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CLIENT MEMORANDUM

Sixth Circuit Creates Split with Second and Ninth Circuits on Section 11 Liability for Statements of Opinion or Belief

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On May 23, 2013, the United States Court of Appeals for the Sixth Circuit created an express split with the Second and Ninth Circuits in *Indiana State District Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.*[1] Reversing in part the district court's dismissal of claims under § 11 of the Securities Act of 1933, the Sixth Circuit held that § 11 does not require a plaintiff to plead a defendant's knowledge of falsity when attacking a statement of opinion or belief. As the Sixth Circuit acknowledged, its holding is directly contrary to the Second Circuit's decision in *Fait v. Regions Financial Corp.*[2] and the Ninth Circuit's decision in *Rubke v. Capitol Bancorp Ltd.*[3]

In the context of evaluating the issuer's statements of legal compliance, which the Sixth Circuit had already held was "soft information" (encompassing "matters of opinion and predictions"),[4] the court drew a distinction between § 10(b) and Rule 10b-5 on the one hand and § 11 on the other. Whereas the former require a plaintiff to prove scienter, under the latter, a strict liability statute, "once a false statement has been made, a defendant's knowledge is not relevant."[5] Thus, it was enough under § 11 for plaintiffs to plead that the company was not in legal compliance, without regard to whether the issuer knew that when it stated its belief that it was in legal compliance.

[1] No. 12-5287, 2013 WL 2248970 (6th Cir. May 23, 2013).

[2] 655 F.3d 105 (2d Cir. 2011).

[3] 551 F.3d 1156 (9th Cir. 2009).

[4] *Omnicare*, 2013 WL 2248970, at *4.

[5] *Id.* at *6.

To reach this holding, the Sixth Circuit expressly rejected *Fait* and *Rubke*, in which the Second and Ninth Circuits had cited the Supreme Court's decision in V*irginia Bankshares v. Sandberg*[6] to require a § 11 plaintiff to allege both objective and subjective falsity to survive dismissal of claims based on statements of opinion or belief. In *Omnicare*, however, the Sixth Circuit limited *Virginia Bankshares* to its facts, wherein the jury had already found knowledge of falsity, leaving the Supreme Court to determine only whether a § 14(a) plaintiff need plead objective falsity. As such, like § 10(b) and Rule 10b-5, *Virginia Bankshares* "effectively treated [§ 14(a)] as a statute that required scienter."[7] The Sixth Circuit thus found that precedent to have no bearing on its *Omnicare* case.

But in rejecting the holding of the Second and Ninth Circuits, the Sixth Circuit appears to have lost sight of essential language in § 11 — to wit, that it applies to "an untrue statement of a material fact." The only factual component of a statement of opinion or belief is that the speaker believes the statement. In other words, statements of opinion or belief can be false only if they misstate the speaker's actual opinions or beliefs. The Sixth Circuit's focus on a scienter element as a distinction between § 11 claims and § 10(b) or 14(a) claims is therefore misplaced. Even though § 11 is a strict liability statute, § 11 claims based on statements of opinion or belief necessarily require proof of knowledge of falsity because without it there can be no misrepresentation "of a material fact." The Second Circuit recognized this in *Fait*: "Requiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements."[8] The court explained: "We do not view a requirement that a plaintiff plausibly allege that defendant misstated his truly held belief and an allegation that defendant did so with fraudulent intent as one and the same."[9]

With *Omnicare*, the Sixth Circuit has thus created a significant circuit split as to § 11 liability for statements of opinion or belief, employing reasoning that is directly contrary to that of the Second and Ninth Circuits. In light of this circuit split on an important issue, the *Omnicare* defendants may well petition for and be granted a writ of *certiorari* to resolve the conflict created by the Sixth Circuit.

If you have any questions regarding this memorandum, please contact Richard D. Bernstein (202-303-1108, rbernstein@willkie.com), Zheyao Li (212-728-8165, zli@willkie.com), or the Willkie attorney with whom you regularly work.

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[6] 501 U.S. 1083 (1991).

[7] Additionally, the Sixth Circuit requires proof of scienter in a § 14(a) case. *Omnicare*, 2013 WL 2248970, at *7 & n.3.

[8] *Fait*, 655 F.3d at 112.

[9] *See id.* at n.5.