



May 2016

***Omnicare* Applied to Audit Reports by the Second Circuit**

On Friday, May 20, 2016, the Second Circuit issued the first opinion by a Circuit Court applying the Supreme Court's *Omnicare* decision to audit reports under Section 11 of the Securities Act of 1933. The Second Circuit's Summary Order, issued in *In re Puda Coal Securities, Inc. Litigation*, Case No. 15-2100, slip op. at 5–6 (2d Cir. May 20, 2016) (*Puda Coal*), held that audit reports are statements of opinion and subject to the *Omnicare* standard for Section 11 claims.

In *Omnicare, Inc., v. Laborers Dist. Council Constr. Ind. Pension Fund*, 135 S. Ct. 1318 (2015) (*Omnicare*), the United States Supreme Court held that statements of opinion are only actionable under Section 11 of the Securities Act if: (1) the defendant did not honestly hold the opinion issued, or (2) material facts are omitted about the basis of the opinion making the opinion statement at issue “misleading to a reasonable person reading the statement fairly and in context.” *Id.* at 1332. To read about the *Omnicare* decision in more detail, please see our previous [GT Newsletter](#).

Historically, investors have asserted claims under Section 11 against accountants (as well as engineers, appraisers or other professionals) who “certified” any portion of a registration statement (such as the financial statements). 15 U.S.C. § 77k(a)(4). Before Friday, investors argued that *Omnicare* did not apply to auditors' reports under Section 11 because the reports contained “certifications” of the financial statements of the issuer. See, e.g., *Miller v. Global Geophysical Svcs., Inc.*, No. 14-cv-0708, ECF. No. 100–1 (S.D. Tex. 2015).

An auditors' report, however, does not contain the word “certify” or “certification.” Instead, the auditors' standard unqualified report states that (i) the audit has been conducted in accordance with certain auditing standards, and (ii) in the auditor's “opinion,” the financial statements taken as a whole are “present[ed] fairly.” The auditing standards allow for a significant amount of subjective judgment to be exercised by the auditor in performing the audit, in assessing the audit evidence, and

in reaching the ultimate opinion on the fair presentation of the financial statements taken as a whole.

The Second Circuit's decision in *Puda Coal* now makes clear that investors cannot sue accountants under Section 11 for their audit "opinions" unless they have evidence that the auditors did not honestly hold the opinion or omitted material facts from the audit report causing the opinion to be misleading to a reasonable person.

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