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Omnicare Decision Clarifies Pleading Standard for Section 11 Claims Based on Statements of Opinion in Registration Statements

In an opinion issued earlier today, the U.S. Supreme Court held in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* that an issuer may be held liable under Section 11 of the Securities Act of 1933 for statements of opinion made in a registration statement if the issuer failed to hold the belief professed or failed to disclose material facts about the basis for the opinion that rendered the statement misleading. The Court granted certiorari to consider how Section 11 pertains to statements of opinion, and today's opinion addresses the question as applied to misstatements and omissions. Justice Elena Kagan delivered the opinion of the Court, in which Chief Justice John Roberts and Justices Anthony Kennedy, Ruth Bader Ginsburg, Stephen Breyer, Samuel Alito and Sonia Sotomayor joined. Justices Antonin Scalia and Clarence Thomas each filed opinions concurring in the judgment.

The Court vacated and remanded the Sixth Circuit's 2013 decision holding that a Section 11 plaintiff need only allege that an opinion in a registration statement was "objectively false," notwithstanding the company's understanding when the statement was made. In particular, the Court held that a statement of opinion in a registration statement may not support Section 11 liability merely because it is "ultimately found incorrect." With regard to the prong of Section 11 that addresses alleged misstatements of fact (and always careful to note that materiality was being assumed), the Court held that "liability under §11's false-statement provision would follow ... not only if the speaker did not hold the belief she professed but also if the supporting fact she supplied were untrue." Slip op. at 9. The plaintiffs below, however, limited their objection to two pure statements of opinion and, in expressly disclaiming and excluding any allegation sounding in fraud or deception, did not contest that the company's opinion was honestly held. Importantly, the Court held that with respect to potential misstatement liability under Section 11, "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong." *Id.*

The Court thereafter considered "when, if ever, the omission of a fact can make a statement of opinion like Omnicare's, even if literally accurate, misleading to an ordinary investor." Slip op. at 10. As to this omissions prong of Section 11, the Court further held that an issuer may be liable under Section 11 for omitting material facts about the inquiry into or knowledge concerning a statement of opinion if those facts "conflict" with what a reasonable investor would "understand an opinion statement to convey" with respect to "how the speaker has formed the opinion" or "the speaker's basis for holding that view." *Id.* at 11-12. The Court clarified that an issuer need not disclose every fact "cutting the other way" against an opinion because "[r]easonable investors understand that opinions sometimes rest on a weighing of competing facts." *Id.* at 13. Underscoring the importance of context, the Court held that issuers may be liable only where the omitted facts "conflict with what a reasonable investor would take from the [opinion] statement itself." *Id.* at 12.

The Court reiterated that "an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion." Slip op. at 17. Specifically, the Court held that a Section 11 plaintiff must identify particular and material "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," which the Court described as "no small task." *Id.* at 18. The Court remanded the case to the trial court for further proceedings and analysis consistent with the standard articulated by the Court.