

# Client Update

## In *Omnicare*, the Supreme Court Clarifies when Statements of Opinion Are Actionable Under Section 11 of the Securities Act

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On March 24, 2015, the U.S. Supreme Court issued its much anticipated decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, 2015 WL 1291916. Resolving a circuit split, the Court held that a statement of opinion in a registration statement does not constitute an untrue statement of fact that gives rise to liability under Section 11 of the Securities Act of 1933 simply because it ultimately proves to be incorrect. Instead, a statement of opinion may give rise to liability only if the issuer either (i) does not genuinely believe the opinion or (ii) omits a material fact regarding the issuer's basis for the opinion that renders it misleading to a reasonable person. The *Omnicare* decision clarifies a key issue in securities litigation and, especially with respect to potential omissions, may have important implications for those who are preparing registration statements and for future litigation over them.

### THE CIRCUIT SPLIT

Section 11 provides that issuers of securities and other associated persons may be held liable if a registration statement contains "an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k.

The Courts of Appeals were split on the issue of how Section 11 applies to statements of opinion. Both the Second and Ninth Circuits had held that a statement of opinion is actionable only if it is both objectively false and not honestly believed. See *Fait v. Regions Financial Corp.*, 655 F.3d 105, 113 (2d Cir. 2011) (statements regarding adequacy of loan loss reserves may give rise to liability under Sections 11 and 12 only if they were "both false and not honestly believed when they were made"); *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (fairness determination 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”). The Sixth Circuit, however, expressly disagreed with the holdings of *Fait* and *Rubke* that subjective falsity was required, stating: “No matter the framing, once a false statement has been made, a defendant’s knowledge is not relevant to a strict liability claim.” *Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 505 (6th Cir. 2013). The Supreme Court granted certiorari to review the Sixth Circuit’s decision and resolve the circuit split.

### THE OMNICARE DECISION

In *Omnicare*, the Supreme Court considered a Section 11 claim based on statements by Omnicare that it believed certain contractual arrangements were in compliance with applicable laws. Following the text of Section 11, the Court considered separately the questions of (i) when a statement of opinion constitutes an untrue statement of fact and (ii) when the omission of a fact can render a statement of opinion misleading.

Regarding the first question, the Court rejected the Sixth Circuit’s holding that a statement of opinion that is genuinely believed when made may constitute an “untrue statement of a material fact” simply because it ultimately proves to be incorrect. That holding, the Court explained, “wrongly conflates facts and opinions” and ignores congressional intent in crafting the first part of Section 11 to expose issuers to liability for untrue statements of *fact*. *Omnicare* at 6. Instead, the Court reasoned that a statement of opinion explicitly affirms only the fact that “the speaker actually holds the stated belief.” A statement of opinion is an untrue statement of fact, therefore, only if the speaker does not genuinely believe it. *Id.* at 7-8. Section 11 “does not allow investors to second-guess inherently subjective and uncertain assessments.” *Id.* at 9. Of course, if supporting facts are supplied along with a statement of opinion and those facts turn out to be untrue, liability under Section 11’s false statement provision may follow. The principles undergirding the Court’s ruling with respect to this first question were established in the context of Section 14(a) of the Securities Exchange Act of 1934 in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991).

As to the second question, the Court stated that “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.” *Id.* at 11. For example, a statement that the issuer believes its conduct complies with the law may be misleading if the issuer makes the statement without having consulted a lawyer. *Id.* at 11-12.

Accordingly, the Court held that an issuer may be liable under Section 11 “if a registration statement omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion [even if such statement is literally true], and if those facts conflict with what a reasonable investor would take from the statement itself.” *Id.* at 12.

The Court emphasized that whether an omission renders a statement of opinion misleading must be determined taking into account factors that a reasonable investor would consider (such as the customs and practices of the relevant industry) and in the context of the registration statement as a whole, including “hedges, disclaimers, and apparently conflicting information.” *Id.* at 14 (“[t]he reasonable investor understands a statement of opinion in its full context, and § 11 creates liability only for the omission of material facts that cannot be squared with such a fair reading”).

Thus, to plead a Section 11 claim with respect to a statement of opinion based on omitted facts, a plaintiff “must identify 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.* at 18. The Court also provided helpful guidance to issuers on how to avoid liability under this standard: “[T]o avoid exposure for omissions under § 11, an issuer need only divulge an opinion’s basis, or else make clear the real tentativeness of its belief.” *Id.* at 19.

The Court remanded the case for a determination of whether the plaintiff had adequately alleged that Omnicare omitted a material fact regarding its statements of opinion, and, if so, whether “the excluded fact shows that Omnicare lacked the basis for making those statements that a reasonable investor would expect.” *Id.* at 20.

### SIGNIFICANCE FOR SECURITIES LITIGATION

In rejecting the Sixth Circuit’s “falsity” standard, the Supreme Court’s *Omnicare* decision relieves issuers from a significant source of potential liability and provides some comfort for issuers that continue to provide opinion information in offering materials and other public filings. While the opinion does not insulate issuers from all liability for statements of opinion unless they were not honestly believed, it does provide substantial protection to issuers with regard to statements of opinion. It imposes significant pleading requirements on a plaintiff seeking to base a securities lawsuit on a statement of opinion, which the Court stated will be “no small task for an investor” to satisfy. *Id.* at 18.

Additionally, although the Court addressed only Section 11, it is likely that courts will apply the *Omnicare* analysis to other provisions of the securities laws, as the Second Circuit previously applied *Fait* to claims under Section 10(b) of the Securities Exchange Act of 1934.

It remains to be seen how broadly courts will interpret the Supreme Court's holding regarding omitted facts – in particular, what types of opinion statements convey facts regarding the speaker's basis for the opinion, and precisely what facts those statements convey to a reasonable investor. Further, despite the guidance the Court provided to issuers, the *Omnicare* ruling may invite investors and their counsel to seek to press new claims based on alleged omissions that may spawn additional litigation as lower courts sort out the limits of potential omission liability.

It seems clear from the Court's opinion that issuers face a significantly diminished risk of incurring Section 11 liability for stating an untrue fact when disclosing statements of opinion formed with a reasonable basis. However, if an issuer's disclosure omits facts that go to the reasonableness of the basis for the statement of opinion, the issuer may not succeed on a motion to dismiss the claim and could ultimately face potential Section 11 liability based on the omission of those facts (if proven material). In order to both maximize the chances of prevailing on a motion to dismiss and protection from potential liability for omissions claims, issuers should be mindful of the Court's guidance when crafting cautionary language concerning the basis of their opinions, estimates and judgments, as well as any significant limitations on, or "tentativeness" surrounding, their opinions.

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Please do not hesitate to contact us with any questions.