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CLIENT MEMORANDUM

Supreme Court Holds Statements of Opinion Actionable Under Section 11 Only in Narrow Circumstances

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Earlier today, the U.S. Supreme Court, in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, ruled that an issuer cannot be liable under §11 of the Securities Act for statements of opinion that turn out to be wrong unless the speaker did not genuinely hold the stated opinion.[1] In doing so, the Supreme Court reversed the Sixth Circuit, which had held that, under §11, an issuer could be liable for a statement of opinion that turned out to be incorrect. The Supreme Court concluded that the Sixth Circuit had erred by failing to distinguish between statements of fact and statements of opinion. Observing that a statement of fact "expresses certainty about a thing" whereas "a statement of opinion does not," the Supreme Court held that "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless whether an investor can ultimately prove the belief wrong." In other words, a statement of opinion cannot be actionable as an affirmative misstatement under §11 unless the speaker did not truly hold the stated opinion.

However, the Court also held that a statement of opinion potentially could give rise to liability under §11 in certain circumstances. The Court noted that statements of opinion can be the basis for liability if an investor "identif[ies] *particular* (and material) facts going to the basis for the issuer's opinion—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

[1] Willkie represented the Securities Industry and Financial Markets Association (SIFMA) as *amicus curiae* in the Supreme Court.

person reading the statement fairly and in context." The Supreme Court further cautioned that establishing liability on this basis was "no small task for an investor" and required more than pleading that "the issuer failed to reveal its basis" for an opinion, or that "external facts show the opinion to be incorrect." It also required more than pleading that the issuer "lacked 'reasonable grounds for the belief,'" or that "the issuer knows, but fails to disclose, some fact cutting the other way." The Court's particularity requirement is thus a significant constraint on plaintiffs' ability to plead and prove an actionable omission based on a statement of opinion. At the end of the day, only two kinds of omitted facts will satisfy *Omnicare*'s stringent requirement for an omissions claim based on a statement of opinion: (1) the lack of an inquiry, and (2) the speaker's knowledge of a sufficiently uncontradicted and important fact that conflicts with the opinion.

Omnicare may affect disclosure practices among issuers and others who are potentially liable under §11 and other provisions of the securities laws. Certainly, the decision should and will be studied carefully by counsel to issuers, underwriters, and other participants in the capital markets for guidance on whether, and to what extent, statements of opinion should be utilized in registration statements and other offering documents.

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