



## Winston Prevails for Omnicare in Landmark Supreme Court Securities Act Case

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We successfully represented Omnicare and its officers and directors before the U.S. Supreme Court, securing a unanimous victory in the most important Securities Act case in decades. Plaintiffs alleged that Omnicare misrepresented its financial results and its legal compliance in a registration statement filed with the SEC. We succeeded in obtaining dismissal of plaintiffs' claims under Section 10(b) for failure to plead *scienter*, and that dismissal was affirmed on appeal. The plaintiffs then repleaded to focus on a strict liability claim under Section 11, based on Omnicare's stated belief that its business practices complied with the law.

In the case, the Supreme Court addressed the standards for a claim under Section 11 of the Securities Act of 1933 (the "Securities Act"), which applies to false or misleading statements in Registration Statements filed with the SEC. The question presented was how those standards apply to a statement of opinion. The Sixth Circuit had held that a plaintiff can state a claim simply by alleging that the opinion turned out to be wrong — a decision that created a clear conflict with decisions of the Second, Third, and Ninth Circuits.

The Supreme Court disagreed, rejecting the Sixth Circuit's analysis as "an invitation to Monday morning quarterback an issuer's opinions." Per the Court, to plead that a statement of opinion is "an untrue statement of material fact" under Section 11, the plaintiff must allege that the issuer/speaker did not actually hold the opinion expressed. And, to plead an actionable material omission, on the other hand, the Court held that the plaintiff must allege that the Registration Statement—read as a whole by a reasonable investor—implied some fact about how the speaker formed the opinion, when the true facts were otherwise.

Along the way, the Supreme Court recognized that "[r]easonable investors do not understand [registration] statements as guarantees," and they "understand that opinions sometimes rest on a weighing of competing facts." It also recognized that "whether an omission makes an expression of opinion misleading always depends on context." An investor reads every assertion in a registration statement "in light of its surrounding text, including hedges, disclaimers, and apparently conflicting information."

Finally, the Court stressed that a plaintiff "cannot just say the issuer failed to reveal its basis." The plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion... whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. That is no small task...."

## IMPACT

The Supreme Court's decision was a major victory for issuers and their officers, directors, and underwriters, as it narrowed significantly the circumstances under which they could be held liable under the federal securities laws for statements of opinion or belief. The Supreme Court's precedential opinion also provides needed guidance for those drafting registration statements for filing with the SEC.

**(*Omnicare v. Laborers District Council Construction Industry Pension Fund* (Case No. 13-435, U.S. Supreme Court))**

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