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Client Alert

Shareholder and Securities Litigation Practice Group

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U.S. Supreme Court's *Omnicare* Decision Leaves Open Narrowed Theory Of Liability For Statements Of Opinion Under Federal Securities Laws

Can a public company violate the federal securities laws simply by expressing an opinion that turns out to be wrong? In 2013, the U.S. Court of Appeals for the Sixth Circuit startled the business community by recognizing just such a broad theory of liability. This week, in ***Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund***, the Supreme Court of the United States restored some sanity to this area by vacating the Sixth Circuit's judgment. But *Omnicare*'s narrower theory of liability suggests that litigation over statements of opinion will continue apace, as litigants and lower courts grapple with the question of what factual basis a reasonable investor would take those statements to imply.

At issue in *Omnicare* were opinion statements in a public company's registration statement, to the effect that "we believe we are obeying the law" governing payments from pharmaceutical companies.[1] The plaintiffs claimed that two such statements by Omnicare violated Section 11 of the Securities Act of 1933, which assigns liability for a registration statement that "contain[s] an untrue statement of a material fact" or "omit[s] to state a material fact . . . necessary to make the statements therein not misleading."[2] The Sixth Circuit agreed with the plaintiffs, holding that "a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an 'untrue statement of a material fact.' "[3] On this view, the challenged opinion statements were actionable under Section 11 because the Federal Government subsequently accused Omnicare of violating anti-kickback laws by taking money from drug manufacturers.[4]

The Supreme Court vacated in an opinion by Justice Kagan, explaining that the Sixth Circuit erred by ignoring Section 11's dichotomy between misstatements and omissions, and then "wrongly conflat[ing] facts and opinions."[5] A statement of opinion does not express a fact, held the Court, insofar as it communicates a belief rather than a certainty.[6] And a pure statement of opinion conveys only one idea with certainty: "that the speaker actually holds the stated belief."[7] Accordingly, Omnicare's stated opinion about legal compliance was not "an untrue statement of a material fact" under Section 11, even though it turned out to be wrong, because Omnicare expressed a sincerely held belief that was not accompanied by untrue supporting facts.[8]

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The Court went on to hold, however, that a statement of opinion can be rendered "misleading" under Section 11 by the speaker's "omitt[ing] to state a material fact."[9] Applying an objective standard, the Court concluded that a statement of opinion is misleading if it would imply to a reasonable investor some factual basis that does not actually exist.[10] "Thus, if a registration statement omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then § 11's omissions clause creates liability."[11] The Court remanded the case for application of its newly announced standard.[12]

Omnicare leaves the door open to litigation about the omissions clause of Section 11, much of which will take place at the motion-to-dismiss stage. The Court stressed that satisfying the applicable pleading burden will be "no small task" for plaintiffs, who cannot skate by with "conclusory assertions" or allegations "that the issuer failed to reveal [the] basis" for its opinion.[13] Instead, "[t]he investor 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."[14]

Lower courts can expect to spend long hours applying this new standard to the prolix complaints that are regularly filed when stock prices drop in the wake of bad news. Public companies hoping to avoid getting caught up in that process might heed *Omnicare*'s advice that, "to 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."[15] Alternatively, they might "control what they have to disclose . . . by controlling what they say to the market,"[16] in recognition of the fact that "[s]ilence, absent a duty to disclose, is not misleading."[17] Such reluctance to opine could contribute to a deepened circuit split over whether a violation of Item 303 can form the basis of a claim under the federal securities laws.[18]

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[1] *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, No. 13-435, slip op. at 9 (U.S. Mar. 24, 2015) ("The two sentences to which the [plaintiffs] object are pure statements of opinion: To simplify their content only a bit, Omnicare said in each that 'we believe we are obeying the law.' "); *see also id.* at 2–3 (quoting challenged statements).
[2] 15 U.S.C. § 77k(a).
[3] *See Omnicare*, slip op. at 6 (citing *Ind. State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 505 (6th Cir. 2013)).
[4] *See id.* at 3.
[5] *See id.* at 5–6. Justice Kagan's opinion for the Court was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, Breyer, Alito, and Sotomayor. Justice Scalia filed an opinion concurring in part and concurring in the judgment. Justice Thomas filed an opinion concurring in the judgment.
[6] *See id.* at 6–7.
[7] *See id.* at 7–9.
[8] *See id.* at 9. The Court noted that even an insincere statement of belief will not be actionable under Section 11 if the speaker "thinks he [is] lying while [he is] actually (*i.e.*, accidentally) telling the truth about the matter addressed in his opinion." *Id.* at 8 n.2 (citing *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1095–96 (1991)).
[9] *See id.* at 10–12.
[10] *See id.* at 11–12.
[11] *Id.* at 12.

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[12] *See id.* at 19–21.
[13] *Id.* at 18.
[14] *Id.*
[15] *Id.* at 19.
[16] *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1322 (2011).
[17] *Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988).
[18] *Compare In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1053–56 (9th Cir. 2014) (holding it cannot), *with Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 100–04 (2d Cir. 2015) (holding it can).