District Courts Apply 'Omnicare' to Section 10(b) Claims

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In the two months since the U.S. Supreme Court issued its landmark decision in *Omnicare v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), several federal district courts have applied the court's new two-prong standard for determining opinion statement liability under Section 11 of the Securities Act of 1933 to claims of false statements of belief under Section 10(b) of the Securities Exchange Act of 1934. Under the second prong of the *Omnicare* standard, a plaintiff may plead an opinion statement violation of Section 11, a strict liability statute, even where the defendant

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honestly believed the statement when he made it. The plaintiff can do this by adequately alleging that a reasonable investor would find the statement misleading due to the omission of material facts. Holding a defendant liable under Section 10(b) for stating an opinion he or she honestly held at the time, however, conflicts with that statute's requirement that the plaintiff plead a strong inference that the defendant acted with scienter, or the intent to deceive, manipulate or defraud. None of the district court decisions applying the *Omnicare* standard to Section 10(b) claims addresses this conflict.

Two-Prong Standard for Opinion Statement Liability

In *Omnicare*, the Supreme Court vacated the ruling by the U.S. Court of Appeals for the Sixth Circuit that an issuer of securities and its officers and directors could face liability under Section 11 for opinions set forth in a registration statement that later proved to be false, regardless of whether the defendants subjectively believed the opinions when the issuer filed the registration statement with the U.S. Securities and Exchange Commission (SEC). Rejecting the Sixth Circuit's objective-falsity test for determining Section 11 opinion statement liability, the court's decision sets two separate standards instead: (1) a subjective-falsity standard for evaluating a plaintiff's claims that the defendants' opinions constitute untrue statements of material fact, so long as the statements are "pure" opinions and contain no "embedded statements of [untrue] fact"; and (2) a "reasonable investor" standard for reviewing claims that the defendants' opinions omitted material facts. To successfully allege that a pure statement of opinion is materially false under *Omnicare*'s first prong, a plaintiff must plead facts showing that the defendants did not "honestly" hold the opinion stated since "a sincere statement of pure opinion is not an 'untrue statement of material fact,' regardless [of] whether an investor can ultimately prove the belief wrong." As the Supreme Court explained, this provision does not "allow investors to second-guess inherently subjective and uncertain assessments" or provide "an invitation to Monday morning quarterback an issuer's opinions." To satisfy the "reasonable investor" prong for alleged omissions of material fact, a plaintiff must identify "particular" material "facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have," the omission of which "makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." A plaintiff can meet this standard without having to further allege that the defendant did not honestly hold the opinion when he or she stated it.

Decisions Applying 'Omnicare' to Section 10(b) Claims

To plead a violation of Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, a plaintiff "carries a heavier burden than a Section 11 plaintiff. Most significantly, a plaintiff must prove that the defendant acted with scienter, i.e., with intent to

deceive, manipulate, or defraud," as in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382-83 (1983). Thus, to hold a defendant liable under Section 10(b) for an opinion he or she honestly held at the time it was stated cannot be squared with this scienter requirement.

Despite this incongruity, several district courts have applied both prongs of the *Omnicare* Section 11 standard when assessing a plaintiff's allegations of a defendant's opinion statement under Section 10(b). (See *In re Genworth Financial Securities Litigation*, No. 3:14-CV-682, 2015 U.S. Dist. LEXIS 57600, at *39-45 (E.D. Va. May 1, 2015) (holding, inter alia, that plaintiffs sufficiently alleged that defendants' opinion statements violated Section 10(b) under *Omnicare*); *In re BioScrip Stockholder Litigation*, No. 13-CV-6922, 2015 U.S. Dist. LEXIS 46763, at *29-40 (S.D.N.Y. March 31, 2015) (holding that plaintiffs adequately alleged that BioScrip's opinion statements violated Section 10(b) under *Omnicare*'s "reasonable investor" standard); *Corban v. Sarepta Therapeutics*, No. 14-CV-10201, 2015 U.S. Dist. LEXIS 42688, at *19-20, 31-32 (D. Mass. March 31, 2015) (holding, inter alia, that plaintiffs' Section 10(b) opinion statement claims failed to satisfy both prongs of *Omnicare* standard); but see *Nakkhumpun v. Taylor*, 782 F.3d 1142, 2015 U.S. App. LEXIS 5547, at *37-38 (10th Cir. 2015) (applying only first subjective-falsity prong of *Omnicare* to Section 10(b) opinion statements).) In addition, one district court went so far as to cite the Supreme Court's "reasonable investor" analysis as persuasive authority for analyzing a plaintiff's allegations or proof of scienter in Section 10(b) opinion statement cases. (See *In re Merck & Co. Securities, Derivative and ERISA Litigation*, MDL No. 1658, 2015 U.S. Dist. LEXIS 62983, at *94-98 (D.N.J. May 13, 2015) (stating that *Omnicare* "illuminates this court's Section 10(b) scienter analysis").)

Surprisingly, none of the courts in these cases addressed the question of whether the application of *Omnicare*'s "reasonable investor" prong would conflict with Section 10(b)'s scienter requirement. Going forward, parties in Section 10(b) opinion statement cases should thoroughly brief this issue so that courts will be cognizant of the inherent inconsistency such application creates.