No more bullsh*t: securities opinions after *Omnicare*

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Abstract

Purpose – *To review and analyze the implications for rendering opinions in connection with the sale of securities in the wake of the US Supreme Court's decision in* Omnicare, Inc. et al. *v.* Laborers District Council Constr. Ind. Pension Fund, et al.

Design/methodology/approach – *Analyzes the* Omnicare *holding and dissent in light of past practices and decisions and discusses how the case changes the risks of liability for rendering opinions in registration statements, and by necessary implication in other contexts where the securities laws proscribe either the statement of untrue "facts" or, by omissions, the making of misleading "statements."*

Findings – Omnicare *opens issuers and securities professionals to liability for rendering opinions that are not reasonably based in facts and rationality. Because the measure of such reasonableness depends on the reasonable investor, makers of opinions will need to take more matters into consideration in rendering opinions than they might have previously, when the only test of an opinion was whether it was genuinely believed by its maker. This creates a number of unresolved issues, but it also suggests that prudence will dictate more detailed disclosure and documentation of the bases of opinions than has been thought necessary until now.*

Originality/value – *Practical guidance from experienced securities and financial services lawyers.*

Keywords *Securities and Exchange Commission (SEC), Misleading statements, Opinions, Registration statements*

Paper type *Research paper*

Midway through the Supreme Court's oral argument of *Omnicare, Inc., et al.* v. *Laborers District Council Constr. Ind. Pension Fund, et al.*[1], Justice Breyer asked counsel:

> [S]uppose [. . .] a museum expert on an archeological mission says, it is my opinion that those bones in that mountain are of a diplodocus and not a Trisopterus. Now, wouldn't you have thought that at least he'd looked into it, that at least he'd seen the bones? [. . .]. If you had learned later he'd been in a bar all night and had never even seen or heard one word about what the bones were like, wouldn't you think he had issued a misrepresentation?"[2]

Justice Kagen's subsequent majority opinion essentially answered that question, in the context of the federal securities laws, "Yes." That answer has deep implications.

Justice Breyer's hypothetical reminded us of Professor Harry G. Frankfurt, one of the country's preeminent philosophers, now, in his mid-80s, an emeritus professor at Princeton University. In 2005, Frankfurt published a small book that (perhaps on its title alone) made *The New York Times* Bestseller List: *On Bullshit*[3]. "One of the most salient features of our culture," Frankfurt wrote, "is that there is so much bullsh*t."[4] In attempting to define "bullsh*t," Frankfurt distinguished it from lying. The liar knows the truth and deliberately misstates it or omits it. "Bullsh*t," on the other hand, is "unconnected to a concern with the truth."[5] The promoter of "bullsh*t":

> [. . .] is grounded neither in a belief that it is true nor, as a lie must be, in a belief that it is not true. *It is just this lack of connection to a concern to the truth – this indifference to how things really are – that I regard as of the essence of bullsh*t.* * * * He does not care whether the things he says describe reality correctly. He just picks them out, or makes them up, to suit his purpose[6].

Frankfurt specifically called out as being "bullsh*t" the giving of opinions when there is a "lack [of] any significant connection between a person's opinion and his apprehension of reality [. . .]."[7] The securities law consequences of stating opinions lacking a significant "apprehension of reality" is the crux of *Omnicare*. The spurious opinion of Justice Breyer's besotted archeologist is just what Frankfurt would call "bullsh*t," and the Supreme Court in *Omnicare* clearly found it objectionable.

It is a fundamental dichotomy in securities law – in law generally – that opinions are not "facts." Statements prefaced by words such as "we believe," or "we think," or "in our opinion" communicate that what follows is subject to a much greater degree of uncertainty than would a clear-cut statement of what is, and no "reasonable person" should understand such qualified statements as necessarily being true. The common-sense distinction between the one and the other is so clear that Justice Kagan in *Omnicare* even apologized for harping on it. "Indeed, that difference between the two is so ingrained in our everyday ways of speaking and thinking as to make resort to old dictionaries seem a mite silly."[8] The distinction is also rooted in the practical necessities of trying cases. Facts can be proven true or false by resort to conventional evidence; opinions, being essentially emanations of thought and imagination, cannot[9].

It is generally understood that only *facts* need to be disclosed under the federal securities laws, whether in registration statements, in connection with soliciting proxies, or otherwise in connection with the purchase or sale of securities[10]. Nevertheless, non-factual statements are made in connection with the purchase or sale of securities all the time. It could not be otherwise, because the value of any security is fundamentally rooted in a prediction of the issuer's *future* performance, and a dry financial statement at best shows what was, maybe what is, but never what will be. Inevitably, then, investors seize on statements of beliefs, intentions, estimates, projections, predictions and a host of other such "soft" information to help them make up their minds, and so issuers and other sellers of securities always give them. All such "soft" statements fall under the general rubric of "opinions."

Section 11 of the Securities Act of 1933 provides an action for rescission or damages to any purchaser of a security as to which the registration statement filed with the Securities and Exchange Commission "contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading [. . .]."[11] In its SEC-filed registration statement, Omnicare stated two relevant opinions: "We believe our contract arrangements [with other healthcare entities] are in compliance with applicable federal and state laws;" and "We believe that our contracts with pharmaceutical manufacturers are legally [. . .] valid arrangements [. . .]."[12] Those opinions were wrong: The government later sued Omnicare because the very contractual arrangements that it opined were "in compliance" and "legally valid" actually violated anti-kickback laws. The plaintiff investors charged that Omnicare and its officers, since they knew the governments' opposing positions, had no reasonable basis for their stated opinions – and therefore that those opinions misrepresented material facts in violation of §11[13].

Omnicare had argued otherwise, in two steps. *First*, whether a statement is or is not misleading depends on the perspective of who hears it, and that person is the objective "reasonable investor." *Second*, "no reasonable investor, in any context, can understand a pure statement of opinion to convey anything more than the speaker's own mindset. As long as an opinion is sincerely held, Omnicare argue[d], it cannot mislead as to any matter, regardless what related facts the speaker has omitted. Such statements of belief [. . .] are thus immune from liability under §11 [. . .]."[14]

That indeed had been the conclusion of the Second and Ninth Circuit Courts of Appeal, both following what they viewed to be the Supreme Court's mandate in *Virginia Bankshares, Inc.* v. *Sandberg*[15]. In *Rubke* v. *Capitol Bancorp, Ltd.*, the Ninth Circuit affirmed the dismissal of a §11 claim that certain published fairness opinions were misleading because the complaint "fail[ed] to plead facts indicating that Capitol believed these prior valuations were incorrect."[16] Likewise, in *Fait* v. *Regions Fin. Corp.*, the Second Circuit affirmed the dismissal of claims under §§11 and 12 that the issuer's statements about the value of its goodwill were misleading because "[t]he complaint does not [. . .] plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them[17]. Not surprisingly, then, the District Court in *Omnicare* had also "held that Plaintiffs were required to plead that Defendants knew that the statements of legal compliance were false at the time they were made."[18]

Interestingly enough, and notwithstanding such clear case authority, the Securities and Exchange Commission never adopted this restricted view of when securities law liability could attach to opinions. The Solicitor General, in its *amicus* brief in *Omnicare*, pointed out that "For more than 50 years, the Commission has imposed liability in formal adjudications for statements of opinion made in bad faith or without a reasonable basis."[19] Thus, the Commission had held that opinions about future earnings were false when they lacked a reasonable basis; that "[a] broker-dealer in his dealings with customers impliedly represents that his opinions and predictions respecting a stock * * * are responsibly made on the basis of actual knowledge and careful consideration"; and that estimates of value were deemed materially false and misleading when the makers of those estimates "had no reasonable basis for the statements."[20]

The Court of Appeals in *Omnicare* looked at the problem completely differently, and more narrowly, and adopted neither the reasoning of the Second and Ninth Circuits nor that of the SEC. The Sixth Circuit panel reasoned that since §11 was a strict liability statute, the state of mind of the speaker of a false statement, however phrased, was irrelevant. "No matter the framing, once a false statement has been made, a defendant's knowledge is not relevant to a strict liability claim. * * * Under §11, [therefore], if the defendant discloses information that includes a material misstatement, that is sufficient and a complaint may survive a motion to dismiss without pleading knowledge of the falsity."[21] The court rejected *Rubke* and *Fait* as having improperly applied the logic of *Virginia Bankshares*, which construed a *scienter*-based statute (§14(a) of the Securities Exchange Act of 1934), to a strict liability statute like §11, and therefore having improperly incorporated a *scienter* requirement where none was required[22]. The court made no mention of the SEC's practices.

The Supreme Court rejected the Sixth Circuit's reasoning, criticizing it for "conflating" the two separate parts of §11. Looking closely at the statutory language, the Court agreed that the first prong – "contained an untrue statement of material *fact*" – left little room for actions based on untrue statements of *opinion*. Indeed, the only way an opinion can be deemed an "untrue fact" is if it contains an embedded fact that is itself untrue. The Court recognized two ways in which an opinion can carry an embedded false fact, both rooted in common sense. The first is the long-standing perception that every opinion implies that the person stating the opinion truly believes what is being opined[23]. The second encompasses actual facts stated in support of an opinion, usually presented in the form "I believe X because Y." The prepositional statement "Y" could be "an untrue statement of fact" either because "Y" is not true or because "Y," even if true, is not the real basis for the opinion "X."[24]

All that is fairly old news. What's new in *Omnicare* is how it deals with the second prong of §11. The predicate of an omissions claim under §11 is the existence of a statement that is "misleading." That being so, the Court's analysis, and also the heart of the debate between the majority and Justice Scalia, turns on when, if ever, an opinion can be deemed "misleading." Carefully parsing the language of §11, the Court noted the key distinction between the first and second prongs of §11: While only a "statement of material fact" can be "untrue," *any* "statement" – of fact or not – may be "misleading."[25] Hence, opinions may be misleading even though they are not "facts."

Justice Scalia, who also wrote a concurring opinion in *Virginia Bankshares*[26], championed Omnicare's argument as being consistent with the common law of fraudulent misrepresentations. In a concurring opinion that is really more of a dissent, Justice Scalia began by observing that, contrary to the majority's view, under common law principles an expression of an opinion would be seen "as *disclaiming* the assertion of a fact."[27] Justice Scalia explained that under the common law of tort, an action could be premised on a faulty opinion (in addition to that when the speaker lies about holding the opinion) only in these "extraordinary" situations:

- If the speaker's opinion "'varie[d] so far from the truth that no reasonable man in his position could have such an opinion[,]'" then an opinion "reasonably implied 'that the maker knows of no fact incompatible with this opinion.'"[28]
- If there was a special relationship of trust in the maker of the opinion, then "a listener could reasonably infer from an expression of an opinion [. . .] that the speaker had a reasonable basis for holding the opinion."[29] On this ground, a lawyer could be held liable for a spurious legal opinion, or an expert (like Justice Breyer's hypothetical archeologist).for an unfounded expert's opinion, but ordinary people's opinions would be beyond reach.

However, the *Omnicare* majority saw opinions rendered by management in registration statements as special cases. By reason of the securities laws, readers of registration statements have higher expectations about the statements made to them. "In the context of the securities market, an investor [. . .] likely expects [an opinion of legality] to rest on some meaningful legal inquiry – rather than, say, on mere intuition, however sincere [. . .]. [The investor] expects not just that the issuer believes the opinion (however irrationally), but that it fairly aligns with the information in the issuer's possession at the time. * * * Investors do not, and are right not to, expect opinions contained in [registration] statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life. * * * [Otherwise,] companies would have virtual *carte blanche* to assert opinions in registration statements free from worry about §11."[30] Thus, "a reasonable investor may, depending on the circumstances, understand an opinion statement to convey facts about how the speaker has formed the opinion – or, otherwise put, about the speaker's basis for holding that view. And if the reasonable facts are otherwise, but not provided, the opinion statement will mislead the audience."[31] Thus, if an issuer opines that its conduct is legal but has not consulted a lawyer about it, the opinion could be "misleadingly incomplete."

The Court argued that its formulation was consistent with common law principles that imposed obligations on persons rendering opinions when they had superior information. These circumstances take in the special rule governing lawyers and experts cited by Justice Scalia. Indeed, perhaps the simplest way to view *Omnicare* is as a recognition that an issuer and its officers *are* experts – they are experts in the business they are running and whose securities they are selling. The issuer and its management "'hold[themselves] out or [are] understood as having special knowledge of the matter which is not available to'" the investor[32]. In this sense, the issuer and its management – and by extension any securities professional engaged in selling a security – are in the same position as a lawyer rendering a legal opinion and Justice Breyer's derelict archeologist. In the majority's view, so treating the issuer and its management is consistent both with common law principles and the goals of the securities laws.

But Justice Scalia highlighted a critical difference. A professional or expert renders an opinion based on inquiry that is sufficient by *his or her own professional standards as an expert*. As Justice Scalia pointed out, if a lawyer's own standards for rendering an opinion are below the norms of the legal profession, the remedy would not be a claim of misrepresentation, but one for malpractice[33]. On the other hand, an opinion rendered in a securities registration statement may expose the speaker to liability under *Omnicare* if it lacks sufficient support, not by the standards of the person who *makes* the opinion, but by the standards of the reasonable investor, that is of the person who *hears* the opinion. By changing whose yardstick is used to measure the reasonableness of the basis for an opinion, *Omnicare* forces sellers of securities to take *all* facts into consideration before rendering an opinion, not just those facts that the speaker in his or her own judgment deems relevant.

Moreover, by shifting the measure of reasonableness from the speaker to the listener, *Omnicare* threatens to lead the courts into a "psychic thicket."[34] A jury, in theory, can decide whether an opinion is sincerely held. But without extrinsic professional norms to guide a jury, the "reasonableness" of an opinion in the eyes of an investor will be harder to pin down. As Justice Breyer observed, there will always be a "basis" for an opinion: His hypothetical archeologist genuinely "did have the opinion about the diplodocus, it was his opinion [. . .]. He, you know, looks around, sees the sky, the mountains. There's some basis."[35] Therefore, the inquiry will always be whether the given reasons are so "unreasonable" as to not count as reasons at all – to be, in Frankfurt's word, "bullsh*t." But what standard of reasonableness should apply?

It is not an idle musing. Justice Breyer's archeologist could well argue, "In my 40 years digging up dinosaurs whenever I saw a sky like that, or a mountain like that, I always found a diplodocus and never a Trisopterus; therefore it is my opinion that the bones are of a diplodocus." By what standard should a jury discard that kind of reasoning – which happens to be the kind of reasoning that most of us use all the time? As Justice Oliver Wendell Holmes once observed, "Men to a great extent believe what they want to [. . .]."[36] Behavioral economics has convincingly demonstrated how we are hard-wired to choose those facts that support what we already believe and discard those that don't, and to invent and articulate logical narratives that support our preconceived views against competing ones[37]. Logical thinking may have itself evolved as just another tool to win arguments in favor of our preexisting beliefs[38]. By what principled rubric, then, do we discount opinions, genuinely held, that are rooted in the sky or the mountains, or astrology, or feng shui, or a biblical text? On whose authority would a jury proclaim those reasons more or less valid than the outputs of a spreadsheet, or GAAP-based accounting, or a head-and-shoulders stock chart pattern? Which of these various possibilities should be within the ken of the "reasonable investor" and which too far out to be considered "reasonable" by anyone?[39]

The *Omnicare* decision is pregnant with these issues, and the Court was not unmindful of them. Although quipping that "To the extent our decision today chills *misleading* opinions, that is all to the good,"[40] the *Omnicare* majority described at length how difficult it would be for a plaintiff to successfully prosecute a case based on a misleading opinion. "[A]n investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion."[41] The successful plaintiff must point to specific omitted facts that rendered an opinion misleading:

> To be specific: The investor must identify particular (and material) facts going to the basis for the issuer's opinion – facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have – 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 for an investor[42].

Small task or not, private securities plaintiffs now have a new theory to pursue. It is much too early to tell how *Omnicare* will affect future securities litigations, but the outlines of potential liability are already clear enough to make three practical observations:

First, opinions must be honestly held, and they cannot be divorced from the facts of the real world. That means, at least, that opinions must be rooted in objective facts discerned from an adequate investigation, and they must be derived from those facts using some conventionally accepted mode of reasoning.

Second, best practices will suggest that opinions fully disclose the facts and reasoning on which they are based. Keeping in mind that liability for opinions stems from them being misleading because collateral facts are omitted, the practical truism applies that disclosure cures a multitude of sins. The best that any issuer or seller of securities can do is to tell listeners in detail why it is that he or she believes what is said. Then the investor can judge for itself how much weight the opinion should carry. An investor might then conclude that the opinion is not valid – even that it is absurd – but he or she would be hard-pressed to call it misleading.

Third, and perhaps most important from a practical litigation perspective, the support for the opinion should be fully documented. Given the requirements on plaintiffs that *Omnicare* imposes – to plead specifically both that the opinion was wrong and that facts were withheld – it will be key to defending these sorts of actions to have all opinions backed-up. Lawyers understand this instinctively. Lawyers do not render legal opinions without having created a file of research and analysis supporting the opinion. Issuers and stock sellers would do well to emulate that practice.

It will be interesting to see how *Omnicare* is applied over the coming years. The decision will undoubtedly have implications beyond §11 to all the myriad other provisions of the securities laws, most of them *scienter*-based, that use the same "untrue fact/misleading omission" rubric of liability. But it may also have unpredictable effects beyond the securities laws[43]. In *Omnicare*, the Supreme Court laid down a marker: In certain contexts, spewing spurious opinions will lead to legal liability. Bullsh*tters in all realms should take notice.

Notes

1. 575 US ___, 135 S. Ct. 1318 (2015) ("Omnicare").
2. Transcript of Oral Argument at 5, lines 13-24, *Omnicare*, available at: www.supremecourt.gov/oral_arguments/argument_transcripts/13-435_4fbi.pdf
3. Harry G. Frankfurt, On Bullsh*t (Princeton University Press 2005).
4. *Id.* at 1.
5. *Id.* at 30.
6. *Id.* at 33-34, 55-56 (emphasis added).
7. *Id.* at 63-64.
8. *Omnicare*, 135 S. Ct. at 1325.
9. *See Virginia Bankshares, Inc.* v. *Sandberg,* 501, US 1083, 1093-94 (1991).
10. *See, e.g., I. Meyer Pincus & Assoc., P.C.* v. *Oppenheimer & Co., Inc.,* 936 F.2d 759, 762 (2d Cir. 1991)("The federal securities laws require [. . .] the disclosure of material objective factual matters." (quoting *Data Probe Acquisition Corp.* v. *Datalab, Inc.,* 722 F.2d 1, 5-6 (2d Cir. 1983))).
11. 15 U.S.C. §77k(a). This formulation recurs in substantially the same form throughout the federal securities laws. See, e.g., 15 U.S.C §§77d-1; 77l; 78u-4; 77w. Similarly, SEC Rule 10b-5(b), 17 C.F.R. §240.10b-5, adopts it as a "deceptive practice" in implementing §10(b) of the Securities Exchange Act of 1934, and SEC Rule 14a-9, 17 C.F.R. §240.14a-9, adopts it in connection with proxy statements. It is also a deceptive practice under §206(4) of the Investment Advisers Act of 1940 (*see* 17 C.F.R. §275.206(4)-1(a)(5)).
12. *Omnicare,* 135 S. Ct. at 1323. With respect to both those statements, Omnicare did undermine any sense of certainty by also disclosing the existence of state enforcement actions and stated federal government positions to the effect that Omnicare's contracts might be forms of commercial bribery, which would of course be diametrically opposed to Omnicare's stated opinions about the

legality of those contracts. *Id.* at 1324. Whether those collateral statements were enough to neutralize the stated opinions would be an issue of fact. "If it would take a financial analyst to spot the tension between the one and the other, whatever is misleading will remain materially so, and liability should follow [. . .]. The point of a [. . .] statement, after all, should be to inform, not to challenge the reader's critical wits." *Virginia Bankshares, Inc.* v. *Sandberg,* 501 US at 1097 (citation omitted).

13. *Omnicare,* 135 S. Ct. at 1324.

14. *Id.* at 1328.

15. *See Virginia Bankshares, Inc.* v. *Sandberg,* 501 US at 1095-96 (permitting a cause of action under §14(a) of the Exchange Act when a statement of opinion is objectively false and the reasons for that opinion are "knowingly false or misleadingly incomplete").

16. 551 F.3d 1156, 1162 (9th Cir. 2009).

17. 655 F.3d 105, 110-11 (2d Cir. 2011).

18. *Ind. State Dist. Council* v. *Omnicare, Inc.*, 719 F.3d 498, 504 (6th Cir. 2013), referring to *Ind. State Dist. Council of Laboreres & HOD Carriers Pension & Welfare Fund* v. *Omnicare, Inc.,* 2012 US Dist. LEXIS 17256 (E.D. Ky., Feb. 13, 2012).

19. Brief for the United States as *Amicus Curiae* at 31, *et seq., Omnicare.*

20. *Id.* at 31-33, citing and quoting from *Hamilton Oil & Gas Corp.,* No. 24D-2258, 1961 WL 61074 (July 25, 1961); *Alexander Reid & Co.,* No. 8-7105, 1962 WL 68464 (Feb. 8, 1962); *Gold Props. Restoration Co.,* No. 3-7735, 1992 WL 211480 (Aug. 27, 1992).

21. *Ind. State Dist. Council* v. *Omnicare, Inc.*, 719 F.3d at 505.

22. *Id.* at 505-07.

23. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts §109, p. 755 (5th ed. 1984)("Prosser and Keeton")("[A]n expression of opinion is itself always a statement of [. . .] the fact of the belief, the existing state of mind, of the one who asserts it"), cited in *Omnicare*, 135 S. Ct. at 1326.

24. *Omnicare*, 135 S. Ct. at 1326-27.

25. *Id.* at 1325-26 ("Congress effectively incorporated just that distinction [between facts and opinions] in §11's first part by exposing issuers to liability not for 'untrue statement[s]' full stop (which would have included ones of opinion), but only for 'untrue statement[s] of [. . .] *fact.*'"). Justice Kagan also pointed this out at oral argument: "Well, it just says 'statements therein.' It doesn't actually say 'statements of material fact' or not." Transcript of Oral Argument at 20, lines 5-7, *supra* n.2.

26. *Virginia Bankshares, Inc.* v. *Sandberg,* 501 US at 1108-10 (Scalia, J., concurring). Justice Scalia laid out his understanding of the result as follows:

> As I understand the Court's opinion, the statement "In the opinion of the Directors, this is a high value for the shares" would produce liability if in fact it was not a high value and the directors knew that. It would not produce liability if in fact it was not a high value but the directors honestly believed otherwise. The statement "The directors voted to accept the proposal because they believe it offers a high value" would not produce liability if in fact the directors' genuine motive was quite different – except that it would produce liability if the proposal in fact did not offer a high value and the directors knew that.
>
> I agree with all of this.

Id. at 1108-09.

27. *Omnicare*, 135 S. Ct. at 1334 (Scalia, J., concurring in part).

28. *Id.*, quoting Restatement of Torts §539(1), at 91 (1938); and Restatement of Contracts §474(b), p. 902, and Comment b (1932).

29. *Id.*

30. *Id.* at 1328-30.

31. *Id.* at 1328.

32. *Id.* at 1330, quoting Prosser and Keeton, *supra* n.23, §109, at 760-61.

33. *Id.* at 1336 (Scalia, J., concurring in part).

34. *Virginia Bankshares, Inc.* v. *Sandberg,* 501, US at 1109 (Scalia, J., concurring).

35. Transcript of Oral Argument at 12, lines 8-13, *supra* n.2.

36. Oliver Wendell Holmes, *Natural Law, in* Collected Legal Papers 310, 314 (1920).

37. *See generally*, Daniel Kahneman, Thinking, Fast and Slow at 19-105 (2011).

38. *See* H. Mercier & D. Sperber, *Why do humans reason? Arguments for an argumentative theory,* Behavioral and Brain Sciences, No. 34(2), at 57-74 (Cambridge University Press 2011), https://hal.archives-ouvertes.fr/hal-00904097

39. It is no answer to say the SEC does this already. The SEC is an enforcement agency, and its judgments tend to err on the side of regulating more rather than regulating precisely. We once represented an issuer who projected future earnings by an elaborate mathematical model by which it first estimated the probability that each of its then-pending prospect discussions would result in a contract, then estimated the value of each such probable contract and added up the resulting discounted values. The individual estimates were not "unreasonable," and the logic of the model was mathematically flawless. But the SEC still thought it resulted a misleading projection.

40. *Omnicare,* 135 S. Ct. at 1332 (emphasis original).

41. *Id.* at 1332.

42. *Id.* (internal citation omitted).

43. For example, the "untrue fact/misleading omission" formula also appears in federal laws affecting agricultural contracts (7 U.S.C. §6b) and control of arms exports and imports (22 U.S.C. §2778), and in federal regulations affecting banks (*see, e.g.,* 12 C.F.R. §§16.32, 194.3, 390.419, 563d.2b-6, 1010.29) and taxation (*see, e.g.,* 26 C.F.R. 301.7216-2).

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