

## Unanimous Win for Winston Client Omnicare in Blockbuster Securities Act Case

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Winston's client Omnicare has earned a unanimous victory in the most important Securities Act case in decades.

In *Omnicare v. Laborers District Council Construction Industry Pension Fund*, No. 13-435, the Supreme Court addressed the standards for a claim under Section 11 of the Securities Act of 1933, which applies to false or misleading statements in Registration Statements filed with the SEC. The question was how those standards apply to a statement of opinion. The Sixth Circuit had held that a plaintiff can state a claim simply by alleging that the opinion turned out to be wrong — a decision that created a clear conflict with decisions of the Second, Third, and Ninth Circuits.

The Supreme Court disagreed, rejecting the Sixth Circuit's analysis as "an invitation to Monday morning quarterback an issuer's opinions." To plead that a statement of opinion is "an untrue statement of material fact" under Section 11, the plaintiff must allege that the issuer/speaker did not actually hold the opinion expressed. To plead an actionable material omission, on the other hand, the plaintiff must allege that the Registration Statement—read as a whole by a reasonable investor—implied some fact about how the speaker formed the opinion, when the true facts were otherwise.

Along the way, the Supreme Court recognized that "[r]easonable investors do not understand [registration] statements as guarantees," and they "understand that opinions sometimes rest on a weighing of competing facts." It also recognized that "whether an omission makes an expression of opinion misleading always depends on context." An investor reads every assertion in a registration statement "in light of its surrounding text, including hedges, disclaimers, and apparently conflicting information."

Finally, the Court stressed that a plaintiff "cannot just say the issuer failed to reveal its basis." The plaintiff "must identify particular (and material) facts going to the basis for the issuer's opinion... whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context. That is no small task...."

The Court's decision was a major victory for the defendants. It also provides needed guidance for those drafting registration statements.

Winston & Strawn partners represented the defendants in this case throughout this litigation, including in the petition for certiorari. They were joined by partners from Williams & Connolly LLP on the merits in the Supreme Court.

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