

But That's Just, Like, Your Opinion, Man: U.S. Supreme Court Clarifies Executive Statement Liability Under Securities Law

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Statements of opinion do not constitute an “untrue statement of fact” if they turn out to be incorrect, the U.S. Supreme Court has ruled in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, drawing a line between the types of federal disclosure statements that can create liability for executives under securities laws.

The ruling struck down a Sixth Circuit decision that corporate executives could be responsible for opinions expressed to investors that later turned out to be false, and that plaintiffs need only allege that the stated belief was “objectively false,” not that the executives knew it was false at the time it was expressed.

In 2006, a group of pension fund investors filed suit in *Omnicare*, alleging the company’s statement that it complied with federal and state law tied to a 2005 public offering was false and misleading under Section 11 of the Securities Act, because the company and four executives concealed purported payments from drug manufacturers as part of a kickback scheme. Because *Omnicare* failed to disclose these alleged illicit activities in a registration statement issued with a December 2005 public offering, the investors argued that *Omnicare* misled them when it said it believed it was in “legal compliance.”

The unanimous Supreme Court struck down the Sixth Circuit’s ruling, which held that the claims were adequately stated, reasoning that the Sixth Circuit decision “wrongly conflates facts and opinions,” and explaining the difference as “a statement of fact (‘the coffee is hot’) expresses certainty about a thing, whereas a statement of opinion (‘I think the coffee is hot’) does not.”

The court noted, however, that the executives could be liable under Section 11 “[i]f 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.” The *Omnicare* decision resolves a long-standing circuit split involving the pleading standard for cases under Section 11 of the Securities Act.

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