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KD Alert: Supreme Court Keeps Monday Morning Quarterbacks on the Bench – No Second Guessing Sincerely Held Opinions Under §11 of the Securities Act

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On Tuesday, March 24, 2015, the Supreme Court of the United States released its much anticipated opinion in Omnicare, Inc., et al. v. Laborers District Council Construction Industry Pension Fund, et al., 525 U.S. ___ (2015). The case, on appeal from the Sixth Circuit Court of Appeals, presents the issue of whether an opinion expressed in a registration statement filed under the Securities Act of 1933 (the "Securities Act") can create liability for the issuer under §11 of the Securities Act if the opinion later proves to be objectively false.

*The statements at issue in Omnicare's registration statement provided that Omnicare believed it was in compliance with all applicable state and federal laws. Omnicare was eventually the subject of actions brought by the Federal Government concerning alleged kickbacks from pharmaceutical companies. Investor groups brought suit under §11 alleging Omnicare's statements were false – i.e., it was not, in fact, in compliance with all applicable laws – because the company was forced to settle civil actions relating to its alleged illegal conduct. The Eastern District of Michigan court dismissed the complaint for failure to state a claim because, in the court's view, "statements regarding a company's belief as to its legal compliance are actionable only if those who made them "knew [they] were untrue at the time." See Civ. No. 2006-26 (ED Ky., Feb. 13, 2012), App. to Pet. For Cert. 28a, 38a-40a, 2012 WL 462551, *4-*5. The Sixth Circuit reversed. See 719 F.3d 498 (2013). In doing so, the Sixth Circuit held that the plaintiffs had to allege only that the stated belief was "objectively false"; that they did not need to contend that the defendants "disbelieved" the opinion at the time it was made.*

The Supreme Court vacated the Sixth Circuit decision and remanded, setting a new standard for use in cases involving §11. The Court held: (1) a sincere statement of pure opinion is not an "untrue statement of material fact," regardless of whether an investor can ultimately prove the belief wrong; however, it may create liability for an issuer if the stated opinion includes embedded statements of untrue facts; and (2) §11 creates liability for an issuer if a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a statement of opinion, and if those facts conflict with what a reasonable investor, reading the statement fairly and in context, would take from the statement itself. This standard resolved a split amongst the Circuits with respect to whether §11 provides for strict liability for opinions offered in registration statements (the 6th Circuit ignored previous decisions on this issue from the 2nd and 9th Circuits).

While the Omnicare decision obviously impacts cases brought pursuant to §11, the Court's decision may have effects reaching beyond §11 to securities fraud cases brought under different statutes or, potentially, common law. Both the majority opinion and Justice Scalia's concurrence compared the requirements of an action under §11 to common law actions for misrepresentation. Significantly, Justice Kagan viewed the Court's analysis of liability under §11 as consistent with common law. Justice Scalia, however, viewed the majority's interpretation of §11 as inconsistent with common law because the decision did not limit the liability for omissions under §11 to cases in which a speaker subjectively intends the deception arising from the omission.

The new standard has already been applied by the Court in remanding a previously dismissed class action against Dutch bank ING Groep NV and others back to a lower court to reconsider in light of the Omnicare decision regarding omissions in registration statements (See Freidus v. ING Groep NV, U.S. Supreme Court, 13-1505).

The potential effect of Omnicare outside the scope of §11 has yet to be seen. However, just one day after the Court delivered its decision, prominent plaintiffs firm Bernstein Litowitz Berger & Grossman filed a letter to Hon. Stanley Chesler in a case pending in the District of New Jersey, styled In re Merck & Co., Inc. Secs., Deriv. and ERISA Litig., Nos. 05-1151 and 05-2367, asking the court to take notice of the Omnicare decision in considering a pending motion for summary judgment with respect to the potential for liability from material omissions that allegedly rendered a statement of opinion by one of the defendants misleading.

The Merck case was brought pursuant to Section 10(b) and Rule 10b-5. Although the standard iterated by the Court in Omnicare is not likely to be dispositive of any issues in Merck, the effect of the Court's holding in Omnicare is already being used by parties in actions beyond §11.

As Justice Kagan put it, the Court's interpretation of §11 "is not an invitation to Monday morning quarterback an issuer's opinions." No doubt, however, this will continue to happen.