Today’s Speakers

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Overview

• Certiorari process: How do cases get before the Court?
• The *Omnicare* Case and its Implications for Securities Professionals
• Other Recent Business Decisions
• Supreme Court Lessons on Professional Responsibility
• What the Future Holds
One in a Million: The Certiorari Process
The Certiorari Process

What certiorari is (and is not) about

• Circuits or state supreme courts “in conflict” on an “important federal question,”

• or in “conflict[] with relevant decisions of this Court,”

• or (in theory) “an important question of federal law that has not been, but should be, settled by this Court” [S. Ct. R. 10]

The process and its biases

• Review by “pool” clerks, with institutional bias to recommend “deny”

• Clerk bias against business cases, and the role of amici in defeating it

• Not all hot-button cases: in 2013 Term, 66% were 9-0; only 14% were 5-4

• Grants make up roughly 1% of all petitions, and 5% of all paid petitions
The *Omnicare* Case

I believe…
The *Omnicare* Case: Background

**Facts:**

In December 2005, Omnicare offered 12.8 mm shares of stock for sale.

In advising of legal and regulatory risk, Registration Statement and incorporated 10K included legal compliance statements:

“We believe our contract arrangements with . . . our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.”

**Claims:**

Purchasers sued under Rule 10b-5 but could not allege “scienter.”

Purchasers then sued under Section 11—which does not require scienter—and asserted that Omnicare’s contracts and practices were *not* in compliance with the law.
The *Omnicare* Case: Prior Rulings

**District Court:**

Granted motion to dismiss: Plaintiffs failed to plead facts supporting an inference that Omnicare and its officers knew at the time that the contracts and practices violated the law.

**Sixth Circuit:**

Reversed dismissal: Because Section 11 is a “strict liability” statute and does not require scienter, the speaker’s knowledge is irrelevant. So, Plaintiff need only allege that the opinion was “objectively” wrong.

Disagreed with other Circuits: relying on *Virginia Bankshares*, Second and Ninth Circuits held that a statement of opinion is not actionable unless it is “subjectively false”—that is, unless the speaker did not really hold the opinion at the time.
The *Omnicare* Case: In the Supreme Court

**Issue for review:**

For purposes of a Section 11 claim, may a plaintiff plead that a statement of opinion was “untrue” merely by alleging that the opinion turned out to be wrong, or must the plaintiff also allege that the speaker did not really hold the opinion at the time?

**Held:**

A pure statement of opinion is not actionable as a “false statement of material fact” unless the speaker did not really believe it.

But, if the statement, read in context by a reasonable investor, communicates something misleading about its basis, omitting the facts about the basis may be actionable as a material omission.
The *Omnicare* Case: Analysis

**Analysis:**

Section 11 (like other sections) applies when the filing

> “contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”

15 U.S.C. 77k(a)

A statement of opinion is not a “statement of material fact.”

But a statement of opinion may be “misleading” if a “material fact” about its basis is omitted. To evaluate whether it’s “misleading,” the court must analyze what a reasonable investor would expect to be the basis.

**NOTE:** The Court did *not* adopt the Government’s argument that a statement of opinion is actionable if it lacks a “reasonable basis.”
The *Omnicare* Case: Key Qualifications

*Key qualifications:*

“Reasonable investors do not understand [registration] statements as guarantees,” and they “understand that opinions sometimes rest on a weighing of competing facts.”

“Whether an omission makes an expression of opinion misleading always depends on context . . . including hedges, disclaimers, or qualifications.”

“To avoid exposure for omissions under Section 11, an issuer need only divulge an opinion’s basis, or else make clear the real tentativeness of its belief.”
The *Omnicare* Case: Implications for Issuers and Underwriters

Extremely important case for public companies and their financial and legal advisors

Opinion statements are unavoidable and a pervasive fact of life for public companies

- Not just opinions about legal matters as in *Omnicare*
- “We believe”/“we expect…” statements about: “market share”; “rank in industry”, “restructuring charges” and “synergies”; predictions; and projections abound in prospectuses, SEC filings, and merger proxy statements

- All are “opinion” statements under *Omnicare*
- SEC requires them
- Investors demand them
The *Omnicare* Case: Scope and application

- *Omnicare* involves §11 of Securities Act of 1933
- May easily be extended to Rule 10b-5 and Rule 14a-9 (proxy statements) under Securities Exchange Act of 1934
- 1934 Act antifraud provisions use same language:
  "untrue statement of material fact or omit to state a material fact necessary in order to make statements, in light of the circumstances under which they were made, not misleading" (Rule 10b-5)
- Opinion statements in SEC reports, investor conference calls and press releases likely will be tested by "context" test in *Omnicare*

- Decision should curtail litigation over honestly held opinions that turn out to be wrong, but could give rise to new avenues of litigation over whether opinion statements accurately describe the speaker's belief and disclose all necessary qualifications and underlying assumptions have not disclosed underlying assumptions.
The *Omnicare* Case: Context is Controlling

**Formality:** i.e., registration statements v. press releases or analyst conference calls

- Plaintiffs may face more stringent test for falsity in less formal, more conversational communications (e.g., analyst conference calls)

**Nature of the Subject Matter:**

- Statements about litigation or legal issues (future environmental liabilities) may imply that company checked with counsel or other experts
  - Example: "We believe we should prevail in the lawsuit" may be misleading if speaker did not consult counsel
- Failure to disclose key assumptions, qualifiers, and warnings could make opinion misleading, depending on what a reasonable investor would think
- Failure to disclose total absence of due diligence could make opinion misleading

**Surrounding disclosures:**

- Court said disclosure of material assumptions, etc., will serve as defense to liability
- Disclosure of uncertainty also important: i.e., “these laws may . . . be interpreted in the future in a matter inconsistent with our interpretation”; "no assurances are possible"; "Courts may disagree…"

**Overall objective:** Enable the investor to decide how much weight to put on opinion
The *Omnicare* Case: Practical Tips

- Use caution for SEC periodic filings, proxy statements and private placement offering memoranda, as well as registration statements
  - *Omnicare* may well apply outside Section 11
  - Incorporation by reference
  - A court might not agree “context” is much different
  - Proxy statements for mergers may be especially likely to be second-guessed, as they likely contain numerous opinions about the combined company
- Don't depend on *Omnicare*'s statements about formality to lower standards when preparing written communication as scripts for analyst conference calls
- Analyze and draft opinion statements carefully and, consider disclosing key bases, qualifications, and assumptions
- Include material “hedges, disclaimers, or qualifiers” to decrease risk of liability
- Pay special attention to facts tending to contradict or undermine opinion (no lawyer consulted; government holds different view)
- Cross-references to Risk Factors in 10-K may help (especially on conference calls)
- Be sure opinion discloses tentativeness of belief and does not overstate degree of confidence ("not free from doubt"; "no assurances can be given")
- Have disclosure committees review opinions carefully
- Give careful thought to documentation
Other Recent Decisions: *Tibble v. Edison*

**Issue:** Whether ERISA’s six-year statute of limitations for claims of breach of fiduciary duty bars a claim when the alleged bad investment decisions were made more than six years before the lawsuit.

**Facts:** In 1999 and 2002, Edison’s 401K plan offered a new group of mutual funds. Plaintiffs sued in 2007, alleging that in both years, Edison breached its fiduciary duty by improperly choosing a more expensive class of funds than it should have. The Ninth Circuit found the claim untimely.

**Held:** Fiduciaries have a *continuing duty to monitor and remove* imprudent investments, and a claim is timely if filed within six years of the breach of that duty.
Tibble v. Edison: Continuing Fiduciary Duty

Significance: ERISA fiduciary’s duty to monitor and remove imprudent investments **applies and can be breached even without a significant change in circumstances.** This duty …

- is independent of the initial investment decision
- requires a regular and systematic review of investments
- requires disposing of inappropriate investments in a reasonable time

Practical Tips: Plan fiduciaries should adopt plans for regular, systematic review of investments, based on the nature of the plan and the investments, and maintain careful documentation of decisionmaking, even after the initial investment.
Other Recent Business Decisions: False Claims Act and Bankruptcy

*Kellogg Brown & Root v. U.S.*: The Wartime Suspension Act does not toll statute of limitations for civil fraud claims, and False Claims Act’s “first-to-file” bar ceases to apply once the pending action is dismissed.

*Wellness Int’l v. Sharif*: Even for “private rights” claims for which the Constitution requires a decision by an Article III court, a bankruptcy court may enter a final order based on consent.
Other Recent Decisions: Employment

*M&G Polymers v. Tackett:* Vesting of benefits under a collective bargaining agreement depends on ordinary principles of contract law.

*Mach Mining v. EEOC:* The EEOC’s compliance with its duty to conciliate claims before bringing suit is subject to judicial review.

*Young v. UPS:* Employee can make out a prima facie case of pregnancy discrimination by comparing her situation to accommodations offered to similar, non-pregnant employees.

*EEOC v. Abercrombie & Fitch:* Employee must show that her need for a religious practice accommodation was a motivating factor for the employer, not that the employer actually knew of her need.

*Perez v. Mortgage Bankers:* No need for notice-and-comment in modifying interpretive rules (invalidating *Paralyzed Veterans*)
Supreme Court Lessons on Professional Responsibility: Delegation

*Admonition:* Compliance with rules cannot be delegated to clients.

*Question Presented in Schindler v. Lee* (pet’n denied 2014):

Does the US Constitution, in legal decisions based on 35 USC §§ 101/102/103/112, require instantly avoiding the inevitable legal errors in construing incomplete and vague classical claim constructions—especially for “emerging technology claim(ed invention)s, ET CIs”—by construing for them the complete/concise refined claim constructions of the Supreme Court’s KSR/Bilski/Myo/Myriad/Biosig/Alice line of unanimous precedents framework, or does the US Constitution for such decisions entitle any public institution to refrain, for ET CIs, for a time it feels feasible, from proceeding as these Supreme Court precedents require—or meeting its requirements just by some lip-service—and in the meantime to construe incomplete classical claim constructions, notwithstanding their implied legal errors?
Supreme Court Lessons on Professional Responsibility: Delegation

Order in In re Howard Neil Shipley:

A response having been filed, the Order to Show Cause … is discharged. All Members of the Bar are reminded, however, that they are responsible—as Officers of the Court—for compliance with the requirement of Supreme Court Rule 14.3 that petitions for certiorari be stated “in plain terms,” and may not delegate that responsibility to the client.
Supreme Court Lessons on Professional Responsibility: Civility
Supreme Court Lessons on Professional Responsibility: Confidentiality

The most leak-proof Washington institution

• *The Brethren, Closed Chambers, Bush v. Gore* articles
  
• Yet still no leaks until after the fact
  
• Press corps relegated to box-counting, calendar-watching, rank speculation, mad dashes out of the Courtroom

The most media-resistant institution, with an unbending refusal to preview decisions or bend to demands of modern media
Supreme Court Lessons on Confidentiality
Supreme Court Lessons on Confidentiality
Supreme Court Lessons on Confidentiality
What the Future Holds . . . 2014 and 2015 Terms

Within the next week:

*King v. Burwell* (argued March 4): Constitutionality of Obamacare tax credits

*Obergefell v. Hodges* (argued April 28): Constitutionality of same-sex marriage bans

Next Term:

Important cases on class certification
What the Future Holds … Retirements?

If they wait through the 2016 election:

Age 83  Age 78  Age 80  Age 80  Age 68
Questions?

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