Supreme Court's *Omnicare* Ruling Advances Investor Rights By Clarifying Liability for Misleading Opinions in Offering Documents

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On March 24, 2015, the U.S. Supreme Court reaffirmed the importance of investors' rights by clarifying the expansive liability provided under the federal securities laws for damages incurred by investors under a registration statement containing false or misleading statements of "opinion."

The issue before the Court in *Omnicare Inc. vs. Laborers District Council Construction Industry Pension Fund et al*. was the standard of liability for false statements of "opinion" in securities offering documents under Section 11 of the Securities Act of 1933 (the '33 Act), the core statute under the federal securities laws addressing registration and disclosure liability. Omnicare, the Chamber of Commerce, and other well-funded corporate interests argued that there should be no liability under Section 11 for objectively false statements of opinion in offering materials unless investors can both plead and prove that a corporate official, underwriter, auditor, or other expert who offered the opinion did not genuinely believe it - obviously an extremely difficult standard for investors to meet in the vast majority of cases, especially at the beginning of the case without the benefit of any formal discovery.

In a 7-2 decision written by Justice Elena Kagan, the Court established an *additional* "reasonable investor" test in which statements of opinion in offering documents can give rise to Section 11 liability if they omit key facts about the opinion that would be important to a reasonable investor. Under *Omnicare*, investors are no longer required to plead (and ultimately prove) that an issuer, underwriter, auditor or other expert did not genuinely hold an opinion expressed in an offering document in order to pursue a claim under Section 11. Instead, investors may also recover under Section 11 if a registration statement omits material facts about a company'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." In other words, that the opinion lacked a reasonable basis when made. In announcing the additional "reasonable investor" test, the Court recognized that investors rely on the integrity of *all* statements in offering documents, including those cloaked as opinions, as well as the special knowledge of the corporate officials and other experts that convey information to investors and sign the registration statement. Significantly, the Court firmly rejected the notion that its decision would chill disclosures useful to investors, and emphasized that this developed liability standard would chill only "misleading opinions" while encouraging "better disclosure" to the markets.

In reaching its important decision in *Omnicare*, the Supreme Court considered an *amicus curiae* (or "friend of the court") brief filed by BLB&G and its Supreme Court counsel of Record, Massey & Gail LLP, on behalf of over 40 prominent institutional investors representing over $2 trillion in assets under management. We believe that the institutional investor community's strong support for the respondents in *Omnicare* was likely an important factor in the Supreme Court's decision.