision, the majority held that the whistle-blower provisions of the Sarbanes-Oxley Act cover employees of private contractors and even subcontractors that are hired by publicly traded companies. The law provides that no public company, or any employee, (sub)contractor or agent of such company, could retaliate against an employee for whistle-blowing, but it was unclear whether the law covered only the employees of public companies, or also employees of contractors who do work for public companies.

The holding in this case extends beyond the mutual fund industry, where most funds are managed by independent investment advisers instead of employees, to cover other professionals who work on a contract basis for publicly held companies, including law firms and accounting firms.

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