WHITE & CASE

# Client**Alert**

## Commercial Litigation

March 2015

# The US Supreme Court Clarifies When Issuers May Be Liable for Opinions Under the Securities Act: *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*

Owen Pell
Partner, New York
+ 1 212 819 8891
opell@whitecase.com

The US Supreme Court's decision in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, Slip op., No. 13-435 (Mar. 24, 2015), held that issuers *may* sometimes be liable under Section 11 of the Securities Act of 1933 ("1933 Act") for statements of opinions in registration statements. Resolving a split in the lower federal courts, the Court held that issuers are *not* liable for sincerely held (i.e., non-fraudulent) opinions that are ultimately found incorrect. Issuers, however, *may* be liable for misstatements or omissions of material fact regarding the basis for an opinion where those misstatements or omissions render an opinion misleading. Significantly, the Court also enunciated a pleading standard for section 11 claims predicated on omissions relating to opinions. After *Omnicare*, plaintiffs must identify particular material facts relating to an issuer's opinion, the omission of which renders the opinion misleading when considered in light of the entire registration statement—including all hedges, qualifiers or conflicting facts it may contain. This pleading standard, which also is likely to be applied in securities fraud cases under the Securities Exchange Act of 1934 ("1934 Act"), will create significant hurdles for plaintiffs attempting to plead opinion claims that will survive motions to dismiss.

## Background: Omnicare's Opinions and Section 11

Omnicare provides pharmaceutical care services to residents of long-term care facilities. A group of pension funds ("Pension Funds") sued Omnicare and several of its directors and officers ("Omnicare") under section 11 of the 1933 Act, alleging that Omnicare's statements about its compliance with state and local laws in a share offering registration statement were materially false and misleading in light of federal lawsuits later filed alleging that Omnicare's rebate practices constituted illegal kickbacks.[1] The Pension Funds did not allege that the opinions were made fraudulently (i.e., that Omnicare had an intent to deceive investors).

A federal district court dismissed the case, holding that "statements regarding a company's belief as to its legal compliance are considered 'soft' information and are generally not actionable," and that the Pension Funds had failed to present sufficient evidence that Omnicare knew its statements were untrue so as to overcome this general rule.[2] The Sixth Circuit reversed, acknowledging that Omnicare's statements were "opinion[s]," not facts, but holding that the Pension Funds did not need to show that Omnicare knew those opinions were false when made.[3]

1 *Ind. State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, No. 2006-26 (WOB), 2012 WL 462551, at *1-2 (E.D. Ky. Feb. 13, 2012).

2 *Id.* at *4-5 (citations omitted).

3 *Ind. State Dist. Council of Laborers and HOD Carriers Pension and Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 504-05 (6th Cir. 2013).

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Section 11 of the 1933 Act allows a claim against a securities issuer where "any part of [a] registration statement...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."[4] Unlike securities fraud actions under section 10b of the 1934 Act (and SEC Rule 10-b5), purchasers need not show that the issuer acted with intent to deceive, manipulate or defraud.[5] The Sixth Circuit's decision created a split among federal Circuit Courts as to whether a statement of opinion could give rise to Section 11 liability where a plaintiff-purchaser did not allege "that the statement was both objectively false and disbelieved by the defendant at the time it was expressed."[6]

## The Supreme Court's Decision: Opinions May Be Actionable, But Claims Must Be Precisely Pled

Justice Kagan, writing for the Court, framed two questions to answer: (1) "when an opinion itself constitutes a factual misstatement," and (2) "when an opinion may be rendered misleading by the omission of discrete factual representations."[7] In answering, the Court set forth a section 11 liability standard different from the district court, the Sixth Circuit, *and* the Second and Ninth Circuits, beginning with the Court's analytical divide between considering liability for misstatements versus liability for omissions.[8]

With respect to the first question, the Sixth Circuit held, and the Pension Funds argued, that "a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an 'untrue statement of material fact'" under Section 11.[9] The Court rejected this, holding that Section 11 only imposes liability for untrue statements of *fact*, not all untrue statements.[10] Section 11 misstatement liability only may be imposed on an opinion where the speaker does not hold the stated opinion, as every opinion "explicitly affirms one fact: that the speaker actually holds the stated belief."[11] Although liability also could apply to opinions that contain "embedded statements of fact," if the "supporting fact...supplied [is] untrue," the Pension Funds had not claimed that here. Thus, in a victory for issuers, the Court held that an opinion is not actionable "just because [an issuer's] belief turned out to be wrong."[12]

As for the second question, the Pension Funds argued that Omnicare's opinions were actionable because "Omnicare 'omitted to state facts necessary' to make its opinion[s] on legal compliance 'not misleading.'" Omnicare argued that fact omissions can *never* make an opinion misleading because no reasonable person ever takes from a pure opinion statement anything other than the speaker's mindset.[13] In a victory for plaintiffs, the Court rejected Omnicare's argument because, depending on the circumstances, a reasonable investor may "understand an opinion statement to convey facts about...the speaker's basis for holding that view," (e.g., that an assertion about legal compliance is based on some inquiry or legal advice), such that, "if the real facts are otherwise, but not provided," the opinion may be misleading.[14] Because the lower courts had not looked at the claims here under these standards, the case was sent back to the Sixth Circuit for further consideration.

But, having found that opinions sometimes are actionable, the Supreme Court then provided a detailed analysis of how omissions claims should be pled. Highlighting specifically the importance of factual context and the overall mix of facts disclosed, the Court acknowledged that these pleading standards would not be easy for plaintiff-investors to meet: "To be specific: The investor must identify particular (and material) facts, going to the basis of 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... misleading," when "reading the statement fairly and in context. That is no small task for an investor."[15]

Among other things, the Court noted that opinions are not misleading simply because some fact cutting the other way is omitted, as "[r]easonable investors understand that opinions sometimes rest on a weighing of competing facts."[16] The Court also highlighted the importance of context, as reasonable investors must consider a registration statement "in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information."[17]

4 15 U.S.C. § 77k(a).

5 *Herman & MacLean v. Huddleston,* 459 U.S. 375, 381-82 (1983).

6 *Fait v. Regions Fin. Corp.*, 655 F.3d 105, 110 (2d Cir. 2011); *see also Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009).

7 *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,* Slip op., No. 13-435, at 5 (Mar. 24, 2015) ("Slip Op.").

8 *See* Slip Op. at 19.

9 Slip Op. at 6.

10 *Id.*

11 Slip Op. at 7 (citations omitted).

12 Slip Op. at 8-9.

13 Slip Op. at 10 (citations omitted).

14 Slip Op. at 11-12.

15 Slip Op. at 18 (citation omitted).

16 Slip Op. at 13.

17 Slip Op. at 14.

Thus, to plead an omission claim as to an opinion, plaintiffs first must identify one or more material facts missing from an issuer's registration statement.[18] The omitted facts then must be assessed (i) in the context of what was allegedly omitted (i.e., was there a good reason to omit a particular fact); and (ii) in the context of the entire registration statement, including any "hedges, disclaimers, or qualifications" included in it.[19] In this regard, the Court highlighted facts that seem to favor dismissal of the Pension Funds' claims, including that Omnicare had disclosed the existence of state enforcement proceedings and federal inquiries regarding its legal compliance.[20]

## Implications

*Omnicare* makes clear that investor-plaintiffs *may* sue under Section 11 of the 1933 Act for opinions stated in registration statements. However, a unanimous Court made clear that opinions do not become actionable simply because they turn out to be wrong.[21] Rather, plaintiffs attacking statements of opinion either *must plead facts* showing that an opinion contained a specific misstatement of material fact *or* omitted specific material facts that thereby rendered the opinion false or misleading.

By twice highlighting the importance of "hedges," "disclaimers," "qualifications," or "conflicting information" in registration statements, the Court underscored for the lower federal courts (and investor-plaintiffs) the importance of taking the issuer's disclosures in whole and giving those disclosures weight in assessing alleged omissions. Indeed, the Court emphasized that Omnicare's "caveats" were presented "on the same page," or "adjacent" to the opinions they couched—providing some guidance to issuers on how disclosures might be structured for maximum effect.[22]

Perhaps most significantly, *Omnicare* details how plaintiffs must plead in a *non-securities fraud case*—a context in which plaintiffs generally have *not* had to plead with the particularity required in securities fraud cases. *Omnicare* thus will likely make it harder for plaintiff-investors to survive motions to dismiss in *all* securities actions: although it involved claims under the 1933 Act, *Omnicare* will likely affect omission and opinion claims under the 1934 Act because "[i]n a typical § 10(b) private action[,] a plaintiff must prove," among other things, "a material misrepresentation or omission by the defendant."[23] By raising the bar on pleading even *outside* the realm of securities fraud claims, *Omnicare* is in line with other Supreme Court rulings (under the 1934 Act) that have progressively tightened and raised pleading standards for securities claims.[24]

18 Slip Op. at 19-20 (materiality being based on an objectively reasonable investor).

19 Slip Op. at 20.

20 Slip Op. at 20.

21 Justice Kagan wrote for the entire Court. Justice Scalia concurred in part and concurred in the judgment. Justice Thomas concurred in the judgment.

22 Slip Op. at 3 (citations omitted).

23 *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

24 *See Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2412 (2014) (pleading standard in securities fraud cases for invoking presumption of reliance on an issuer's alleged misstatement or omission); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (pleading scienter in securities fraud cases); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005) (pleading required proximate causation and economic loss in securities fraud cases).

---

*Paige Spencer, an associate at the Firm in the New York office, assisted with the preparation of this alert.*




NY0315/CL/A/09960_3