

## Securities Alert

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### High Court Announces New Standard for Opinion Statements

The U.S. Supreme Court found middle ground in *Omnicare* this week, holding that issuers' statements of opinion issued in registration statements can be the basis for liability under Section 11 if either the speaker does not actually hold the stated opinion, or the statement omitted facts regarding the basis for the opinion and those omissions made the statement misleading in context. *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435 (March 24, 2015).

#### Background

The *Omnicare* case involved a pharmacy operator that was alleged to be giving improper kickbacks to nursing homes that used its services. Plaintiffs sued *Omnicare*, arguing that two statements of opinion included in *Omnicare's* registration statement were false and thus actionable under Section 11 of the Securities Act of 1933. These statements were:

- "We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws," and
- "We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve."

Defendants responded that the complaint fails because defendants subjectively believed that their opinion statements were true at the time, so even if such statements were wrong in hindsight, they could not be held liable. The 6th Circuit sided with plaintiffs and held that if an opinion is proven to be false—even in hindsight—it is actionable under Section 11. The 6th Circuit's opinion stood in direct contradiction with the 2nd, 3rd and 9th Circuits and set the stage for determination of under what circumstances opinions could be actionable under Section 11.

#### The Court's Opinion

In an opinion by Justice Kagan, the Court held that a statement does not constitute an "untrue statement of . . . fact" simply because the opinion ultimately proves incorrect. The Court then outlined two scenarios where opinion statements are potentially liable under Section 11: (1) where the speaker does not actually hold that opinion; and (2) where the opinion omits facts that in context make the statement of opinion misleading.

In a victory for defendants, the Supreme Court rejected the idea that opinions must always be correct to avoid liability. The Court noted that the phrase "I believe" does not render everything in the statement an opinion; such statements may contain "embedded statements of fact." For example, the Court found that every "I believe" statement includes the embedded statement of fact that the speaker actually holds that

belief. The Court held that such opinions could be considered factual misstatements only where plaintiffs plead that the speaker did not actually hold the opinion, something the *Omnicare* plaintiffs did not allege here.

The Court then evaluated the more complicated question of whether an opinion may be rendered misleading by the omission of certain facts. Analogizing to the materiality standard of *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 445 (1976), the Court noted that “whether a statement is ‘misleading’ depends on the perspective of a reasonable investor.” The Court noted that the statement of opinion “[w]e believe our conduct is lawful” implies to a reasonable investor that the speaker consulted a lawyer and made some meaningful legal inquiry. If there was no such inquiry and that fact was omitted, the statement could give rise to liability. “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.”

To avoid opening the floodgates, the Court then noted that it “is not necessarily misleading when an issuer knows, but fails to disclose, some facts cutting the other way. . . . A reasonable investor does not expect that every fact known to an issuer supports its opinion statement.”

The Court then remanded the case to the district court, providing specific instruction that the lower court identify particular material facts going to the basis for the issuer’s opinion that were alleged to be omitted and then evaluate the statement in context, including all cautionary language and other disclosures. Notably, *Omnicare*’s alleged opinion misstatements were directly followed by cautionary language that several states had initiated enforcement actions against pharmaceutical manufacturers for offering payments to pharmacies that dispensed their products and that the federal government had expressed “significant concerns” about some manufacturers’ rebates to pharmacies. Both of these statements were highlighted by the Court as specifically relevant to the inquiry of whether the opinion statements contained omissions that were misleading.

## **Future Implications**

The *Omnicare* decision likely leaves more questions than answers. The district courts will have to grapple with what other facts about the basis for an opinion a “reasonable investor” would want to know, and whether the omission of such facts made an opinion statement misleading. The concurring opinions of Justices Scalia and Thomas demonstrate the wide variety of interpretation on what types of opinion statements would be deemed misleading.

Justice Scalia would have adopted a more rigorous standard than the majority for determining when a reasonable listener would conclude that an opinion implies facts regarding the basis for the opinion. He discusses, for example, the common-law “no-facts-incompatible-with-the-opinion” standard for non-expert statements, which would require that “a speaker’s judgment . . . ‘var[y] so far from the truth that no reasonable man in his position could have such an opinion.” The majority opinion, however, adopts a much looser standard for when a statement of opinion would imply a reasonable inquiry and therefore be misleading if facts regarding the basis for the opinion are not disclosed.

The holding is confirmation of the desirability of the current best practice of having appropriate backup support for such statements of opinion and providing balanced disclosure. The Court's reference to opinion statements about legal compliance requiring actual legal investigation and inquiry, according to Justice Scalia, could effectively impose a duty of investigation and inquiry before issuance of opinion statements. Prudent practice will dictate that companies conduct due diligence for each statement of opinion. In the end, the *Omnicare* decision has something for all litigants: (1) for defendants—indirectly imposing a scienter requirement to prove misstatements of opinion; and (2) for plaintiffs—allowing a standard of reasonableness that will likely be easier to get past a motion to dismiss in determining liability for omissions.

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