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Going Public? After Omnicare, You May Want to Keep Your Opinions to Yourself

May 5, 2014

Reading Time : **2 min**

The case centers on Omnicare, a healthcare company that offered 12.8 million shares of common stock for sale pursuant to a registration statement in December 2005. According to the plaintiffs, the Registration Statement stated "that [Omnicare's] therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed" and that its contracts with drug companies were "legally and economically valid arrangements that bring value to the healthcare system and patients that we serve." In reality, according to plaintiffs, the company failed to disclose that it was engaging in illegal kickback arrangements with pharmaceutical companies and submitting false claims to Medicare and Medicaid. At issue is whether the statement that its contracts with drug companies were "legally and economically valid" is a soft statement of opinion that requires proof of subjective falsity (or intent).

If this were an action under Section 10(b) of the Securities Exchange Act of 1934, there would be no question: plaintiffs would be required to prove intent. However, Section 11 is a different securities animal. Section 11(a) of the Securities Act of 1933 creates an express right of action for damages by shareholders when a registration statement contains untrue statements of material fact or omissions of material fact. Unlike Section 10(b), which is available for any purchase or sale of securities, Section 11 is limited to purchasers directly traceable to a registration statement. Also unlike Section 10(b), Section 11 plaintiffs need not prove scienter or reliance and plaintiffs are entitled to statutory damages, with the burden of proof for the "negative causation" defense shifting to defendants. In sum, Section 11 is the one private cause of action that places most of the burden of proof on defendants.

An exception to the "no scienter" requirement developed in response to the Supreme Court's decision in *Virginia Bankshares v. Sandberg*, 501 U.S. 1083 (1991). In *Virginia Bankshares*, the

court held that in the Section 14(a) proxy-statement context, to prove a misstatement, investors would have to prove that the information was both wrong and inconsistent with the opinion actually held by the speaker. The Second, Third and Ninth Circuits subsequently adopted similar approaches in Section 11 cases as well, reasoning that because Section 14(a) is a negligence-based statute that does not require proof of scienter, it should be applicable in a Section 11 context as well. *Fait v. Regions Fin. Corp*., 655 F.3d 105, 110 (2d Cir. 2011); *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009); *In re Donald J. Trump Casino Sec. Litig*., 7 F.3d 357, 368-69 (3d Cir. 1993) (assessing under a materiality analysis).

Ultimately, the decision will come down to whether the Supreme Court believes that to prove falsity of a statement of "soft information" or opinion, the plaintiff must show that the holder of that opinion believed it to be false. The *Omnicare* decision will have significant consequences to plaintiffs, who previously avoided the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) by not alleging fraud. If *Omnicare* requires proof of subjective intent, plaintiffs will face a higher hurdle at the motion-to-dismiss stage for Section 11 claims. And if the Supreme Court sides with the Sixth Circuit, companies, officers, directors and auditors will likely face increased liability (and similarly increased D&O insurance premiums). Merits briefs of the petitioners and respondents will be filed over the summer, and we will update you as the case unfolds.

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