

## Supreme Court Limits, But Does Not Reject, Securities Liability for Statements of Opinion in Registration Statements.

In a highly anticipated securities law ruling, the Supreme Court yesterday overturned a controversial Sixth Circuit Court of Appeals ruling that held that an opinion in a securities registration statement can be the basis of liability if that opinion ultimately proves to be incorrect. The case, *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, involved claims by investors in Omnicare, a pharmacy services company, brought under Section 11 of the Securities Act of 1933, which governs liability for untrue statements of fact or omissions of material fact contained in an issuer’s registration statement. Section 11 does not contain a scienter requirement, and a plaintiff need not plead the defendant’s intent or knowledge of wrongdoing to state a Section 11 claim.

The Sixth Circuit upheld the investors’ Section 11 claim based on opinions contained in the registration statement regarding Omnicare’s legal compliance. Applying a strict liability standard, the Sixth Circuit held that the ultimate objective incorrectness of those opinions was sufficient to state a claim, even absent an allegation that Omnicare knew the opinions were false at the time they were made. In contrast, other circuits that had considered the issue held that both objective and subjective falsity are required to establish Section 11 liability for opinion statements.

In a unanimous decision, with Justices Scalia and Thomas concurring, the Supreme Court overruled the Sixth Circuit, reasoning that because a statement of opinion implicitly admits the possibility of error, it cannot constitute an untrue statement of fact simply because it ultimately proves incorrect. As long as the issuer sincerely holds the stated opinion at the time it is made, the opinion cannot constitute an untrue statement of fact. Therefore, objective falsity alone cannot be the basis for Section 11 liability. The Supreme Court did not, however, eliminate the risk that opinion statements can form the basis of Section 11 liability; rather, it held that opinions may be actionable if it can be demonstrated that the issuer (1) included a statement of opinion in its registration statement that the issuer knew to be false; (2) included in that opinion a supporting fact that was

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false; or (3) omitted a specific material fact in its registration statement indicating that the issuer lacked a reasonable basis for its opinion.

As further explained below, the Supreme Court's decision eliminates much of the uncertainty to issuers of public securities offerings in the M&A context or otherwise concerning the use of opinions in registration statements that was created by the circuit split, but still leaves a potential loophole if plaintiffs can point to a specific undisclosed fact that creates a material uncertainty as to the truth of the issuer's belief in its opinion.

## Background

An investor may sue under Section 11 on the basis either of an untrue statement of material fact contained in a registration statement and/or an omission of a material fact necessary to make the statements contained in the registration statement not misleading.<sup>1</sup> Neither basis of liability requires a showing that the issuer acted with intent to deceive or defraud.

The investors in Omnicare, asserting claims based both on misstatements and omissions, alleged that Omnicare and four of its executives were liable under Section 11 for statements of opinion in Omnicare's registration statement that Omnicare was in compliance with applicable state and federal laws. Citing lawsuits subsequently brought by the U.S. government against Omnicare alleging various illegal activities including violation of anti-kickback laws, the investors claimed that Omnicare's opinion of legal compliance was objectively incorrect, and that Omnicare and its executives were therefore liable under Section 11. The district court dismissed the Section 11 claim, holding that the investors were required, but ultimately failed, to plead that Omnicare knew the opinions of legal compliance were false at the time they were made.

The Sixth Circuit overturned the district court's ruling, holding that because Section 11 is a strict liability statute, plaintiffs need not plead knowledge of falsity. The Sixth Circuit acknowledged that it was parting company with other circuit courts that had held that, in the context of a Section 11 claim based on opinion or belief, knowledge of falsity is required in order to establish liability.

## The Supreme Court Opinion

In vacating the Sixth Circuit's decision and remanding for further proceedings, the Supreme Court made clear that while there are only limited circumstances under which such statements may provide the basis for Section 11 liability, statements of opinion are not wholly immune from liability under Section 11. Emphasizing throughout its opinion the need to discourage the issuance of misleading opinions

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<sup>1</sup> Section 11 provides in pertinent part, "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statement therein not misleading, any person acquiring such security (unless it is proved at the time of such acquisition he knew of such untruth or omissions) may, either at law or in equity, in any court of competent jurisdiction, sue." 15 U.S.C. § 77k(a).

while promoting the full and fair disclosure of information relevant to any public offering, the Supreme Court devoted most of its opinion to considering how statements of opinion should be judged under each prong of Section 11.

## **Potential Liability Under the “False-Statement” Provision of Section 11**

With regard to the false-statement provision of Section 11, the Supreme Court held that liability may result where, assuming materiality, (1) the speaker of the opinion does not believe the opinion to be true, or (2) any embedded facts contained within the opinion are untrue. In so holding, the Supreme Court reasoned that while opinion statements do not imply certainty, they do imply that the issuer actually holds the stated belief, and that any facts included in the opinion as support for that opinion are true. Thus, if the issuer includes a statement of opinion that the issuer knows to be false, or includes in that opinion a supporting fact that is false, Section 11 liability may result.

Although the Supreme Court found that liability may result from violations of the false-statement provision of Section 11, it held that Omnicare was not liable under the false-statement provision because the plaintiffs failed to allege or demonstrate that Omnicare did not believe it was compliant with applicable federal and state laws. The mere fact that Omnicare’s legal compliance opinion was later revealed to be incorrect did not give Omnicare’s investors the right to second-guess the inherently subjective and uncertain assessments of the company. As the Court put it, the false-statement provision is not “an invitation to Monday morning quarterback an issuer’s opinions.”

## **Potential Liability Under the “Omissions” Provision of Section 11**

The Supreme Court also held that the omission of a fact can provide a basis for liability under the omissions provision of Section 11 in the context of a statement of opinion, where a registration statement omits material facts about the issuer’s inquiry into or knowledge concerning a statement of opinion, and where those facts conflict with a reasonable investor’s understanding of the registration statement.

The Supreme Court acknowledged that while a reasonable investor may not view a statement of opinion as a guarantee of accuracy, if an opinion reasonably conveys facts about how the issuer has formed that opinion, but actual, contrary facts are omitted from the registration statement, the opinion may nonetheless mislead investors and therefore provide a basis for Section 11 liability.

Although the Supreme Court thus found that liability could result from an omission that renders a statement of opinion misleading, it was quick to note that investors must view any opinions contained in a registration statement in the context of the registration statement as a whole and in light of all of the text surrounding the opinion, including any disclaimers, hedges or conflicting information. Furthermore, investors seeking to state a claim under the omissions provision must pass a high bar; to succeed on such a claim, plaintiffs are required to identify particular and material omitted facts, and show that such omissions

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make the opinion at issue materially misleading to a reasonable investor reading the statement in context. That said, if a plaintiff could point to such a fact, and allege that the omitted fact was material, a complaint could withstand a motion to dismiss.

Because neither the district court nor the Sixth Circuit had considered Omnicare's liability under the omissions provision, the Supreme Court remanded the case for further consideration. Providing a highly specific directive, the Supreme Court instructed the lower court on remand to review the investors' complaint to determine whether it adequately alleged that Omnicare had omitted facts from its registration statement, and if so, whether a substantial likelihood exists that a reasonable investor, reading the statement in context, would consider the omitted facts important in their investment decision.

## Conclusion

The Supreme Court's opinion in Omnicare resolves a pressing and controversial circuit split and clarifies the limited circumstances under which Section 11 liability may result from statements of opinion. Although the Supreme Court limited the circumstances giving rise to such liability, the decision clarifies that both bases of Section 11 liability could apply to opinion statements contained in an issuer's registration statement. Where issuers include opinions in their registration statement, they should do so with a view to completely and accurately disclosing truthfully held beliefs and the basis of their opinions, and should include disclaimers or other qualifying language where appropriate.

Authors: James Warnot, Jr., Paul Hessler, Lance Croffoot-Suede, Kate Machan, Jessica Djilani

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## Contacts

For further information please contact:

**James Warnot, Jr.**  
Partner

+1 (212) 903 9028

[james.warnot@linklaters.com](mailto:james.warnot@linklaters.com)

**Paul Hessler**  
Partner

+1 (212) 903 9132

[paul.hessler@linklaters.com](mailto:paul.hessler@linklaters.com)

**Lance Croffoot-Suede**  
Partner

+1 (212) 903 9261

[lance.croffoot-suede@linklaters.com](mailto:lance.croffoot-suede@linklaters.com)

**Kate Machan**  
US Associate

+1 (212) 903 9289

[kate.machan@linklaters.com](mailto:kate.machan@linklaters.com)

**Jessica Djilani**  
US Associate

+1 (212) 903 9241

[jessica.djilani@linklaters.com](mailto:jessica.djilani@linklaters.com)

1345 Avenue of the Americas  
New York, NY 10105

Telephone +1 (212) 903 9000  
Facsimile +1 (212) 903 9100

[Linklaters.com](http://Linklaters.com)