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THE OMNICARE DECISION: THE U.S. SUPREME COURT ELIMINATES SUBJECTIVE FALSITY AS AN ELEMENT OF “MATERIAL OMISSION” CLAIMS UNDER SECTION 11 OF THE SECURITIES ACT THAT ARE BASED ON STATEMENTS OF OPINION

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Client Advisory

On March 24, 2015, the U.S. Supreme Court issued its long-awaited decision in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, 2015 WL 1291916, which resolved a Circuit split regarding liability for statements of opinion under Section 11 of the Securities Act. While the Second, Third and Ninth Circuits held that a statement of opinion is actionable under Section 11 only if it was objectively false and subjectively disbelieved by the speaker at the time it was made,¹ the Sixth Circuit held in *Omnicare* that a statement of opinion is actionable—irrespective of the speaker’s subjective belief—if it simply turns out to have been objectively false.²

In a 9-0 decision,³ the Supreme Court reversed decades of Circuit Court securities law precedent and eliminated the subjective disbelief requirement for “material omission” Section 11 claims based on statements of opinion (*i.e.*, allegations that an omitted material fact rendered a statement of opinion materially misleading).⁴ In such cases, the Court held that an investor is only required to (i) prove that the opinion was objectively false and (ii) identify facts demonstrating that the issuer “lacked the basis for making those statements that a reasonable investor would expect.”⁵

While the full impact of *Omnicare* will not be known until the decision is applied by the lower courts, the pleading requirements for “material omission” claims under Section 11 based on statements of opinion appear to have been significantly reduced by the Supreme Court’s decision. Additionally, in pending securities cases, investors may attempt to amend their claims to satisfy the standards set forth in *Omnicare* or utilize *Omnicare* to revive Section 11 claims that were previously dismissed for failure to plead subjective falsity.

For additional information about the *Omnicare* decision and its potential impact, please contact [Jeff Willis](#) of Rogers & Hardin.



¹*Fait v. Regions Fin. Corp.*, 655 F.3d 105, 111–112 (2d Cir. 2011) (“[W]hen a plaintiff asserts a claim under section 11 or 12 based upon a belief or opinion alleged to have been communicated by a defendant, liability lies only to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed.”); *Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156, 1162 (9th Cir. 2009) (holding that statements of opinion “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”); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 368–69 (3d Cir. 1993) (“We have squarely held that opinions, predictions and other forward-looking statements are not *per se* inactionable under the securities laws. Rather, such statements of ‘soft information’ may be actionable misrepresentations if the speaker does not genuinely and reasonably believe them.”).

²*Ind. State Dist. Council of Laborers v. Omnicare, Inc.*, 719 F.3d 498, 506–507 (6th Cir. 2013), *rev’d and remanded*, No. 13–435, 2015 WL 1291916 (U.S. Mar. 24, 2015).

³Justices Scalia and Thomas concurred in the judgment, but wrote separate concurring opinions explaining their disagreements with the reasoning of the Court’s decision. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, No. 13–435, 2015 WL 1291916, at *13–16 (U.S. Mar. 24, 2015) (Scalia, J., concurring); *id.* at *16–17 (Thomas, J., concurring).

⁴Subjective disbelief remains an element of “untrue statement” claims under Section 11 that are based on statements of opinion (*i.e.*, an allegation that a statement of opinion was an untrue statement of material fact). *See id.* at *5–7.

⁵*Id.* at *10–12.