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Sixth Circuit Splits with Second and Ninth Circuits Regarding Need to Allege Defendants' State of Mind for Claims Challenging Soft Information Under Section 11 of the Securities Act of 1933

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In *Indiana State District Council of Laborers & Hod Carriers Pension & Welfare Fund v. Omnicare, Inc.*, 2013 WL 2248970 (6th Cir. May 23, 2013), the United States Court of Appeals for the Sixth Circuit held that a claim alleging a false statement of opinion or belief in a registration statement may proceed under Section 11 of the Securities Act of 1933, 15 U.S.C. § 77k, despite the absence of allegations suggesting that the defendants did not actually hold the opinion or believe the statement. In reaching this decision, the Sixth Circuit declined to follow decisions by the Second Circuit (*see Fait v. Regions Financial Corp.*, 655 F.3d 105 (2d Cir. 2011) [blog article here]) and Ninth Circuit (*see Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156 (9th Cir. 2009) [blog article here]) holding that a Section 11 complaint which fails to allege that the defendant did not actually believe the false statement or hold the opinion at issue would be dismissed. **This clear Circuit split on an important issue of federal securities law will require resolution by the United States Supreme Court**.

Omnicare, Inc. (“Omnicare”) is the nation’s largest provider of pharmaceutical care services for the elderly and other residents of long-term care facilities in the United States and Canada. In December 2005, Omnicare made a public offering of 12.8 million shares of common stock. In its registration statement, Ominicare represented, among other things, “that [its] therapeutic interchanges were meant to provide [patients with] . . . more efficacious and/or safer drugs than those presently being prescribed” and that its contracts with drug companies were “legally and economically valid arrangements that [brought] value to the healthcare system and patients that [Omnicare] serves.”

Plaintiffs (a class of investors who purchased in the offering) alleged that these representations in Omnicare’s registration statement were material, untrue and misleading because they effectively concealed that Omnicare had been engaging in a variety of illegal activities, including kickback arrangements with pharmaceutical manufacturers and the submission of false claims to Medicare and Medicaid. Plaintiffs asserted a claim under Section 11, which provides a remedy for investors who have acquired securities under a registration statement that was materially misleading or omitted material information. Section 11 imposes strict liability on issuers of registration statements containing untrue statements or omissions of material fact.

The United States District Court for the Eastern District of Kentuckydismissed the complaint for failure to state a claim on the grounds that plaintiffs failed to plead defendants' knowledge that the statements — which were treated as matters of opinion rather than historical fact — were false when made. *See Indiana State Dist. Council v. Omnicare Inc.*, 527 F. Supp. 2d 698, 700-01 (E.D. Ky. 2007). Plaintiffs appealed, arguing that Section 11 provided for strict liability and that it was therefore inappropriate for the district court to require plaintiffs to plead defendants' state of mind in connection with their Section 11 claim.

The Sixth Circuit agreed with plaintiffs and reversed, **holding that it was error to have required plaintiffs to plead defendants' knowledge in connection with claims of alleged false assertions of "legal compliance**." The Court recognized that its decision conflicted with the decision of the Second Circuit in *Fait*, where the Court held that statements concerning goodwill and loan loss reserves contained in a prospectus and registration statement were "opinions" which could be false or misleading only if defendants did not genuinely believe the opinions at the time they were issued. In so holding, the Second Circuit in Fait held that the Supreme Court's decision in *Virginia Bankshares v. Sandberg*, 501 U.S. 1083, 1095 (1991), controlled and supported requiring a Section 11 plaintiff to allege not only the falsity of the opinion (i.e., that it turned out to be wrong), but also that the defendant did not genuinely believe the opinion expressed. The Sixth Circuit, in contrast, saw nothing in *Virginia Bankshares* to support such a holding. It refused to extend *Virginia Bankshares* — which involved a claim under Section 14(a) of the Securities Exchange of Act 1934, 15 U.S.C. § 78n(a) — to impose knowledge of falsity requirement in claims under Section 11.

The Sixth Circuit's decision makes it easier for plaintiffs to plead a Section 11 claim where predictions and opinions, even if genuinely and reasonably believed by the issuer, turn out not to be true. As the decision directly and expressly conflicts with the Second Circuit's decision in *Fait* (as well as the Ninth Circuit's decision in *Rubke*), this case would appear ripe for resolution by the Supreme Court.

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