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# **OMNICARE V. INDIANA STATE DISTRICT COUNCIL AND ITS RATIONAL BASIS TEST FOR ALLOWING FOR OPINION STATEMENTS TO BE A MISLEADING FACT OR OMISSION UNDER SECTION 11 OF THE SECURITIES ACT OF 1933**

**BRIAN ELZWEIG\***  
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## **INTRODUCTION**

Prior to the Securities Act of 1933 (Securities Act), there was disarray in the Securities markets in the United States. In response, Congress passed the Securities Act to restore “investor confidence following a rash of corporate scandals and the stock market crash of 1929[;] Congress enacted the Securities Act of 1933 to ensure accurate reporting by companies in their registration statements.”<sup>1</sup> This is evidenced by the Senate Report on the bill prior to passage of the Securities Act, which stated: “[t]he purpose of this bill is to protect the investing public and honest business. The basic policy is that of informing the investor of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and

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1. Richard A. Spehr et al., *Securities Act Section 11: A Primer and Update of Recent Trends*, 49 WASH. LEGAL FOUND. CONTEMP. LEGAL NOTE SERIES 3 (2006), <http://www.wlf.org/upload/0106CLNSpehr.pdf>.

misrepresentation.”<sup>2</sup> Companies who sell securities to the public by means of interstate commerce are required to file a registration statement with the United States Securities and Exchange Commission (SEC).<sup>3</sup> One of the cornerstones for the protection of the public in securities law is Section 11 of the Securities Act (“Section 11”).<sup>4</sup> Section 11 gives private plaintiffs actionable claims for false or misleading statements that are made in registration statements.<sup>5</sup> Liability arises if the registration statement “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . .”<sup>6</sup> The right to take action is given to “any person acquiring such security[.]”<sup>7</sup> unless the issuer can prove that the purchaser knew of the untrue statement or omission.<sup>8</sup> The classes of people who can be sued for violations in accordance with the stated purpose of the Act are widespread. Section 11 includes liability for:

- (1) every person who signed the registration statement;
- (2) every person who was a director of (or person performing similar functions) or partner in the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
- (3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;
- (4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his

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2. MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES 4A-5 n.4 (2005) (quoting S. REP. NO. 47 (1933)).

3. 15 U.S.C. § 77e(c) (2012).

4. 15 U.S.C. § 77k (2012).

5. Spehr et al., *supra* note 1, at 3.

6. 15 U.S.C. § 77k(a).

7. *Id.*

8. *Id.*

consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him;  
(5) every underwriter with respect to such security.<sup>9</sup>

Again, in keeping with the stated purpose of the Securities Act, in addition to having a wide range of people who can have potential liability (unlike many other violations of securities laws), a plaintiff need not prove that the misrepresentation or omission was done with the intent to deceive or defraud the purchaser.<sup>10</sup> Instead, a potential plaintiff only has to prove that there was a misrepresentation or omission.<sup>11</sup> This protects the public interest because scienter<sup>12</sup> (as would be needed for a 10b-5 securities fraud case) can be one of the more burdensome elements for a plaintiff to prove.<sup>13</sup> The idea behind all of these elements is to protect the public by requiring that issuers make a “full and fair disclosure of information to the public,”<sup>14</sup> so that the investing public can make informed decisions on whether to purchase a registered security.

What constitutes an actionable misstatement, or where an omission might have led a statement not to be misleading, has been the focus of much litigation. The standard to incur Section 11 liability arising from statements of opinion, leading to either a material misstatement or omission of a material fact, was addressed in the United States Supreme Court case of *Omnicare, Inc. v. Laborers District Council Construction*

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9. *Id.*

10. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).

11. *Id.*

12. *Scienter*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “scienter” as “[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act or omission”).

13. *Herman*, 459 U.S. at 382.

14. *Pinter v. Dahl*, 486 U.S. 622, 646 (1988).

*Industry Pension Fund*.<sup>15</sup> This case has far-reaching ramifications about what types of forward-looking statements may be put into registration statements and what can and should be omitted. Certainly, in areas where statements of opinion may become actionable under Section 11, an issuer would be advised that including such a statement would become a risk, but an omission that leads to a registration statement becoming misleading *also* poses a risk.<sup>16</sup> The tension between damaging omissions and over-disclosure is ongoing, and there is a substantial burden of proof for liability on the investor. Justice Kagan argues that erring on the side of disclosing helps honest companies, but proving that a statement is false is sometimes easier than finding an omission and proving that it is material.<sup>17</sup> There, the net result to the public would be that registration statements would contain less information on which purchasers would base their investing decisions.

This article examines when statements in a registration statement, couched as opinion, can and cannot be considered to be misstatements of material fact that could lead to liability under Section 11 (and potentially other sections) of the Securities Act. The rest of this paper is formatted as follows. We review the *Omnicare* case, followed by the key cases in the Second, Third, Ninth, and Sixth Circuit Courts of Appeals. The Second, Third, and Ninth Circuits have all required that, in order for there to be an actionable claim under Section 11, the plaintiff must plead not only that the statement or omission was false, but also that the defendant had subjective knowledge that its opinion was false.<sup>18</sup> The Sixth Circuit, although later reversed by the Supreme Court, applied a strict

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15. *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) [hereinafter *Omnicare*].

16. Omissions that are immaterial produce no significant risk and are generally safely omitted. See Spehr et al., *supra* note 1, at 6-7. Immaterial omissions are outside the scope of this paper.

17. *Omnicare*, 135 S. Ct. at 1331-32.

18. Alexander Coley, *When is a Belief or Opinion False?: Indiana State District Council v. Omnicare and the Contested § 11 Pleading Standard*, 5 CALIF. L. REV. 336, 337 (2014). See also Collin R. Flake, *Contrary to Popular Opinion: Why the Sixth Circuit's Omnicare Decision Should Be Reversed*, 76 OHIO ST. L.J. 125, 127 (2015).

liability interpretation of Section 11 and required only that the fact or omission be false or misleading.<sup>19</sup> The split decisions among the circuits may be the reason that the Supreme Court granted certiorari. Then, we explain the implications of these decisions to future registrants and to professionals preparing opinions that are to be included in registration statements. This article is important to future registrants and opining professionals because of their liability implications. We conclude with the assumption that future cases will decide how to apply the new rational basis test created by the Supreme Court in interpreting when an opinion statement becomes a misstatement of material fact, or leads to an omission that renders a registration statement false or misleading in violation of Section 11.

### I. Statements of Opinions as Facts

The facts of the *Omnicare* case illustrate the need to determine when statements of opinions should be treated as just that (statements of opinion that are not actionable under Section 11) and, conversely, when opinions should be treated as fact. The case further shows that, even absent fraud, there are times where a statement of opinion can rise to a material misstatement of fact, or lead to a material omission in which there would be Section 11 liability. In particular, it appears that professionals may be held liable for opinions where those opinions were formed without a reasonable basis.

Omnicare is a pharmaceutical company that provides pharmacy services for nursing home residents.<sup>20</sup> In issuing common stock to the public, as required under Section 11, Omnicare filed a registration statement with the SEC.<sup>21</sup> One of the disclosures that was required in Omnicare's registration statement, as in other registration statements, was a description of the effects of federal and state law on its business.<sup>22</sup> Part of Omnicare's business model included the

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19. See *Ind. State Dist. Council of Laborers et al., v. Omnicare, Inc.*, 719 F.3d 498, 506 (6th Cir. 2013) [hereinafter *Laborers*].

20. *Omnicare*, 135 S. Ct. at 1323.

21. *Id.*

22. *Id.*

receipt of rebates from manufacturers of the pharmaceuticals that it sold to the nursing homes.<sup>23</sup> Omnicare, in reference to these rebates, included the following two assertions in its registration statement: “[1] We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws;”<sup>24</sup> and “[2] We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.”<sup>25</sup>

Omnicare also included further information about those disclosures. Regarding the first statement, the company noted that there had been litigation brought by some states against the manufacturers of some pharmaceuticals for giving these types of rebates.<sup>26</sup> The registration statement noted that laws relating this practice may “be interpreted in the future in a manner inconsistent with our interpretation and application.”<sup>27</sup> Omnicare also addressed the second assertion by including in the registration statement that the federal government had expressed concerns about whether acceptance of rebates by nursing homes was legal.<sup>28</sup> It was further noted that if the acceptance of rebates was discontinued, Omnicare’s business would suffer.<sup>29</sup> This registration statement became part of an offering of 12.8 million shares of Omnicare common stock to the public.<sup>30</sup>

The plaintiffs in the case were pension funds that bought shares in the public offering.<sup>31</sup> They only held the stock for a short period of time, selling the shares a few months after the offering was complete.<sup>32</sup> Lawsuits were later brought by the

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23. *Id.*

24. *Id.* (original citations omitted).

25. *Omnicare*, 135 S. Ct. at 1323 (original citations omitted).

26. *Id.* at 1324.

27. *Id.* (original citations omitted).

28. *Id.*

29. *Id.*

30. *Laborers*, 719 F.3d at 500.

31. *Omnicare*, 135 S. Ct. at 1324.

32. *Ind. State Dist. Council of Laborers et al., v. Omnicare, Inc.*, 2012 U.S. Dist. LEXIS 17526, at \*1, \*4 (E.D. Ky. Feb. 13, 2012).

federal government, which alleged that the rebates that were given to Omnicare from the manufacturers were in violation of anti-kickback laws.<sup>33</sup> Because of the federal lawsuits, the plaintiffs claimed that the assertions in the registration statement about the rebates were “materially false” representations about legal compliance.”<sup>34</sup> Further, it was alleged that Omnicare “omitted to state [material] facts necessary” to make those representations not misleading.”<sup>35</sup>

The United States District Court for the Eastern District of Kentucky granted Omnicare’s motion to dismiss the case.<sup>36</sup> The district court noted that statements made about the legal compliance concerning the kickbacks were not actionable because the bases of those statements were “soft information.”<sup>37</sup> In its ruling, the district court stated that an action could only be sustained if the person who made the statements knew them to be untrue at the time that they were made.<sup>38</sup> In supporting the dismissal of the action, the court noted that there were no allegations that the officers of Omnicare knew that they were violating this law.<sup>39</sup>

The case was then reversed by the United States Court of Appeals for the Sixth Circuit.<sup>40</sup> The Sixth Circuit ruled against precedent set in the Second, Third, and Ninth Circuits, offering “a [more] liberal pleading standard under [] Section 11 . . . .”<sup>41</sup> The Second,<sup>42</sup> Third,<sup>43</sup> and Ninth<sup>44</sup> Circuits have all ruled on the issue of whether opinions on soft information in a registration can trigger a Section 11 violation. All three of

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33. *Omnicare*, 135 S. Ct. at 1324.

34. *Id.* (original citation omitted).

35. *Id.* (original citation omitted).

36. *Ind. State Dist. Council of Laborers*, 2012 U.S. Dist. LEXIS 17526, at \*16.

37. *Id.* at \*\*13-14. “Soft information includes matters of opinions and predictions.” *Laborers*, 719 F.3d at 504.

38. *Ind. State Dist. Council of Laborers*, 2012 U.S. Dist. LEXIS 17526, at \*14.

39. *Id.*

40. *Laborers*, 719 F.3d at 500.

41. *Coley*, *supra* note 18, at 336.

42. *See Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011).

43. *See In Re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357 (3d Cir. 1993).

44. *See Rubke v. Capitol Bancorp.*, 551 F.3d 1156 (9th Cir. 2009).



those circuits required a plaintiff to show that a defendant, when making the opinion, subjectively believed that the stated opinions were false.<sup>45</sup> The Sixth Circuit, instead, clearly “set[] a lower bar for potential [section] 11 claims”<sup>46</sup> by ruling that a case may be brought under Section 11 “without pleading knowledge of falsity.”<sup>47</sup> This circuit split led the Supreme Court to grant certiorari to consider how Section 11 pertains to statements of opinion.<sup>48</sup> The Supreme Court vacated the Sixth Circuit’s decision and remanded the case.<sup>49</sup>

## II. The Second Circuit

The United States Court of Appeals for the Second Circuit addressed the issue of statements of opinion being regarded as statements of material fact in the 2011 case of *Fait v. Regions Financial Corp.*<sup>50</sup> The facts of *Fait* need to be addressed to show the similarity between that case and the *Omnicare* case. In 2006, Regions Financial Corporation acquired a bank holding company, AmSouth Bancorporation.<sup>51</sup> The proxy statement allowed Regions to record any amount over the fair market value paid for AmSouth as goodwill for Regions.<sup>52</sup> In 2008, Regions, through Regions Financing Trust III (“Regions Trust”), made a public securities offering that included the use of this calculation of goodwill.<sup>53</sup> After the merger, there were

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45. Coley, *supra* note 18, at 337.

46. *Id.* at 338.

47. *Laborers*, 719 F.3d at 505.

48. *Omnicare*, 135 S. Ct. at 1324.

49. *Id.* at 1333.

50. *Fait*, 655 F.3d at 105.

51. *Id.* at 107.

52. *Id.*

53. *Id.* Note that Generally Accepted Accounting Principles require that goodwill be tested for impairment, (Accounting Standards Codification 350-20-35), which could happen, for example, when a company held in high public regard subsequently becomes the subject of a scandal or adverse events that tarnish its image so much that the company is not expected to be as profitable in the future as was previously thought. When that happens, the asset labeled “goodwill” is written down (but is never less than \$0.00), and this write-down is off-set by a loss on the income statement. See *generally Accounting Standards Update*, 2016-03 FIN. ACCT. STANDARDS BD., Mar. 2016.

major problems with both the housing and residential markets.<sup>54</sup> Issuers of subprime mortgages were becoming insolvent which, in turn, had an adverse effect on the entire banking industry.<sup>55</sup> During this period, there was a decline in the value of Regions' stock.<sup>56</sup> Alfred Fait, a purchaser of Regions Trust shares, filed a class action against both Regions Trust and Regions Financial Corp., as well as other defendants.<sup>57</sup> The complaint alleged that "despite adverse trends in the mortgage and housing markets . . . [,] Regions failed to write down 'goodwill' and to sufficiently increase 'loan loss reserves.'"<sup>58</sup> This led to the allegation that the defendants, in their offering documents, issued "negligently false and misleading' statements concerning goodwill and loan loss reserves."<sup>59</sup> The complaint stated that "Regions overstated goodwill and falsely stated that it was not impaired, and 'vastly underestimated' Regions' loan loss reserves and failed to disclose that they were inadequate."<sup>60</sup> Using this as a basis, the complaint alleged that these statements constituted misstatements or omissions of material facts in violation of Sections 11(a), 12(a)(2), and 15 of the Securities Act.<sup>61</sup> The courts did not examine the claim under Section 15 of the Securities Act. This is because a Section 15 claim involves a person who controls another person who is liable under Section 11 or 12 of the Act.<sup>62</sup> Since both Sections 11 and 12 refer to misrepresentations of material fact,<sup>63</sup> and neither requires scienter,<sup>64</sup> the courts examined these claims together.

The United States District Court for the Southern District of New York dismissed the case.<sup>65</sup> The dismissal was based on the defendants' claim that the "statements regarding goodwill

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54. *Fait*, 655 F.3d at 107.

55. *Id.*

56. *Id.*

57. *Id.* at 108.

58. *Id.*

59. *Fait*, 655 F.3d at 108.

60. *Id.*

61. *Id.*

62. *Id.* at 110 (citing 15 U.S.C. § 77o (2012)).

63. *Id.* at 110.

64. *Fait*, 655 F.3d at 109.

65. *Id.* at 108.

and the adequacy of loan loss reserves were matters of opinion, which were not actionable because the complaint failed to allege that those opinions were not truly held at the time they were made.”<sup>66</sup> The district court held that goodwill reflected on the balance sheets illustrated judgments of the values that could not be objectively determined.<sup>67</sup> As with goodwill, the court held that the adequacy of reserves was also a statement of opinion.<sup>68</sup> According to the district court, in order for there to have been an actionable claim, the plaintiffs would have had to plead that the “defendants did not honestly hold those opinions at the time they were expressed.”<sup>69</sup>

The Second Circuit, in examining the claims, relied heavily on the Supreme Court’s decision in *Virginia Bankshares v. Sandburg*.<sup>70</sup> *Virginia Bankshares* also involved a freeze-out merger between a bank and its wholly owned subsidiary.<sup>71</sup> The acquiring bank, even though it was not required to, issued a proxy on the merger to its minority shareholders.<sup>72</sup> The minority shareholders accused the directors of falsely stating that the shareholders were being offered a “high” and “fair” value for their stock in the proxy statement.<sup>73</sup> It was alleged that this was a material false or misleading statement in violation of Section 14(a) of the Securities Exchange Act of 1934 (“the Exchange Act”) and its associated SEC Rule 14.<sup>74</sup> The Court considered the question of “whether statements of reasons, opinions, or beliefs are statements ‘with respect to . . . material fact[s]’ so as to fall within the strictures of [Rule 14(a)-9].”<sup>75</sup> The Court held that the directors’ statements of reason or belief were statements of fact “in two senses: as statements that the directors do act for the reasons given or hold the belief stated and as statements about the subject matter of the

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66. *Id.*

67. *Id.* at 109.

68. *Id.*

69. *Fail*, 655 F.3d at 109.

70. *Id.* at 111 (citing *Va. Bankshares v. Sandburg*, 501 U.S. 1083 (1991)).

71. *Sandburg*, 501 U.S. at 1087-88.

72. *Id.* at 1088.

73. *Id.*

74. *Id.*

75. *Id.* at 1091.

reason or belief expressed.”<sup>76</sup>

*Virginia Bankshares* requires that a misstatement of opinion be both objectively and subjectively false for a Section 14(a) claim.<sup>77</sup> Professor James D. Cox of Southern Methodist University succinctly simplified the holding in *Virginia Bankshares* when it comes to purported statements of opinion: “[O]pinion statements are statements of facts when there is before the defendant objective evidence in direct conflict with the professed opinion. Absent conflicting objective evidence, the opinion statement is not a ‘fact’ but a non-actionable misrepresentation of the defendant’s belief or motive.”<sup>78</sup>

During its examination of *Virginia Bankshares*, the Second Circuit in *Fait* noted that, although *Virginia Bankshares* involved claims regarding improper proxy solicitation under Section 14 (a) of the Exchange Act, it was applying the same reasoning to the claims under Sections 11 and 12 of the Securities Act.<sup>79</sup> The Second Circuit, using the rationale of *Virginia Bankshares*, affirmed the district court’s dismissal of the action.<sup>80</sup> In its examination of the plaintiffs’ claims that the estimates of goodwill were actionable misstatements of fact, the court noted that the plaintiffs’ claims were rooted in adverse market conditions.<sup>81</sup> The claim relies on an assertion that Regions should have used different assessments about the market conditions, which would have led to different conclusions about the amount of goodwill in the registration statement.<sup>82</sup> The court held that the since the complaint did not allege that the defendants did not believe the statements about goodwill at the time that they were made, that “[u]nder *Virginia Bankshares* and our related cases, such an omission is fatal to plaintiff’s Section 11 and 12 claims.”<sup>83</sup> The plaintiffs claimed that this approach essentially required a plaintiff to

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76. *Sandburg*, 501 U.S. at 1092.

77. *Id.*

78. James D. Cox, “We’re Cool” *Statements after Omnicare: Securities Fraud Suits for Failures to Comply with the Law*, 68 SMU L. REV. 715, 715 (2015).

79. *Fait*, 655 F.3d at 111 n.4.

80. *Id.* at 109.

81. *Id.* at 112.

82. *Id.*

83. *Id.*

plead scienter, which is not a necessary element of a claim under the Securities Act.<sup>84</sup> The court ruled that it “do[es] 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.”<sup>85</sup>

Similarly, using *Virginia Bankshares*, the Second Circuit examined the plaintiffs’ claims that the amount of the loan loss reserves was a misstatement or omission of a material fact.<sup>86</sup> The court held that the plaintiffs did not allege any objective standards for setting the loan loss reserves.<sup>87</sup> In its holding, the court stated:

in order for the alleged statements regarding the adequacy of loan loss reserves to give rise to liability under sections 11 and 12, plaintiff must allege that defendant’s opinions were both false and not honestly believed when they were made. Because the complaint does not plausibly allege subjective falsity, it fails to state a claim.<sup>88</sup>

### III. The Third Circuit

The United States Court of Appeals for the Third Circuit addressed the issue of whether an opinion can be considered a material misstatement or omission in *In re: Donald J. Trump Casino Securities Litigation* (“*Trump*”).<sup>89</sup> In *Trump*, the language of a prospectus for a bond issuance for the financing of the Taj Mahal Casino in Atlantic City, New Jersey was at issue.<sup>90</sup> The plaintiffs alleged that language in the prospectus, which stated that “[t]he Partnership believes that funds generated from the operation of the Taj Mahal will be sufficient to cover all of its debt service (interest and principal),” was

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84. *Fait*, 655 F.3d at 109.

85. *Id.* at 112 n.5.

86. *Id.* at 113.

87. *Id.*

88. *Id.*

89. *Trump*, 7 F.3d at 357.

90. *Id.* at 364.

misleading.<sup>91</sup> It was alleged that the defendants had “neither an honest belief in nor a reasonable basis” for this statement.<sup>92</sup> This and other statements in the prospectus (which are not germane to this article) were alleged to have been a violation of several sections of the Securities Act.<sup>93</sup> The United States District Court for the District of New Jersey dismissed the action for failure to state a claim, and the plaintiffs appealed to the Third Circuit.<sup>94</sup>

For most of the issues, both the district court and the Third Circuit used the “bespeaks caution” doctrine as a linchpin for rendering their decisions.<sup>95</sup> Instead of addressing the question of whether opinion statements rise to the level of believable fact, the bespeaks caution doctrine primarily addresses the materiality of statements made in connection with the sale of securities.<sup>96</sup> The bespeaks caution doctrine holds that, if there are sufficient cautionary statements in the prospectus, the misrepresentations or omissions are rendered inactionable.<sup>97</sup> In essence, the bespeaks caution doctrine allows for a prospectus to have enough warnings that the subject matter of the warnings should be taken with caution as to their materiality in a decision to purchase a security.<sup>98</sup> Even though the bespeaks caution doctrine was the primary reason that the Third Circuit affirmed the dismissal of the case, the court did address opinion statements in light of *Virginia Bankshares* and its effect on the bespeaks caution doctrine; the court stated that *Virginia Bankshares* bolstered the defense provided to the defendants in their opinion statements by the bespeaks caution doctrine.<sup>99</sup> The court interpreted *Virginia Bankshares*, stating: “a speaker’s subjective disbelief or motivation, standing alone, would be inadequate to state a

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91. *Id.* at 365.

92. *Id.* at 366.

93. *Id.* at 364.

94. *Trump*, 7 F.3d at 364.

95. *Id.* at 371.

96. *Id.*

97. *Id.* There is literature on the subject of the bespeaks caution doctrine and its applicability to specific situations, but this analysis is not necessary for this article.

98. *Id.* at 364.

99. *Trump*, 7 F.3d at 372.

claim under § 14(a).”<sup>100</sup> The Third Circuit also applied *Virginia Bankshares* to the bespeaks caution doctrine, stating: “by recognizing that an accompanying statement may neutralize the effect of a misleading statement, the [*Virginia Bankshares*] Court impliedly accepted the logic of the bespeaks caution doctrine.”<sup>101</sup>

#### IV. The Ninth Circuit

The case of *Rubke v. Capitol Bancorp.*, decided in the United States Court of Appeals for the Ninth Circuit, addressed the issue of opinion statements being asserted as a misstatement or omission of a material fact in a pleading for a securities law violation.<sup>102</sup> *Rubke* essentially turns on the heightened pleading requirements under the Private Securities Litigation Reform Act and Section 9(b) of the Federal Rules of Civil Procedure in allegations of violations of securities laws.<sup>103</sup> This article will only concentrate on the facts and analyses that are relevant to the heightened pleading requirement.

Capitol Bancorp filed a registration statement for an exchange offer in an attempt to acquire Napa Community Bank.<sup>104</sup> The offer document was given with two fairness opinions, both of which stated that the share exchange was “fair from a financial point of view.”<sup>105</sup> The plaintiffs in this case were dissident shareholders who disagreed with the terms of the offer and alleged that the terms were couched in fraud and misrepresentation.<sup>106</sup> The district court, relying on Rule 9(b) of the Federal Rules of Civil Procedure, ruled that, since claims against Capitol Bancorp “sound[] in fraud,” the claims under Section 11 of the Securities Act must be pled with particularity.<sup>107</sup> Rule 9(b) states: “In alleging fraud or mistake,

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100. *Id.* It should be noted that, similar to the Second Circuit, the Third Circuit expanded the rationale of *Virginia Bankshares* to cases arising under securities law violations other than Section 14 of the Exchange Act, including Sections 11 and 12 of the Securities Act. *Id.* at 369.

101. *Id.* at 372.

102. *Rubke v. Capitol Bancorp.*, 551 F.3d 1156 (9th Cir. 2009).

103. *Id.* at 1160.

104. *Id.* at 1159.

105. *Id.*

106. *Id.* at 1166.

107. *Rubke*, 551 F.3d at 1161.

a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.”<sup>108</sup>

The district court ruled that this requirement was not met, and the plaintiffs appealed to the Ninth Circuit.<sup>109</sup> In determining what the proper pleading requirements are in the case, the Ninth Circuit discussed the fairness opinions statements.<sup>110</sup> The court, citing *Virginia Bankshares* as authority, stated: “[b]ecause these fairness determinations are alleged to be misleading opinions, not statements of fact, they can give rise to a claim under Section 11 only if the complaint alleges with particularity that the statements were both objectively and subjectively false or misleading.”<sup>111</sup> The court then used this reasoning to determine that, to plead with particularity as required, the plaintiffs would have had to allege in the complaint that either that the writers of the fairness opinions or Capitol Bancorp believed that the proposed deal was unfair.<sup>112</sup> There was no such claim in the complaint, and the Section 11 violation allegation was dismissed.<sup>113</sup>

## V. The Sixth Circuit *Omnicare* Decision

In *Indiana State District Council of Laborers et al., v. Omnicare, Inc.*, (“*Laborers*”), the Sixth Circuit addressed whether opinion statements could be used as the basis of a material misstatement or omission claim for Section 11.<sup>114</sup> At issue were the two statements in the legal compliance section of its registration statement that were litigated in the *Omnicare* district court case,<sup>115</sup> which indicated that Omnicare's officers felt that the kickback agreement with pharmaceutical companies was in compliance with the law and

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108. Fed. R. Civ. P. 9(b).

109. *Rubke*, 551 F.3d at 1158.

110. *Id.* at 1161-62.

111. *Id.* at 1162.

112. *Id.* at 1165.

113. *Id.*

114. *Laborers*, 719 F.3d at 500.

115. *Id.* at 501.



constituted “legally and economically valid arrangements.”<sup>116</sup> The kickbacks were later found to be illegal.<sup>117</sup> Then, in considering whether these two statements were misleading (either directly or indirectly), the Sixth Circuit’s decision departed from the other circuit courts that have addressed this issue.<sup>118</sup>

The Sixth Circuit in *Laborers*, like the Ninth Circuit in *Rubke*, held that the Section 11 claim in this case did sound in fraud, and was therefore subject to the heightened pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.<sup>119</sup> The court held that in order to state a fraud claim with particularity to meet the heightened pleading requirement, “a plaintiff [must] allege the time, place, and content of the alleged misrepresentations on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud.”<sup>120</sup> The court then noted that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”<sup>121</sup> In its examination of the pleading requirements, the Sixth Circuit overruled the district court’s determination that the plaintiffs’ complaint must allege that the defendants *knew* that the statements of legal compliance were false at the time they were made.<sup>122</sup> The Sixth Circuit stated that a Section 11 claim was one of strict liability, without the need to examine the speaker’s state of mind.<sup>123</sup> The court, referring to Section 11, stated that the plaintiffs only need to show that, at the time of the effective date of the registration statement, it “contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.”<sup>124</sup>

Regarding omissions, *Omnicare* cited parallels to a case

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116. *Id.*

117. *Id.*

118. *Id.* at 506.

119. *Laborers*, 719 F.3d at 502-03.

120. *Id.* at 503 (quoting *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006)).

121. *Id.* (quoting Fed. R. Civ. P. 9(b)).

122. *Laborers*, 719 F.3d at 503.

123. *Id.*

124. *Id.* (citing 15 U.S.C § 77k(a)).

brought under Section 10b and Rule 10b-5 of the Exchange Act.<sup>125</sup> Omnicare argued that, since the statements of legal compliance are soft information, they need not be disclosed.<sup>126</sup> Since there is no requirement to release soft information, Omnicare felt that there should be no liability for an omission related to the legal compliance statements.<sup>127</sup> The Sixth Circuit responded that when a company elects to remain silent regarding soft information, the company is not liable under Section 10 of the Exchange Act (and therefore presumably not liable under Section 11 as well).<sup>128</sup> However, this is only true when a company remains “completely silent.”<sup>129</sup> Since Omnicare addressed the issues of legal compliance (when it was not required to), the court stated that “the protections for soft information end where [that] speech begins.”<sup>130</sup> The court reasoned that once information is disclosed, it becomes subject to the scrutiny of the securities laws.<sup>131</sup> When there is knowledge of falsity in the disclosure, opinions are no longer soft information, but instead become hard facts.<sup>132</sup> Omnicare then argued that, even if the statements could be taken as fact and contained a falsity, they could only be actionable if the plaintiffs could prove that there was knowledge of the falsity at the time the statements were made.<sup>133</sup> The court disagreed with this analysis, reasoning that a claim under Section 10b and Rule 10b-5 requires scienter as a basic element of the claim.<sup>134</sup> However, the same is not true for a Section 11 claim; the court stated:

Section 10(b) and Rule 10b-5 require a plaintiff to prove scienter, § 11 is a strict liability statute. It makes sense that a defendant cannot be liable

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125. *Laborers*, 719 F.3d at 504.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Laborers*, 719 F.3d at 504 (quoting *Helwig v. Vencor, Inc.*, 251 F.3d 540, 560 (6th Cir. 2001) (en banc)).

131. *Laborers*, 719 F.3d at 504.

132. *Id.* at 505.

133. *Id.*

134. *Id.*

for a fraudulent misstatement or omission under § 10(b) and Rule 10b-5 if he did not know a statement was false at the time it was made. The statement cannot be fraudulent if the defendant did not know it was false. Section § 11, however, provides for strict liability when a registration statement “contain[s] an untrue statement of a material fact.” No matter the framing, once a false statement has been made, a defendant’s knowledge is not relevant to a strict liability claim.<sup>135</sup>

Pursuant to the court’s judgment in *Laborers*, when a defendant discloses information, knowledge of the falsity of the information is irrelevant in a strict liability claim.<sup>136</sup> “Under § 11, however, if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of falsity.”<sup>137</sup> The court then went further and specifically rejected the reasoning of the Second Circuit in *Fait* and the Ninth Circuit in *Rubke*.<sup>138</sup> In doing so, the Sixth Circuit also refused to extend the holding in *Virginia Bankshares* to a Section 11 claim.<sup>139</sup> *Virginia Bankshares*, in interpreting a claim under Section 14a of the Exchange Act, had stated that a plaintiff is required to prove objective falsity, not just the belief of falsity.<sup>140</sup> The Sixth Circuit in *Laborers* noted that the Supreme Court in *Virginia Bankshares* did not address whether a plaintiff must additionally plead knowledge of the falsity.<sup>141</sup> Further, the Sixth Circuit noted that *Virginia Bankshares* did not discuss scienter, and instead “limited its discussion to statements of opinion and belief that it presumed

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135. *Id.* (original citations omitted).

136. *Id.*

137. *Id.*

138. *Id.* at 505-06. The Sixth Circuit did not address the Third Circuit case *In Re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357 (3d Cir. 1993), discussed *infra* p. 66.

139. *Laborers*, 719 F.3d at 506-07.

140. *Id.* at 506.

141. *Id.*

were made with knowledge of falsity . . . .”<sup>142</sup> The Sixth Circuit opined that the Supreme Court reserved the question of the necessity of scienter for a Section 14 claim, and that in *Virginia Bankshares*, the “jury in [that] case had already found knowledge of falsity—whether necessary or not—and proceeded from there.”<sup>143</sup>

Using this reasoning, the Sixth Circuit stated that both the Second and Ninth Circuits had overreached by applying the logic of *Virginia Bankshares* to a Section 11 claim.<sup>144</sup> Since the Supreme Court had assumed that there was knowledge of the falsity of the statements relevant in *Virginia Bankshares*, the Sixth Circuit presumed that the Supreme Court was treating scienter as a requirement for a Section 14(a) violation.<sup>145</sup> The Sixth Circuit concluded that, since Section 11 does not require scienter, *Virginia Bankshares* has “very limited application” to it.<sup>146</sup> Instead, the Sixth Circuit stated that the proper precedent to use in determining the pleading requirements against Omnicare was *Herman & MacLean v. Huddleston*,<sup>147</sup> which had previously ruled that claims under Section 11 were properly brought under the theory of strict liability.<sup>148</sup> Using this logic, the Sixth Circuit in *Laborers* explicitly refused “to extend *Virginia Bankshares* to impose a knowledge of falsity requirement upon § 11 claims.”<sup>149</sup>

## VI. The Supreme Court *Omnicare* Decision

Presumably due to the circuit split created by the Sixth Circuit in the *Omnicare* case, the Supreme Court granted certiorari.<sup>150</sup> Writing for the majority, Justice Kagan phrased the issue before the Court as follows:

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142. *Id.*

143. *Id.*

144. *Laborers*, 719 F.3d at 506-07.

145. *Id.*

146. *Id.* at 507.

147. *Huddleston*, 459 U.S. at 375.

148. *Laborers*, 719 F.3d at 507.

149. *Id.*

150. *See generally Omnicare*, 135 S. Ct. at 1318.

Before a company may sell securities in interstate commerce, it must file a registration statement with the Securities and Exchange Commission (SEC). If that document either “contain[s] an untrue statement of a material fact” or “omit[s] to state a material fact . . . necessary to make the statements therein not misleading,” a purchaser of the stock may sue for damages. This case requires us to decide how each of those phrases applies to statements of opinion.<sup>151</sup>

As did the Sixth Circuit, the Supreme Court focused on the two statements in the legal compliance section of Omnicare’s registration statement in which Omnicare opined that the kickback agreements were legally compliant and economically sound.<sup>152</sup> In addressing the issue, the Court examined the Sixth Circuit’s approach.<sup>153</sup> The Court disagreed with the Sixth Circuit’s holding “that a statement of opinion that is ultimately found incorrect—even if believed at the time made—may count as an ‘untrue statement of a material fact’ . . . [because it] wrongly conflates facts and opinions.”<sup>154</sup> The Court explained that a fact is something that expresses certainty of a thing, whereas an opinion does not.<sup>155</sup> The Court held that when it comes to a statement of opinion, there could still be an actionable claim brought under Section 11.<sup>156</sup> It was noted that when an opinion statement contains one fact, “the speaker actually holds the stated belief.”<sup>157</sup> Citing *Virginia Bankshares*, the Court noted that in order for the legal compliance claims to be false or misleading statements of material fact, allowing for a Section 11 claim, Omnicare would have had to have believed that the company was indeed

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151. *Id.* at 1323 (citing 15 U.S.C. § 77k(a)).

152. *Id.* at 1324.

153. *Id.* at 1325.

154. *Id.*

155. *Omnicare*, 135 S. Ct. at 1325.

156. *Id.* at 1326.

157. *Id.*

breaking the law when it stated that it believed it was not.<sup>158</sup> The Court then took this argument to its extreme, stating that one could not just make a statement that is embedded within statements of fact and avoid liability by couching it in terms of opinion.<sup>159</sup> Justice Kagan applied *Virginia Bankshares* as illustrated through a hypothetical involving a CEO of a company saying: “I believe our TVs have the highest resolution available because we use a patented technology to which our competitors do not have access.”<sup>160</sup> This statement would not address the CEO’s state of mind, but it would affirm “an underlying fact: that the company uses a patented technology.”<sup>161</sup>

The Court, addressing the two statements of legal compliance in the registration statement, stated that the plaintiffs could not prevail by claiming that these were untrue statements of material fact.<sup>162</sup> The statements were held to be “pure statement[s] of opinion.”<sup>163</sup> Even though Omnicare’s belief about violating the anti-kickback laws turned out to be wrong, the belief was sincerely held at the time the registration statement was filed.<sup>164</sup> Just because an opinion in a registration statement later turns out to be wrong, that does not allow for Section 11 liability as an untrue statement of material fact.<sup>165</sup>

The Court then addressed whether Omnicare “omitted to state facts necessary” to make its opinions on its legal compliance with the anti-kickback laws “not misleading” to a reasonable investor.<sup>166</sup> It was plaintiffs’ contention that Omnicare’s omission would lead to a Section 11 violation.<sup>167</sup> In

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158. *Id.*

159. *Id.* at 1327.

160. *Omnicare*, 135 S. Ct. at 1327.

161. *Id.* at 1328.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Omnicare*, 135 S. Ct. at 1328.

166. *Id.* at 1327.

167. *Id.* Justice Thomas, in his concurring opinion, did not find it necessary to address omissions because he believed that it should be remanded without discussion to the lower court to decide the issue. *Id.* at 1337 (Thomas, J., concurring). The majority however, disagreed and noted that although the plaintiffs could have written a clearer complaint, the

response, Omnicare argued that it is not possible for an opinion statement to convey anything to a reasonable person other than the speaker's own mindset.<sup>168</sup> Therefore, if an opinion is sincerely held, it cannot be misleading, which causes Section 11 liability "regardless [of] what related facts the speaker has omitted."<sup>169</sup> The Court rejected Omnicare's interpretation of the *Virginia Bankshares* decision that that there could never be liability for an omission related to making an opinion statement.<sup>170</sup> Omnicare, in making its assertion, was primarily relying on *Virginia Bankshares*' statement that "[a] statement of belief may be open to objection . . . solely as a misstatement of the psychological fact of the speaker's belief in what he says."<sup>171</sup> The court replied that Omnicare, by taking that sentence as an absolute prohibition, was taking it out of context; Justice Kagan wrote that if there is a statement of legal compliance in a registration statement, it could be misleading if it were incomplete.<sup>172</sup> A reasonable person purchasing securities would believe that the opinion was based on something other than mere intuition, even if belief in the statement were sincerely held.<sup>173</sup> The investor would reasonably believe that the statement was based on a meaningful legal inquiry.<sup>174</sup> An opinion would also be so incomplete by an omission as to be misleading if the statement was made "in the face of its lawyers' contrary advice, or with knowledge that the Federal Government was taking the opposite view . . . ."<sup>175</sup> The opinion must not be believed by the issuer, but it also must also reflect the information that the issuer has.<sup>176</sup> The Court stated:

[I]f a registration statement omits material facts

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question of omissions was raised and was an integral part of the claims sought. *Id.* at 1325.

168. *Id.* at 1328.

169. *Id.*

170. *Id.*

171. *Id.* at 1329 n.7 (quoting *Va. Bankshares*, 501 U.S. at 1095).

172. *Omnicare*, 135 S. Ct. at 1328.

173. *Id.*

174. *Id.*

175. *Id.* at 1329.

176. *Id.*

about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself, then §11's omissions clause creates liability.<sup>177</sup>

Further, the Court noted that an opinion statement is not misleading if it omits a fact that concerns weighing disparate facts that created the opinion.<sup>178</sup> A reasonable investor should expect that an opinion may come from the weighing of competing facts.<sup>179</sup> It was noted that a "reasonable investor does not expect that *every* fact known to an issuer supports its opinion statement."<sup>180</sup>

The Court also held that when determining whether an omission makes a statement misleading, the context must be taken into account.<sup>181</sup> While the investor would not expect a registration statement to contain baseless, off-the-cuff judgments, any statements must be read in a broader context of the entire statement.<sup>182</sup> The Court stated that "[t]he reasonable investor understands a statement of opinion in its full context, and §11 creates liability only for the omission of material facts that cannot be squared with such a fair reading."<sup>183</sup>

The Court reasoned that if it interpreted *Virginia Bankshares* the way that Omnicare had argued, liability could be nullified if any sentence started with phrases such as "we believe" or "we think," even though statements may still be misleading.<sup>184</sup> The Court remanded the question to the lower courts to decide if there is a factual basis to conclude that the omission made the statements of legal compliance misleading.<sup>185</sup> The Court instructed the lower courts that a

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177. *Omnicare*, 135 S. Ct. at 1329.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 1330.

182. *Omnicare*, 135 S. Ct. at 1330.

183. *Id.*

184. *Id.* at 1331.

185. *Id.* at 1333.



complaint is not sufficient just by claiming that an opinion was wrong; the basis for the opinion must also be called into question.<sup>186</sup> In order to have a valid claim, the plaintiffs would have to show that one or more facts was left out of the registration statement, and that the omitted fact “rendered Omnicare’s legal compliance opinions misleading . . . because the excluded fact shows that Omnicare lacked the basis for making those statements that a reasonable investor would expect.”<sup>187</sup> The Court further noted that this must be done in the context of not only the surrounding language in the registration statement, but also in the context of why they may or may not have excluded an outside expert’s advice in forming the stated opinion.<sup>188</sup>

## VII. The Tenth Circuit

The United States Court of Appeals for the Tenth Circuit in *MHC Mutual Conversion Fund, L.P. v. Sandler O’Neill* posed the following question: “[w]hen does Section 11 of the Securities Act of 1933 impose liability on issuers who offer opinions about future events?”<sup>189</sup> This case is interesting because it occurred prior to *Omnicare*. The case involved a secondary stock offering by United Western Bancorp, Inc. (“Bancorp”) issued after the 2008 financial crisis.<sup>190</sup> In its registration statement, the company stated it held a significant amount of mortgage-backed securities, which had lost much of their value during the crisis due to homeowner defaults.<sup>191</sup> It was further stated, however, that it had conducted internal analyses and had consulted independent experts, which led them to believe that the level of delinquencies and defaults had likely leveled off and the values of its securities would rebound.<sup>192</sup> However, it also stated that it would have to

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186. *Id.*

187. *Omnicare*, 135 S. Ct. at 1333.

188. *Id.*

189. *MHC Mut. Conversion Fund, L.P. v. Sandler O’Neill & Partners, L.P.*, 761 F.3d 1109, 1110 (10th Cir. 2014).

190. *Id.* at 1111.

191. *Id.*

192. *Id.*

recognize additional losses if adverse market conditions lasted longer than their analyses suggested.<sup>193</sup> Bancorp's opinion in its registration statement that losses had leveled off did not come true, and instead the markets remained depressed for the next fifteen months, causing Bancorp to recognize another \$69 million in losses.<sup>194</sup> Investors sued over the additional loss recognition under the theory that the opinion statement about the rebound, which later proved to be false, was an untrue statement of material fact in violation of Section 11.<sup>195</sup>

When determining when a statement of opinion could be recognized as a material false statement for Section 11 liability, the Tenth Circuit noted that there were three different approaches that could be taken.<sup>196</sup> The first approach examined by the court was that, since the statute itself only speaks of misstatements of fact, statements of opinion could not be subject to Section 11 liability at all.<sup>197</sup> The court stated that some contemporary scholars at the time of the creation of the Securities Act believed that relying on an opinion is foolish.<sup>198</sup> It was further noted that the SEC, until the 1970s, prohibited companies from issuing opinions related to future speculation because it believed that the typical investor was "as competent as anyone to predict the future from the given facts."<sup>199</sup> The court seemed to indicate that the first approach was flawed under the analyses that the Second, Third and Ninth Circuits used, relying on *Virginia Bankshares*.<sup>200</sup>

The Tenth Circuit examined a second approach, stating that an opinion statement is often interpreted as a statement of fact as to the state of mind of the speaker of the statement, and the speaker actually believes the opinion as it is stated.<sup>201</sup> The court then repeated the subjective falsity used in the other circuits—that a plaintiff must show both that an opinion was

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193. *Id.*

194. *MHC*, 761 F.3d at 1111.

195. *Id.* at 1121.

196. *Id.* at 1113.

197. *Id.* at 1111-12.

198. *Id.* at 1112.

199. *Id.* (quoting Harry Heller, *Disclosure Requirements Under Federal Securities Regulation*, 16 BUS. LAW. 300, 307 (1961)).

200. *MHC*, 761 F.3d at 1113.

201. *Id.*

not a real opinion (subjective disbelief), and that the opinion turned out to be incorrect (objective falsity).<sup>202</sup>

The most interesting aspect of this case, especially since the opinion was issued prior to the *Omnicare* Supreme Court decision, is the third approach examined by the court. The Tenth Circuit also examined an approach similar to the one that was taken in the *Omnicare* Supreme Court decision.<sup>203</sup> The court noted that common law misrepresentation claims are often brought against fiduciaries that hold themselves out to be experts and then make an opinion that lacks “an objectively reasonable basis.”<sup>204</sup> The court noted that the expectation of some professionals, such as attorneys, is that when they make an opinion of future occurrences, the opinion is based on a reasonable amount of research or expertise.<sup>205</sup>

The court noted that this approach was examined by many courts “in the securities context, though it is difficult to find many actually holding a security issuer liable on this basis . . . .”<sup>206</sup> The Tenth Circuit then examined why courts had not used this rational basis test for the opinion statements in a securities context; first, the court wondered if *Virginia Bankshares* precluded this since it did not mention any alternatives to the subjective falsity test that it created.<sup>207</sup> While noting that many have understood that to be the case, the Tenth Circuit also (maybe prophetically) noted that Supreme Court may not have intended the creation of one test to exclude all others.<sup>208</sup> Second, the court stated that the plain meaning of the statute, by not including statements of opinion as a trigger for liability, may have excluded a requirement that the speaker have an objective basis for an opinion.<sup>209</sup> The third reason that the court proffered for the rational basis test not

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202. *Id.*

203. *Id.* at 1115-16.

204. *Id.* at 1115.

205. *MHC*, 761 F.3d at 1115.

206. *Id.* at 1116. In his concurring opinion, Justice Thomas quoted *MHC* for this notion which was the only mention of the case in the Supreme Court *Omnicare* decision. See *Omnicare*, 135 S. Ct. at 1337 (Thomas, J., concurring).

207. *MHC*, 761 F.3d at 1116.

208. *Id.*

209. *Id.*

being used is that, while modern common law authorities view securities issuers as fiduciaries of investors, this has not always been the case.<sup>210</sup> Many early commentators and the SEC itself have, for much of its history, treated the issuers of securities as “more like sellers of goods whose crystal balls are thought no better than anyone else’s.”<sup>211</sup>

The fourth, and probably most intriguing reason in light of the *Omincare* outcome, is that the Tenth Circuit wondered if the goal of investor protection would be overall enhanced by a rational basis test.<sup>212</sup> Opposite of Justice Kagan’s prediction of no real effect on honest issuers, the Tenth Circuit wondered if “[r]equiring more extensive disclosure of evidence tending to undermine a sincerely held opinion may, in the view of some, do more to invite information overload than materially benefit the consumer.”<sup>213</sup> Ultimately, in *MHC*, the court did not say what test it was using, but rather stated that in this case it did not matter, since under a factual analysis, the plaintiffs would fail under any of the tests.<sup>214</sup>

## VIII. Policy Issues

### A. Will the Rational Basis Standard from the *Omincare* Decision Cause an Increase in Section 11 Claims?

When the Sixth Circuit decided *Omincare*, many commenters suggested that the Sixth Circuit would become the new hotspot for securities litigation.<sup>215</sup> It was thought, and probably correctly so, that having a lower bar for pleading Section 11 claims would make bringing a case in the Sixth Circuit more attractive than trying the case in other circuits. It makes inherent sense that plaintiffs in securities cases,

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210. *Id.* at 1117.

211. *Id.*

212. *MHC*, 761 F.3d at 1117.

213. *Id.*

214. *Id.*

215. See James Grohsgal & Amy Ross, *The Sixth Circuit - The New Hotspot for Section 11 Suits*, SEC. LITIG., INVESTIGATIONS & ENF’T (May 29, 2013), <http://blogs.orricks.com/securities-litigation/2013/05/29/the-sixth-circuit-the-new-hotspot-for-section-11-suits/>. See also Coley, *supra* note 18 at 337; Flake, *supra* note 18.

especially class action cases which often allow for selection of multiple forums, would rather plead in a jurisdiction that allows one to only plead only that an opinion is objectively wrong than to have to prove that the opinion was rendered with subjective knowledge of the falsity. The issue of forum shopping may have been largely eliminated by the Supreme Court's reversal of the Sixth Circuit. However, the question that now arises is whether the Supreme Court decision will lead to Section 11 litigation, itself, becoming a hotspot.

Commenters have opined that the Supreme Court in *Omnicare* rejected the subjective falsity test that was used in the Second and Ninth Circuits, and that the plaintiffs' attorneys in the *Omnicare* case will see this as a victory.<sup>216</sup> Instead, the Supreme Court decision in *Omnicare* has created a rational basis test, i.e. that in order to recover, "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.*"<sup>217</sup> Prior to the *Omnicare* decision, in the Second and Ninth Circuits (which see the majority of securities litigation), one would have had to plead that the defendant did not subjectively believe that the statement was misleading when it was stated.<sup>218</sup> After *Omnicare*, it appears that that theory would still hold, but alternatively, liability could be found where, even if belief in the statement was truly held, the belief was based on information on which should not have led to the opinion stated.<sup>219</sup> The same would go for omissions. The *Omnicare* decision makes it clear that an opinion statement may be actionable if it omits information that a reasonable investor would perceive as rendering the opinion misleading.<sup>220</sup> The opinion should be based on the information available, and if there is available information that should have changed the opinion, the omission of this information would become

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216. See, e.g., Jay B. Kasner et al., *Lessons for the Defense in Light of Halliburton II and Omnicare*, ASPATORE, 2015 WL 2407614, at \*12 (Apr. 2015).

217. *Omnicare*, 135 S. Ct. at 1332 (emphasis added).

218. *Id.*

219. *Id.*

220. *Id.*

actionable.<sup>221</sup> The court also noted that off-the-cuff opinions also would be actionable, because a reasonable investor would believe that an opinion statement in a formal doctrine, such as a registration statement, carries with it that the issuer “know[s] the facts that justify it.”<sup>222</sup> This would allow for an investor to plead not just subjective falsity of an opinion, but also that the basis for the opinion was not rational as interpreted by a reasonable investor.

Justice Kagan was not specific as to what constituted a reasonable basis for an opinion, but she may have been drawing a parallel to a concept long-existent and codified in professions that regularly express opinions. For example, one auditing standard requires that a CPA exercise due professional care in the performance of the audit and preparation of the audit opinion.<sup>223</sup> And, there have been many tort and malpractice liability cases that try to apply this general concept to varied, specific fact sets.<sup>224</sup>

The Court’s *Omnicare* decision has been hailed as a win by the securities plaintiffs’ bar, but the true effect of the decision has yet to be determined.<sup>225</sup> The Court, by addressing the pleading standards for a case to move forward alleging that an opinion statement violated Section 11, noted that it was “no small task for an investor” to show that the opinion was not rationally based on relevant information.<sup>226</sup> The court reasoned that to prove this:

[t]he investor must identify 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

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221. *Id.* at 1333.

222. *Id.* at 1330.

223. Due Professional Care in the Performance of Work, AU § 230 (1972).

224. See, e.g., *Cupersmith v. Piaker & Lyons P.C.*, 2016 U.S. Dist. LEXIS 131849, at \*23 (N.D.N.Y. Sept. 27, 2016); *Iowa Pub. Emp. Ret. Sys. v. Deloitte & Touche LLP*, 919 F. Supp. 2d 321 (S.D.N.Y. 2013).

225. *Kasner et al.*, *supra* note 216, at 12.

226. *Omnicare*, 135 S. Ct. at 1332.

person reading the statement fairly and in context.<sup>227</sup>

To be successful in the claim, a plaintiff would have to be able to show on a case-by case basis that there was actual information that was available that rendered that opinion statement misleading; a plaintiff would prevail merely by alleging in general statements that the opinion was wrong or that the opinion did not derive from a reasonable basis.<sup>228</sup> The need to show particularity as to what actually caused the statement to be false or misleading is thought by some to moot much of the advantage that a plaintiff's claim received from the *Omnicare* decision.<sup>229</sup>

B. Will the *Omnicare* Decision Cause Less Disclosure in Securities Offerings?

Another concern that was raised in response to the Sixth Circuit's *Omnicare* decision is that, since opinion statements are generally comprised of soft information, there is no affirmative duty to disclose the opinions in the first place.<sup>230</sup> However, once information is disclosed in a registration statement, that disclosure would seem to increase the risk of liability to the disclosing company, and conversely may also decrease the risk to the investor, which affects the issue price of the security.<sup>231</sup> Disclosing soft information in a registration statement affects issue price in two ways. First, the disclosure of information allows investors to benefit from the information itself. Projections of future warnings and stock price movements allow investors that invest to have a clearer view of the company in which the investment is being made.<sup>232</sup> This awareness allows for the investors to lower uncertainty, which decreases the transaction costs.<sup>233</sup> This, in turn, would make

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227. *Id.*

228. Kasner et al., *supra* note 216, at 13.

229. *Id.*

230. Coley, *supra* note 18, at 346-47.

231. *Id.*

232. *Id.* at 347.

233. *Id.*

stocks with optional disclosures more attractive, making the price of those stocks higher, and increasing overall market efficiency for honest companies. Thus, lowering the incentive to disclose information would likely lead to an overall drop in investment activity and market efficiency.<sup>234</sup> This would lead to a result that is contrary to Justice Kagan's position in the *Omnicare* case that market forces, in the attempt to sell the securities, would not substantially alter the amount of disclosure in registration statements.<sup>235</sup>

Secondly, however, the lower bar for pleading would also likely lead to more litigation based on the opinions in the registration statements. Companies would have an increased likelihood for lawsuits being brought against it, and increased litigation would lead to a decrease in stock value.<sup>236</sup> In both the *Virginia Bankshares*<sup>237</sup> case and the *Omnicare* case,<sup>238</sup> the defendants were sued based on voluntary disclosures. Thus, it has been suggested that making voluntary disclosures would lead to an unfair punishment of companies who publish their views on legal compliance (and by caveat other things as well), since investors may bring suits on slim evidence, essentially betting that the company did not comply with the law.<sup>239</sup> Justice Kagan addressed this concern in the Supreme Court decision, but again, only time will tell how the outcome of the Court's decision will affect Section 11 litigation. Certainly, the Supreme Court opinion would less likely lead to litigation than that of the Sixth Circuit interpretation, but it also seems that the Court's opinion might allow for more litigation than those in *Fait* and *Rubke*. Justice Kagan, in allowing for a rational basis test for claims of misstatements and omissions, states that this does derive from policy issues.<sup>240</sup> However, Justice Kagan notes that policy decisions are left to Congress, and not the courts.<sup>241</sup> In her interpretation, she stated that "Section

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234. *Id.*

235. *Omnicare*, 135 S. Ct. at 1332.

236. Flake, *supra* note 18, at 129.

237. *Va. Bankshares*, 501 U.S. at 1083.

238. *Omnicare*, 135 S. Ct. at 1318.

239. Coley, *supra* note 18, at 347.

240. *Omnicare*, 135 S. Ct. at 1331.

241. *Id.*



11's omissions clause, as applied to statements of both opinion and fact, necessarily brings the reasonable person into the analysis, and asks what she would naturally understand a statement to convey beyond its literal meaning."<sup>242</sup>

The Court reasoned that considering the foundation on which an issuer based an opinion is a "feature" and not a "bug" of the omissions provision.<sup>243</sup> Congress' stated purpose in adopting Section 11 is to "ensure that issuers 'tell [] the whole truth' to investors."<sup>244</sup> By requiring that an opinion have a rational basis, the Court rationalized that more accurate information (i.e. the whole truth) would be communicated to investors.<sup>245</sup> The Court also suggested that the requirement that the basis for stating the claim be pled with specificity, not with general or conclusory statements, which would quell much of the litigation that *Omnicare* claimed to foresee.<sup>246</sup> The Court also stated that it does not think that issuers will "chill disclosures useful to investors" by withholding opinion statements, because there is nothing to indicate that Section 11's applicability to factual assertion has led to that result.<sup>247</sup> The Court rationalizes this by saying that sellers of stock have a strong incentive to try to sell the stock.<sup>248</sup> Market forces push back against under-disclosing information, so essentially these forces will overcome the desire not to disclose opinions.<sup>249</sup> The Court even gave information on how an issuer can protect him or herself by stating that, to avoid liability for omissions under Section 11, "an issuer need only divulge an opinion's basis, or else make clear the real tentativeness of its belief. Such ways of conveying opinions so that they do not mislead will keep valuable information flowing."<sup>250</sup>

How this will be received by issuers going forward remains to be seen. Certainly, the Court's decision may help to chill

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242. *Id.* at 1331-32.

243. *Id.*

244. *Id.* at 1331 (citing H.R. REP. NO. 85 (1933)).

245. *Omnicare*, 135 S. Ct. at 1332.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Omnicare*, 135 S. Ct. at 1332.

misleading information, especially among riskier companies, but the question of what other disclosures it will chill may later need to be assessed. In a comment soon after the release of the opinion, guidance was given to issuers and their counsel; it was first noted “that issuers have some power to control their own destiny.”<sup>251</sup> It is advised that issuers can avoid Section 11 liability by disclosing the basis for an opinion, allowing for an investor to evaluate the opinion on his or her own.<sup>252</sup> An issuer might, however, allow for so many different factors that went into the decision to be disclosed that it would be hard for the investor to form the opinion. If there were a legal compliance statement such as the one in *Omnicare*, two differing opinions to the legality would be helpful. But if it is divulged that six different firms all gave differing opinions, it may become nearly impossible for an investor to know on which legal opinion they should rely. There clearly is not a directive to inundate with every fact on which an opinion is based. Which facts are best stated should be based on the judgment of the issuer, since an investor understands that an opinion is based on weighing disparate facts.<sup>253</sup> But the judgment may lead to overcompensating in the release of information as an attempt to avoid liability. Alternatively, this judgment may also lead to an issuer believing the cost of disclosing an opinion in a registration, even one that was disclosed prior to *Omnicare*, is too high and avoid making the statement altogether. Also, it is advised that issuers need to qualify their opinions “with appropriate ‘hedges, disclaimers and apparently conflicting information.’”<sup>254</sup> Again, issuers might use more hedges and disclaimers that they would have in the past, rendering the opinion statement almost useless.

### CONCLUSION

In the *Omnicare* decision, the Supreme Court addressed the question of whether opinions included in registration statements could be considered an “untrue statement of

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251. Kasner et al., *supra* note 216, at 13.

252. *Id.* at 14.

253. *Id.*

254. *Id.*

material fact” or an omission of a material fact in an opinion could make registration statements misleading, and thus create liability under Section 11.<sup>255</sup> Within the context of protecting the investing public, a new, but not completely defined, “rational basis” standard is given; registrants and investors might look to professional standards (e.g. the Code of Professional Conduct for CPAs) for parallels to what may satisfy the new, rational basis standard. How the courts will react to the new rational basis test, however, is yet to be seen.

Additionally, Justice Kagan argues that registrants should err on the side of disclosure against court case history that may suggest otherwise. Amount of disclosure is a balancing act: in areas where statements of opinion may become actionable under Section 11, an issuer would be advised that including such a statement would become a risk, but an omission that leads to a registration statement becoming misleading also poses a risk. Where liability may exist, there is a substantial burden of proof for liability on the investor. Taken together, the *Omnicare* case has far reaching ramifications about what types of forward-looking opinions are best included or omitted in registration statements. This may also impact other areas of securities laws, as the rationale from *Virginia Bankshares*, which was a case under the Exchange Act, was used to determine the liability under Section 11 of the Securities Act. It is also yet to be determined if now, the rationale from *Omnicare* will be used to create a rational basis test for liability under the Exchange Act, essentially becoming an extension of *Virginia Bankshares*.

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255. *Omnicare*, 135 S. Ct. at 1323.