

## *Omnicare*: Supreme Court Clarifies Pleading Requirements for Claims Premised on Statements of Opinion Under Section 11 of the Securities Act of 1933

12.22.15



(Article from *Securities Law Alert*, December 2015)

For more information, please visit the [Securities Law Alert Resource Center](#)

Section 11 of the Securities Act of 1933 provides a private right of action for any investor who purchases a security pursuant to a registration statement which “contained an untrue statement of a material fact or omitted to state a material fact . . . necessary to make the statements therein not misleading.”

On March 24, 2015, in an opinion written by Justice Kagan, the Supreme Court clarified the pleading requirements for Section 11 claims based on statements of opinion. *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015) (Kagan, J.). The Court held that an opinion can be “an untrue statement of a material fact” under the first clause of Section 11 only if the speaker subjectively disbelieved the opinion at the time the statement was made. The Court made it clear that a defendant cannot be liable under Section 11 merely because his or her opinion ultimately proved to be wrong. The Court explained 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.”

However, the *Omnicare* Court also held that an opinion can form the basis for omissions liability under the second clause of Section 11 if a plaintiff can plead particular material facts underlying the opinion, the omission of which made the opinion misleading “to a reasonable person reading the statement fairly and in context.” The Court stated that a reasonable investor could understand a statement of opinion to convey “facts about how the speaker has formed the opinion” or “about the speaker’s basis for holding that view.” The Court went on to explain that “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 would take from the statement itself, then § 11’s omissions clause creates liability.” The Court cautioned that the facts which can be inferred are inherently contextual, and the reasonable inferences that can be made are dependent on the type of opinion being given, the specificity of the statement, and the context of the opinion in the registration statement as a whole.

## Authors and Contacts

### Paul Gluckow

Partner and General Counsel

[pgluckow@stblaw.com](mailto:pgluckow@stblaw.com)

+1-212-455-2653

### Jonathan Youngwood

Partner

[jyoungwood@stblaw.com](mailto:jyoungwood@stblaw.com)

1-212-455-3539

### Peter Kazanoff

Partner

[pkazanoff@stblaw.com](mailto:pkazanoff@stblaw.com)

+1-212-455-3525

