False Statements of Belief as Securities Fraud

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By Wendy Gerwick Couture*

I. Introduction

Is a CEO's statement that "I believe the TVs we manufacture have the highest resolution on the market" potentially actionable as an "untrue statement of material fact" under § 10(b) of the Securities Exchange Act² and Rule 10b-5³ promulgated thereunder? If so, how does this statement map onto the elements of securities fraud? Must the CEO actually disbelieve the statement? Must the matter addressed in the opinion—i.e., the resolution of the company's TVs—actually be false? How does the CEO's belief or disbelief intersect with the element of scienter? What portion of this statement must be material to investors—the CEO's expression of belief, the resolution of the company's TVs, or both? When is the "truth" about the statement disclosed for the purposes of assessing price impact and measuring loss—when it is revealed that the CEO disbelieved his or her prior opinion or when it is revealed that the TVs did not have the highest resolution on the market?

The Supreme Court's recent decision in Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund⁴ provides guidance on these questions but also raises new issues. In Omnicare, the Court charted a new course for opinions actionable under § 11 of the Securities Act. The Court pronounced a new test to differentiate statements of opinion from statements of fact; held that a statement of opinion is actionable as a misrepresentation of fact only if the speaker did not hold the stated belief and if the matter addressed in the opinion is inaccurate; and held that a statement of opinion can give rise to omissions liability if a reasonable investor would understand the opinion as conveying untrue facts about the basis for the opinion.⁵

An open question is whether Omnicare's teachings apply equally to opinions actionable as securities fraud.⁶ Some courts have applied Omnicare to securities fraud claims as an "alternative analysis," as "instructive,"⁷ or as persuasive authority;⁸ other courts have simply assumed that Omnicare applies to securities fraud claims.⁹

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Against this backdrop, this essay analyzes when a speaker's statement of belief is potentially actionable under § 10(b) and Rule 10b-5 as a false statement of fact post-Omnicare. This essay proceeds in five additional parts. Part II summarizes the holdings in Omnicare. Drawing from the holdings in Omnicare, Part III analyzes how to distinguish statements of fact from statements of opinion for purposes of securities fraud, and Part IV analyzes when opinions are actionable under § 10(b) and Rule 10b-5 as false statements of fact. Finally, Part V considers how the other elements of a securities fraud claim—scienter, materiality, reliance, and loss causation—apply to false statements of belief, and Part VI briefly concludes with proposed future areas of inquiry.

II. The Holdings in Omnicare

In Omnicare, the Supreme Court addressed whether purchasers in a public offering by Omnicare had stated a claim under § 11 based on the following statements in the registration statement:

- “We believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state laws.”
- “We believe that our contracts with pharmaceutical manufacturers are legally and economically valid arrangements that bring value to the healthcare system and the patients that we serve.”

The purchasers alleged that these statements violated § 11 because Omnicare’s receipt of payments from drug manufacturers violated anti-kickback laws and because none of Omnicare’s officers and directors “possessed reasonable grounds” for the belief that they were in legal compliance.

The district court granted Omnicare’s motion to dismiss, the Sixth Circuit reversed, and the Supreme Court granted certiorari “to consider how § 11 pertains to statements of opinion.”

First, the Court classified these statements as opinions rather than as statements of fact. Despite the fact that lower courts have struggled mightily to differentiate statements of opinion from statements of fact for purposes of liability under the securities laws, the Court characterized the discussion as “a mite silly.” The Court relied on the definitions of “fact” and “opinion” in two English dictionaries, published in 1927 and 1933. According to the Court, a fact is “a thing done or existing” or “[a]n actual happening” and “expresses certainty about a thing.” An opinion is “a belief[,] a view” or “a sentiment which the mind forms of persons and things” and does not express certainty.
The Court characterized the difference in level of certainty between a statement of fact and a statement of opinion as the "[m]ost important" difference. Applying this test to the statements at issue in the case, the Court focused on the introductory words "I believe" and held that the statements, which did not express certainty, were "pure statements of opinion." Second, the Court held that an opinion can be actionable as "an untrue statement of a material fact" under § 11 only if the speaker did not hold the stated belief. According to the Court, because a statement of opinion lacks certainty, it explicitly affirms only one fact: "that the speaker actually holds the stated belief." The Court added a caveat, however: even if the speaker did not hold the stated belief, the opinion would not be actionable as a misstatement of fact if the matter addressed in the opinion were accurate. Here, where the purchasers did not contest that Omnicare's opinions were honestly held, the Court held that they were not actionable as untrue statements of material fact.

Third, the Court held that an opinion, even if not actionable as an untrue statement of material fact, potentially gives rise to liability under § 11 if the speaker "omitted to state a material fact . . . necessary to make [the opinion] not misleading." As the Court explained, "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." This is a contextual inquiry that examines the opinion from the perspective of a reasonable investor:

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.

Because neither court below analyzed the investors' omissions theory under this standard, the Court vacated the judgment below and remanded the case for further proceedings.

This essay analyzes the impact of the first two portions of the Omnicare opinion on securities fraud. First, how are statements of opinion differentiated from statements of fact for purposes of securities fraud? Second, when is an opinion actionable as a false statement of fact under § 10(b) and Rule 10b-5? And, finally, if a securities fraud action is premised on an allegedly false statement of belief, how should the other elements of a securities fraud claim be analyzed?

III. The Distinction Between Statements of Fact and Statements of Opinion

Omnicare's new test to differentiate statements of opinion from
statements of fact likely applies equally to securities fraud claims. Nothing in the Court’s analysis in Omnicare suggests that its fact-opinion test is confined to § 11. Rather, the Court relied on two English dictionaries to explain the distinction between a statement of fact and a statement of opinion and reasoned that, by exposing issuers to liability under § 11 for “untrue statement[s] of . . . fact,” Congress simply incorporated this “everyday” distinction. Rule 10b-5, like § 11, prohibits “untrue statement[s] . . . of fact,” and thus likely incorporates this same “everyday” distinction.

Applied to securities fraud claims, Omnicare’s new fact-opinion test will change how courts distinguish statements of fact from statements of opinion. Prior to Omnicare, courts used three primary approaches to make this distinction: the “I know it when I see it” test, the literal test, and the judgment or subjectivity test. The Omnicare test is a combination of the literal test and the judgment or subjectivity test. Like the judgment or subjectivity test, the Omnicare test recognizes that an opinion expresses the speaker’s mental processes—“a belief,” “a view,” or “a sentiment which the mind forms of persons or things.” At the same time, like the literal test, the Omnicare test views the presence of introductory words like “I believe” or “I think” as potentially outcome-determinative because they undercut the certainty of a statement, and the degree of certainty is the “most important” distinction between a statement of fact and a statement of opinion.

After Omnicare, although one court has suggested otherwise, it seems clear that a statement of fact can be transformed into a statement of opinion merely by adding the preface “I think” or “I believe.” The Court provided two examples of the fact-opinion distinction, and the inclusion of such an introductory phrase was outcome-determinative in each example. In the first example, the Court characterized “the coffee is hot” as a statement of fact and “I think the coffee is hot” as a statement of opinion. In the second example, the Court characterized “the TVs we manufacture have the highest resolution available on the market” as a statement of fact and “I believe the TVs we manufacture have the highest resolution available on the market” as a statement of opinion. Therefore, post-Omnicare, issuers and their agents will likely use such introductory language more frequently in public disclosures, to the extent permitted by the disclosure rules and borne by the market.

After Omnicare, it is less clear if the converse is likewise true: if an inherently uncertain statement is expressed without an introductory signal of uncertainty, will it be characterized as a statement of opinion? For example, a statement about the ade-
quacy of reserves is arguably inherently uncertain, but the court in *In re Genworth Financial Inc. Securities Litigation* questioned whether it is a statement of opinion post-Omnicare: “Defendants’ statements do not contain the words ‘believe’ or ‘think,’ but instead suggest a greater sense of certainty.”

The better rule post-Omnicare is to examine the certainty of the statement from the perspective of a reasonable investor: if a reasonable investor would interpret the statement as expressing a lack of certainty—either because the statement includes introductory language like “I believe” or “I think” or because the subject matter is inherently uncertain—then the statement should be categorized as an opinion. For example, in one post-Omnicare case, the court treated loan-to-value ratios, which are arguably inherently uncertain, as opinions despite the absence of prefatory opinion language. Similarly, in another post-Omnicare case, the court characterized as an opinion the statement that “the likeliest interpretation of the data is that naproxen lowered . . . the thrombotic event rate.” A reasonable investor would understand this statement as expressing uncertainty, both because it uses the uncertain word “interpretation” and because the causal link is inherently uncertain.

**IV. Opinions Actionable As False Statements of Belief**

*Omnicare*’s second holding—that, under § 11, an opinion is actionable as a false statement of fact only if the speaker did not hold the stated belief—likely also applies to claims under § 10(b) and Rule 10b-5. In *Omnicare*, the Court reasoned that (1) a statement of opinion only affirms one fact, “that the speaker actually holds the stated belief,” and (2) § 11 only exposes issuers to liability for “untrue statement[s] of . . . fact.” Therefore, the Court held that § 11 imposes liability for an untrue statement of fact only if the speaker disbelieved the subject matter of the opinion. Both of the propositions underlying the Court’s holding in *Omnicare* apply equally to securities fraud claims. First, the proposition that a statement of opinion only affirms the fact that the speaker actually holds the stated belief is not limited to the context of § 11. Indeed, the Court’s only citation in support of this proposition is a treatise on torts law, which is no less persuasive when interpreting § 10(b) and Rule 10b-5 than when interpreting § 11. Second, like § 11, Rule 10b-5 only imposes liability for “untrue statement[s] of . . . fact.” Therefore, *Omnicare*’s conclusion drawn from these two propositions likely also applies to securities fraud claims.

*Omnicare*’s caveat to this holding—that even if the speaker did not hold the stated belief, the opinion would not be actionable if the matter addressed in the opinion were in fact true—also likely applies equally to securities fraud claims. The Court relied
on Virginia Bankshares, Inc. v. Sandberg, which arose under § 14(a) of the Securities Exchange Act and Rule 14a-9 promulgated thereunder, for this caveat.\textsuperscript{48} In that case, quoting a district court case interpreting § 10(b), the Court held that "to recognize liability on mere disbelief or undisclosed motive without any demonstration that the proxy statement was false or misleading about its subject would authorize § 14(a) litigation confined solely to what one skeptical court spoke of as the 'impurities' of a director's 'unclean heart.'"\textsuperscript{49} According to the Virginia Bankshares Court, permitting liability on this basis would "threaten just the sort of strike suits and attrition by discovery that Blue Chip Stamps [a case interpreting § 10(b)] sought to discourage."\textsuperscript{50} Virginia Bankshares's holding, which itself relied on § 10(b) precedent, is at least as persuasive in § 10(b) actions as in § 11 actions. Like § 11, claims under Rule 10b-5 are premised on "untrue statement[s] of material fact."\textsuperscript{51} Further, the Court has explicitly adopted the materiality standard from § 14(a) for claims under § 10(b).\textsuperscript{52}

Therefore, post-Omnicare, a statement of opinion is likely actionable under § 10(b) and Rule 10b-5 as a false statement of fact only if (1) the speaker did not hold the stated belief (\textit{i.e.}, the opinion was subjectively false) and (2) the matter addressed in the opinion was not accurate (\textit{i.e.}, the opinion was objectively false).\textsuperscript{53} This resolves the pre-Omnicare split in authority, whereby some courts required both subjective and objective falsity in order for a statement of opinion to be actionable as securities fraud and other courts merely required objective falsity.\textsuperscript{54} Post-Omnicare, a statement of opinion must be both subjectively and objectively false in order to be actionable as securities fraud.

An interesting question post-Omnicare is whether, in order for an opinion to be objectively false (as required by the Virginia Bankshares caveat), it is sufficient for the matter addressed in the opinion to be objectively unreasonable, even if it is not demonstrably false. Unfortunately, by giving short shrift to the distinction between statements of fact and statements of opinion, the Omnicare Court failed to recognize the possibility that the matter addressed in an opinion might be inherently uncertain—and thus incapable of being proven true or false—and yet might nonetheless be objectively unreasonable. The subject matter of the opinion that the Omnicare Court chose as an example is capable of being proven false, thus allowing the Court to state rather flippantly: "So if our CEO did not believe that her company's TVs had the highest resolution on the market, but (surprise!) they really did, § 11 would not impose liability for her statement."\textsuperscript{55} If the Court had instead chosen as an example an opinion whose subject matter is inherently uncertain (such as the
causal relationship between a drug and a medical condition, based on inconclusive data), the Court would have recognized that the subject matter of an opinion might not be demonstrably false but might nonetheless be objectively unreasonable. Imposing liability for a disbelieved, objectively unreasonable opinion does not merely punish “the ‘impurities’ of a director’s ‘unclean heart.’” Therefore, the better rule post-Omnicare, consistent with the Virginia Bankshares caveat, is to recognize that the objective falsity requirement is satisfied if the matter addressed in the opinion is either demonstrably false or objectively unreasonable.

V. Other Elements of a Securities Fraud Claim Based on a False Statement of Belief

Post-Omnicare, a statement of belief is potentially actionable as a false statement of fact under § 10(b) and Rule 10b-5 if (1) the speaker disbelieved the opinion expressed and (2) the matter addressed in the opinion was inaccurate. In order for such a statement to form the basis of a securities fraud claim, however, the other elements of securities fraud must also be satisfied: scienter, materiality, reliance, and loss causation. As discussed below, these elements—whose contours are fairly well-settled in the context of other types of false statements—pose new challenges when applied to false statements of belief.

A. Scienter

When a securities fraud action is premised on an allegedly false statement of belief, two elements of the claim relate to the speaker’s state of mind. As discussed above, the element of falsity requires the speaker to have actually disbelieved the opinion expressed, contrary to the speaker’s expression of belief. The element of scienter requires the speaker to have made that false statement about his or her state of mind at least recklessly. The issue is whether, in order to satisfy the strong inference of scienter pleading standard, a plaintiff must plead any additional facts other than those that support the speaker’s disbelief of the opinion stated.

The better rule is to recognize that, if the plaintiff adequately pleads that a speaker expressed an opinion that he or she did not in fact hold, the plaintiff has also pleaded a strong inference of scienter. Absent some sort of out-of-body experience, it is inconceivable that a speaker could falsely express the contents of his or her own brain without doing so at least recklessly. As the Supreme Court recognized in Merck & Co. v. Reynolds: “[C]ertain statements are such that, to show them false is normally to show scienter as well. It is unlikely, for example, that someone would falsely say ‘I am not married’ without being aware of the fact
that his statement is false. 61 One is equally as likely to know the contents of one’s own brain as one’s marital status, and thus misstating either should support a strong inference of scienter. This commonsense rule is a logical extension of the “core operations inference,” whereby allegations about a statement’s falsity may be sufficient to allege a strong inference of management’s scienter “where the nature of the relevant fact is of such prominence that it would be ‘absurd’ to suggest that management was without knowledge of the matter.” 62 This rule is also perhaps the purest example of what this essay’s author has previously dubbed the “falsity-scienter inference,” whereby “the well-pleaded falsity of a statement is sufficient to create a strong inference of scienter when (1) the truth is necessarily within the speaker’s core knowledge; and (2) the statement is sufficiently false to have necessarily caught the speaker’s attention.” 63 Indeed, consistent with this rule, post-Omnicare courts have recognized that the elements of falsity and scienter merge when applied to allegedly false statements of belief. 64

B. Materiality

As the Omnicare Court acknowledged in passing, a speaker’s false statement of fact—that he or she believed the opinion expressed—must be materially misleading in order to be actionable. 65 This raises an interesting question: when is there a substantial likelihood that a reasonable investor would find the speaker’s expression of belief about the matter addressed in the opinion to be important when making an investment decision? 66 There are three possible materiality scenarios, only the third of which is tenable.

First, a reasonable investor could arguably find a speaker’s false statement of belief to be important because a reasonable investor values candor from the officers and directors of companies in which he or she invests. Although this articulation has some logical appeal, courts should reject this materiality argument as an impermissible merging of falsity and materiality. If this articulation were successful, a speaker’s misrepresentation of belief about anything—even the paint color on the board room’s walls—would arguably be material. The Court rejected this bootstrapping of materiality to falsity in Basic Inc. v. Levinson. 67 The Sixth Circuit had held that “information concerning ongoing acquisition discussions becomes material by virtue of the statement denying their existence.” 68 The Basic Court rejected the Sixth Circuit’s analysis: “This approach, however, fails to recognize that, in order to prevail on a Rule 10b-5 claim, a plaintiff must show that the statements were misleading as to a material fact. It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.” Therefore, a state-
ment of belief, if not independently material, does not become so merely because it is false.

Second, a reasonable investor could arguably find a speaker's false statement of belief to be important because (1) the matter addressed in the opinion is actually accurate and (2) the speaker's disbelief of the matter addressed in the opinion would demonstrate that the speaker is uninformed or incompetent. The Virginia Bankshares caveat, which requires the subject matter of the opinion to be objectively false, forecloses this materiality argument.

Third, a reasonable investor could arguably find a speaker's statement of belief to be important because it makes it more likely that the matter addressed in the opinion is accurate. To use the Omnicare Court's example, a reasonable investor could find it important when making an investment decision that a CEO stated "I believe that the TVs we manufacture have the highest resolution available on the market" because the CEO's expression of belief makes it more likely that company's TVs actually have the highest resolution.

The materiality analysis is thus a two-step inquiry. First, is the subject matter addressed in the opinion important to a reasonable investor? Second, if so, does the speaker's expression of belief convey meaningful information to a reasonable investor about the likelihood that the subject matter is accurate?

The first step of this materiality inquiry is straightforward. For example, take a CEO's statement that "I believe the TVs we manufacture have the highest resolution available on the market." The first step of the materiality inquiry should focus on whether there is a substantial likelihood that a reasonable investor would find the resolution of the company's TVs to be important when making an investment decision—likely depending on the percentage of revenues associated with TV sales and on the importance of a TV's resolution to consumers. By contrast, if the CEO had expressed an opinion about the food offered in the employee cafeteria, the opinion would likely fail the first step of the materiality inquiry because no reasonable investor would consider that information important when making an investment decision.

The second step of this materiality inquiry depends on three factors. First, is the speaker someone whom a reasonable investor would expect to possess information about the subject matter of the opinion? For example, a reasonable investor likely would expect the CEO to be informed about the company's and competitors' products but probably would not expect the HR director to possess that information.

Second, is the opinion expressed with so much tentativeness
that a reasonable investor would not interpret it as making the subject matter more likely? For example, if the CEO had stated “I actually have no idea, but I believe that the TVs we manufacture have the highest resolution available on the market,” then a reasonable investor would probably not interpret the CEO’s opinion as conveying meaningful information about the resolution of the company’s TVs.

Third, is the basis for the opinion disclosed and available to investors, such that a reasonable investor could reach his or her own independent conclusion about the subject matter of the opinion? If so, the expression of belief would not convey any meaningful information to a reasonable investor, who could reach his or her own opinion. For example, if the CEO had stated “Based on the advertising materials from our five largest competitors, I believe that the TVs we manufacture have the highest resolution on the market,” a reasonable investor would not interpret the CEO’s expression of belief as conveying any meaningful information about the likelihood that the company’s TVs indeed possess the highest resolution. A reasonable investor could assess the quality of the research performed by the CEO and make his or her own determination about whether the company’s TVs have the highest resolution. (Of course, if the advertising materials actually reflected that a competitor’s TV had a higher resolution, the embedded factual statement within the opinion would potentially be actionable as a false statement of fact.) As this author has previously argued, courts making this assessment should draw on the deep body of case law developed in the context of defamation, which differentiates opinions that imply undisclosed defamatory facts from those that do not (usually because the factual basis for the opinion is stated).

There is an interesting overlap between the second step of the materiality analysis in a false statement of belief case and the analysis of potential omissions liability under Omnicare. Under Omnicare, in addition to being potentially actionable as a false statement of belief, an opinion can give rise to omissions liability if a reasonable investor would understand the opinion statement as conveying untrue facts about the speaker’s basis for holding that view. As the Court explained, “[t]o avoid exposure for omissions under § 11, an issuer need only divulge an opinion’s basis, or else make clear the real tentativeness of its belief.” Therefore, if a speaker states the basis for his or her opinion or expresses sufficient tentativeness, the opinion is neither actionable as a false statement of fact—because the second step of the materiality analysis fails—nor as a misleading omission—because no reasonable investor would understand the opinion as conveying untrue facts about the speaker’s basis for that opinion. On the
flip side, however, it may be easier for a plaintiff to plead facts in support of the second step of the materiality analysis than to plead actionable omissions. In order to plead the second step of the materiality analysis, a plaintiff need only plead facts in support of the proposition that the speaker’s expression of belief conveyed meaningful information to a reasonable investor about the likelihood that the subject matter is accurate. In order to plead an omissions claim, however, a plaintiff must “identify particular (and material) facts going to the basis for the issuer’s opinion . . . whose omission makes the opinion statement at issue misleading.”

C. Reliance and Loss Causation

Finally, pinpointing the moment that the purported “truth” is disclosed to the market is potentially relevant to the elements of reliance and loss causation. If the plaintiffs are relying on the fraud-on-the-market presumption of reliance, the defendants may try to rebut the presumption by producing evidence of a lack of “price impact.” The defendants may seek to accomplish this by showing that the disclosure of the “truth” did not impact the market price. Likewise, in order to demonstrate loss causation, plaintiffs often attempt to show that the stock price dropped upon disclosure of the “truth.”

If a securities fraud claim is premised on a false statement of belief about a subject matter, there are two potential moments that the “truth” is disclosed to the market: (1) when the market discovers that the speaker actually disbelieved the earlier-expressed opinion; or (2) when the market discovers that the matter addressed in the opinion was inaccurate. As a practical matter, the former “truth” would rarely be disclosed to the market. Rather, the company would likely state something like: “Although we believed that our TVs had the highest resolution in the market, we have now discovered that one of our competitor’s TVs has a higher resolution.”

The better analysis is to treat the disclosure of the inaccuracy of the matter addressed in the opinion as the “materialization of the risk” concealed by the speaker’s false opinion. Under this theory, even if the truth about the fraudulent statement itself is not revealed to the market, plaintiffs can demonstrate loss causation if “the loss was foreseeable and caused by the materialization of the risk concealed by the fraudulent statement.” For example, in the post-Omnicare case of In re BioScrip, Inc. Securities Litigation, the defendants argued that the plaintiffs had to pinpoint when the market discovered that the speaker actually disbelieved the previously expressed opinion about legal compliance:

Plaintiffs, true to form in a stock drop case, allege that BioScrip’s disclosure of the CID in September 2013 and its reserve estimate in
November 2013 for the DOJ settlement were corrective disclosures regarding the prior Legal Compliance Statement that, in turn, led to precipitous stock drops . . . But to plead loss causation regarding the Legal Compliance Statement, Plaintiffs must “allege that the . . . dishonesty of the opinions[] is revealed to the market.” . . . The mere disclosure of the DOJ investigation and a settlement reserve in no way establishes that BioScrip did not previously believe its Legal Compliance Statement. Accordingly, because the “corrective disclosure” reveals no “concealed” facts, the CAC fails to plead loss causation.79

The court rejected this argument, holding that the disclosure of the truth about the matter addressed in the opinion was sufficient to plead loss causation:

Although it is not clear what portion of the loss can be pegged to BioScrip’s prior misstatements as compared to the Government’s potential lawsuit, at the pleading stage a Plaintiff “need not demonstrate that defendants’ misstatements or omissions caused all of plaintiffs’ losses. Rather, plaintiffs need only allege facts that would allow a factfinder to ascribe some rough proportion of the whole loss to [the defendant’s alleged] misstatements.” . . . Plaintiffs’ allegations ascribe some rough portion of the loss to the misstatements, particularly in light of the fact that, prior to the corrective disclosure, the market had been entirely unapprised of the fact that BioScrip was even involved in the Government’s investigation into Novartis . . . Plaintiffs have adequately plead that the loss was foreseeable to BioScrip at the time they made the misstatements and that the risk concealed materialized, and was exacerbated by, BioScrip’s misstatements.80

This is the better analysis, both as applied to loss causation and to price impact.

VI. Conclusion

Hopefully, this essay will aid litigants, courts, market participants, and scholars when analyzing allegedly false statements of belief as false statements of fact under § 10(b) and Rule 10b-5 post-Omnicare. A separate question, also influenced by Omnicare, is how to analyze whether an opinion gives rise to omissions liability under § 10(b) and Rule 10b-5. This author, and hopefully other scholars, will engage in this line of inquiry in future work.

NOTES:


317 C.F.R. § 240.10b-5.

Id. at 1325, 1326 and 1332.

*In re Hertz Global Holdings, Inc. Securities Litigation*, Fed. Sec. L. Rep. (CCH) P 98581, 2015 WL 4469143, *10 n.7 (D.N.J. 2015) ("Given that *Omnicare* concerned a claim under a statute not at issue here, it is unclear whether the holding in the case would extend to § 10(b) claims.").


*In re Merck & Co., Inc. Securities, Derivative & "ERISA" Litigation*, Fed. Sec. L. Rep. (CCH) P 98516, 2015 WL 2250472, *11 n.7 (D.N.J. 2015) ("*Omnicare*, actually, is not directly applicable to any aspect of the instant motion for summary judgment, which deals with § 10(b) of the Exchange Act and its scienter requirement. Nevertheless, *Omnicare*’s analysis of its discussion of misleading opinions is, to some extent, instructive on the viability of Plaintiffs’ claim as to the opinion-based post-VIGOR statements, and this Court will discuss the Supreme Court’s decision below.").


Future scholarly work should analyze the impact on securities fraud claims of *Omnicare*’s additional holding that a statement of opinion, even if not actionable as a false statement of belief, can give rise to omissions liability.

*Omnicare*, 135 S.Ct. at 1323.

*Id*. at 1324.

*Id*.


*Omnicare*, 135 S. Ct. at 1325.

*Id*. (citing Webster’s New International Dictionary (1927)).

*Id*. (citing Webster’s New International Dictionary (1927) and Oxford English Dictionary (1933)).

*Id*.

Omnicare, 135 S. Ct. at 1325.

Id. at 1326.

See id. at 1335 (Scalia, J., concurring in part and concurring in judgment) (stating that there are certain types of information-such as the cash on hand or the number of shares of common stock outstanding-that a registration statement “would never preface” with an introductory statement like “we believe”).


Omnicare, 135 S. Ct. at 1326.

Id.
43Id. at 1326 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on the Law of Torts § 109 (5th ed. 1984)).

44E.g., Dura Pharmaceuticals, Inc. v. Broodo, 544 U.S. 336, 343-44, 125 S. Ct. 1627, 161 L. Ed. 2d 577, Blue Sky L. Rep. (CCH) P 74529, Fed. Sec. L. Rep. (CCH) P 93218 (2005) (“Judicially implied private securities fraud actions resemble in many (but not all) respects common-law deceit and misrepresentation actions . . . And the common law has long insisted that a plaintiff in such a case show not only that had he known the truth he would not have acted but also that he suffered actual economic loss.”) (citing various treatises on torts law).

4517 C.F.R. § 240.10-5(b).


47Omnicare, 135 S. Ct. at 1326 n.2.


50Id. (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 95 S. Ct. 1917, 44 L. Ed. 2d 539, Fed. Sec. L. Rep. (CCH) P 95200, 1975-1 Trade Cas. (CCH) ¶ 60351 (1975) (interpreting § 10(b)).

5115 U.S.C.A. § 77k(a); 17 C.F.R. § 240.10b-5(b). Claims under Rule 14a-9 are premised on statements that are “false or misleading with respect to any material fact.” 17 C.F.R. § 240.14a-9.


53Accord Fed. Hous. Fin. Auth. v. Nomura Holding Am., Inc., No. 11-CV-6201, at *94 (S.D.N.Y. May 11, 2015) (post-Omnicare, requiring the plaintiff to prove both that an opinion was disbelieved and that it was objectively false); id. at *104 (“To show that the appraisals—and thus the LTV ratios—were false, FHFA was required to show both objective and subjective falsity.”); In re BioScrip, Inc. Securities Litigation, 2015 WL 1501620, *10–11 (S.D.N.Y. 2015) (applying Omnicare to a securities fraud claim and concluding that it is consistent with the Second Circuit’s prior precedent that “a statement of opinion is actionable as securities fraud ‘to the extent that the statement was both objectively false and disbelieved by the defendant at the time it was expressed’”) (quoting Fait v. Regions Financial Corp., 655 F.3d 105, 110, Fed. Sec. L. Rep. (CCH) P 96517 (2d Cir. 2011)).

54Couture, supra note 15, at 392–93 (describing this split in authority).

55Omnicare, 135 S. Ct. at 1326 n.2.

57 Accord Nakkhumpun v. Taylor, 782 F.3d 1142, 1159, Fed. Sec. L. Rep. (CCH) P 98443 (10th Cir. 2015) ("An opinion is considered false if the speaker does not actually or reasonably hold that opinion.") (citing Omnicare); but see In re Hertz Global Holdings, Inc. Securities Litigation, Fed. Sec. L. Rep. (CCH) P 98551, 2015 WL 4469143, *10 n.7 (D.N.J. 2015) (describing objective falsity as an "incorrect" opinion) (citing Omnicare, 135 S.Ct. at 1326 & 1329).

58 Omnicare, 135 S. Ct. at 1326.

59 See Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 n.3, 127 S. Ct. 2499, 168 L. Ed. 2d 179, Fed. Sec. L. Rep. (CCH) P 94335 (2007) ("We have previously reserved the question whether reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b-5 . . . Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required . . . The question whether and when recklessness satisfies the scienter requirement is not presented in this case.").


64 In re BioScrip, Inc. Securities Litigation, 2015 WL 1501620, *16 (S.D. N.Y. 2015) ("To some extent, the question of scienter largely turns on the same considerations as those concerning the Defendants' statements of opinion . . . Even if the direct equivalence between scienter and the pleading standard for opinion statements does not hold in all circumstances, the Court concludes the Plaintiffs have adequately alleged scienter as to the legal compliance statements . . . Plaintiffs have plausibly alleged that BioScrip subjectively knew about the CID, which identified conduct potentially implicating BioScrip in the Government's investigation, yet nonetheless stated publicly that they were in legal compliance."); Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd., 2015 WL 1474984, *14 (S.D.N.Y. 2015) ("As explained above, however, these allegations are insufficient to establish scienter. They likewise do not establish that DTTC subjectively knew its audit opinions to be false.").

65 Omnicare, 135 S. Ct. at 1326 ("In such cases, § 11's first part would subject the CEO to liability (assuming the misrepresentation were material.").)

66 See Basic Inc., 485 U.S. at 231 (holding that a fact is material "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to [invest]").

67 Id. at 238.


69 See, supra, Part IV.

70 Omnicare, 135 S. Ct. at 1327 (confirming that statements of fact embedded in opinions are independently actionable as securities fraud).
Couture, supra note 15, at 436-44.

Omnicare, 135 S. Ct. at 1328.

Id. at 1332.

Id.

Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2417, 189 L. Ed. 2d 339, Fed. Sec. L. Rep. (CCH) P 98003, 88 Fed. R. Serv. 3d 1472 (2014) ("[D]efendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.").

Id. at 2414 ("Basic itself 'made clear that the presumption was just that, and could be rebutted by appropriate evidence,' including evidence that the asserted misrepresentation (or its correction) did not affect the market price of the defendant's stock.") (citation omitted and emphasis added).

See Dura Pharm., Inc., 544 U.S. at 347 ("The complaint's failure to claim that Dura's share price fell significantly after the truth became known suggests that the plaintiffs considered the allegation of purchase price inflation alone sufficient.").


Memorandum of Law in Support the Bioscrip Defendants' Motion to Dismiss the Consolidated Amended Complaint, In re Bioscrip, Inc. Securities Litigation, 2014 WL 1677529 (S.D.N.Y. 2014) (citations omitted).