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AUDITOR LIABILITY

A Matter of Opinion: Parsing the Independent Auditor's Report in the Context of Omnicare



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I. Overview

The Supreme Court's decision this year in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* ("Omnicare"),¹ clarified the standards for attaching liability to opinions that appear in corporate disclosures. This article considers auditors' opinions under *Omnicare*, and concludes that an auditor should be subject to liability only where he or she does not believe the opinion, or where the opinion omits from the audit report material information that is required to be stated under Public Company Accounting Oversight Board ("PCAOB") standards.

¹ No. 13-435, ___ U.S. ___, 135 S. Ct. 1318 (2015).

II. Omnicare's Two Bases of Liability for Opinions

In *Omnicare*, the Supreme Court considered when a statement of opinion may give rise to liability under Section 11 of the Securities Act of 1933 (the "Securities Act").² In so doing, the Court resolved significant issues surrounding the proper interpretation of statements of opinion that apply to the opinions included in an independent auditor's report on a company's financial statements. Although *Omnicare* related to Section 11, the analysis of possible liability for statements of opinion applies also to claims under Section 10 and Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act") as well as other sections under which false material statements and material omissions are actionable.³

² 15 U.S.C. §77k.

³ Although beyond the scope of this article, similar considerations apply to an independent auditor's report on a company's internal control over financial reporting.

Section 11 imposes liability if a company's registration statement filed with the Securities and Exchange Commission ("SEC") either contains an untrue statement of material fact or omits to state a material fact necessary to make the statements therein not misleading.⁴

⁴ *Omnicare*, 135 S. Ct. at 1323; 15 U.S.C. §77k(a).

A. Opinion Misrepresentation

Omnicare held that a statement of opinion may give rise to liability under Section 11 as a misrepresentation of fact only if the speaker does not actually hold the opinion or the opinion contains an embedded misrepresentation of fact.⁵ The Court emphasized that Section 11 "does not allow investors to second-guess inherently subjective and uncertain assessments."⁶ Even if wrong, a genuinely held statement of pure opinion, therefore, cannot be an untrue statement of material fact.⁷

⁵ 135 S. Ct. at 1326–27.

⁶ *Id.* at 1327.

⁷ *Id.*

B. Opinion Omission

Omnicare further held that Section 11 imposes liability for a statement of opinion if an omission of material facts about the nature of the speaker's inquiry or knowledge underlying the opinion "makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."⁸ "Context" is key to the Court's ruling:

[W]hether an omission makes an expression of opinion misleading always depends on context. Registration statements as a class are formal documents, filed with the SEC as a legal prerequisite for selling securities to the public. Investors do not, and are right not to, expect opinions contained in those statements to reflect baseless, off-the-cuff judgments, of the kind that an individual might communicate in daily life. At the same time, an investor reads each statement within such a document, whether of fact or of opinion, in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information. And the investor takes into account the customs and practices of the relevant industry. So an omission that renders misleading a statement of

opinion when viewed in a vacuum may not do so once that statement is considered, as is appropriate, in a broader frame. The reasonable investor understands a statement of opinion in its full context, and §11 creates liability only for the omission of material facts that cannot be squared with such a fair reading.⁹

⁸ *Id.* at 1332.

⁹ *Id.* at 1330.

III. Omnicare Applied in the Context of an Audit Report

The federal securities laws require an issuer to include audited financial statements in a registration statement filed under the Securities Act.¹⁰ Appendix A to the Securities Act specifically requires an issuer to disclose a balance sheet and profit and loss statements “certified by an independent public or certified accountant.”¹¹ The SEC’s Regulation S-X “sets forth the form and content of and requirements for financial statements required to be filed” as a part of registration statements filed under the Securities Act as well as in other documents filed under the federal securities laws.¹² It requires the filing of audited financial statements¹³ and defines “audit” as meaning “an examination of the financial statements by an independent accountant in accordance with generally accepted auditing standards, as may be modified or supplemented by the Commission, for the purpose of expressing an opinion thereon.”¹⁴ Since Appendix A of the Securities Act and various sections of the Securities Act and rules adopted thereunder use the term “certified,” the SEC has defined “certified” in Regulation S-X and various other rules, including the rules adopted under the Securities Act and the Exchange Act, as meaning, with respect to financial statements, “examined and reported upon with an opinion expressed by an independent public or certified public accountant.”¹⁵

¹⁰ The Exchange Act requires entities to include audited financial statements in registration statements and annual reports, as well as certain other documents, filed under that Act.

¹¹ 15 U.S.C. §77aa (25)-(27).

¹² 17 C.F.R. §210.1-01(a) (2015) (hereinafter “Regulation S-X”).

¹³ *Id.* at 3-01 and 3-02.

¹⁴ *Id.* at 1-02(d).

¹⁵ *E.g., id.* at 1-02(f).

Following enactment of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (“Sarbanes-Oxley”), a public accounting firm that audits the financial statements of a company filing a registration statement under the Securities Act or filing registration statements or reports under the Exchange Act must conduct such audits in accordance with the standards adopted by the PCAOB.¹⁶ The rules and standards of the PCAOB, therefore, provide the context for understanding an audit report. The auditor performs work and prepares the report under these rules and standards. “Every accounting firm—both foreign and domestic—that participates in auditing public companies under the securities laws must register with the [PCAOB], pay it an annual fee, and comply with its rules and oversight.”¹⁷ The PCAOB requires that audit reports refer explicitly to the

standards of the PCAOB. ¹⁸ Those standards prescribe the content of the report: “The auditor’s standard report identifies the financial statements audited in an opening (introductory) paragraph, describes the nature of an audit in a scope paragraph, and expresses the auditor’s opinion in a separate opinion paragraph.” ¹⁹

¹⁶ The PCAOB, which was established pursuant to Section 102 of Sarbanes-Oxley, has the authority and responsibility under Section 103 of Sarbanes-Oxley to adopt, subject to SEC approval, auditing, quality control and independence standards to be followed by auditors. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§102–103, 116 Stat. 745, 753–757 (2002); see also PCAOB, *About the PCAOB*, <http://pcaobus.org/About/pages/default.aspx> (last visited Nov. 10, 2015).

¹⁷ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 485 (2010) (citing 15 U.S.C. §§7211(a), 7212(a) & (f), 7213, 7216(a)(1)).

¹⁸ In April 2003, the PCAOB adopted as interim standards the generally accepted auditing standards (“GAAS”) promulgated by the American Institute of Certified Public Accountants’ Auditing Standards Board. PCAOB AS 1, ¶ 2, <http://pcaobus.org/Standards/Pages/default.aspx> (last visited Oct. 29, 2015). The PCAOB required audit reports for public companies to refer to PCAOB standards. PCAOB AS 1, ¶ 3. Auditors’ reports for privately held entities refer to GAAS. PCAOB AU §508.08(d). Effective as of December 31, 2016, the PCAOB’s reorganization of the auditing standards will result in changes to all of the references in this article.

¹⁹ PCAOB AU §508.08; see also *Deephaven Private Placement Trading, Ltd. v. Grant Thornton & Co.*, 454 F.3d 1168, 1174 (10th Cir. 2006) (“[T]he end product of an audit is the audit report, which usually contains three concomitant paragraphs: the introduction, the scope and the opinion.”).

We consider in this article three statements set forth in the audit report that we believe should be analyzed as opinions under the *Omnicare* framework. These are:

- the auditor’s “opinion” that “the financial statements ... present fairly, in all material respects, the [consolidated] financial position of [the company at the identified balance sheet dates], and the [consolidated] results of [its] operations and [its] consolidated cash flows for [each of the three years in the period] ended in conformity with [U.S. generally accepted accounting principles [‘GAAP’]]”; ²⁰
- the auditor’s statement that audits were conducted “in accordance with [the standards of the [PCAOB]]”; ²¹ and
- the auditor’s belief that the audits “provide a reasonable basis for [the] opinion.” ²²

²⁰ *Deephaven*, 454 F.3d at 1175.

²¹ *Id.*

²² *Id.*

Based on *Omnicare*, these opinions—which contain no “embedded facts”—cannot give rise

to liability unless they are not actually held by the auditor,²³ or omit material facts, defined by PCAOB standards, that conflict with what a reasonable investor would take from the statements themselves.²⁴

²³ One court has stated that this standard would require a plaintiff “to point to a factual basis supporting a reasonable inference that [the defendant auditor] did not believe its representation that its audit reports were presented in conformity with GAAP.” See *Se. Pa. Transp. Auth. v. Orrstown Fin. Servs., Inc.*, No. 1:12-CV-00993, 2015 WL 3833849, at *34 (M.D. Pa. June 22, 2015) (hereinafter “SEPTA”).

²⁴ *Omnicare*, 135 S. Ct. at 1329; see also *In re Am. Realty Capital Props. Inc. Litig.*, No. 15 MC 40 (AKH), 2015 WL 6869337, at *2 (S.D.N.Y. Nov. 6, 2015) (“Under *Omnicare*, an auditor can be liable under Section 11 for its audit opinion in only three circumstances: (1) if the auditor does not actually hold the stated opinion; (2) if the opinion contains an embedded statement of fact that is misleading; or (3) if the opinion omits a fact that makes the opinion misleading to an ordinary investor.”). In this regard, *SEPTA* states that a material omission claim would require the plaintiff “to identify actual and material steps taken or not taken by [the defendant auditor] in its audit or knowledge it did or did not have in the formation of its opinion” rather than simply “claiming that any reasonable audit would have uncovered a material fact whose omission renders the opinion misleading to a reasonable person reading the statement fairly and in context.” 2015 WL 3833849, at *34; see also *In re Velti PLC Secs. Litig.*, No. 13-cv-03889-WHO, 2015 WL 5736589, at *17-24 (N.D. Cal. Oct. 1, 2015) (citing *Omnicare* and holding that plaintiffs failed to plead a Section 11 claim against the auditor).

A. Auditor's Opinion on the Financial Statements

A reasonable investor should understand the distinction between an opinion on financial statements and the underlying financial statements to which the opinion refers. The distinction is significant under Section 11. To impose liability on an auditor for any portion of the registration statement, Section 11 requires that the auditor explicitly have consented to be **named** as having prepared or certified the portion of the registration statement or report in question.²⁵ “Accountants are liable under Section 11 only for those matters which purport to have been prepared or certified by them.”²⁶

²⁵ 15 U.S.C. §77k(a)(4).

²⁶ *Herman & MacLean v. Huddleston*, 459 U.S. 375, 381 (1983).

1. The Auditor Does Not Purport to Prepare Financial Statements

Under PCAOB standards, the auditor is not named as having prepared the audited financial statements, and the financial statements do not purport to have been prepared by the auditor.

Indeed, the audit report itself and PCAOB standards preclude any argument that the auditor is “named” as having prepared the company's financial statements. PCAOB standards specifically require that the audit report state that “the financial statements are the responsibility of the company's management and that the auditor's responsibility is to express an opinion on the financial statements based on” the audit.²⁷ Other PCAOB standards elaborate on this division of responsibility: “[T]he fair presentation of financial statements in conformity with [GAAP] is an implicit and integral part of management's

responsibility.”²⁸ In contrast, the auditor's responsibility for the audited financial statements is “confined to the expression of his or her opinion on them,” even if the auditor “may make suggestions about the form or content of the financial statements or draft them, in whole or in part, based on information from management during the performance of the audit.”²⁹ Auditors do not, “by virtue of auditing a company's financial statements, somehow make, own or adopt the assertions contained therein.”³⁰

²⁷ PCAOB AU §508.08(c).

²⁸ PCAOB AU §110.03.

²⁹ *Id.*

³⁰ *Deephaven*, 454 F.3d at 1174 (citations omitted).

2. The Auditor Does Not Purport to Guarantee the Financial Statements

That leaves the question of whether the auditor should be viewed under Section 11 as having guaranteed the accuracy of the company's financial statements. Notwithstanding the SEC's definition of “certified” set forth above, some courts have answered that question in the affirmative on the theory that even if labeled as an opinion, an audit report “affirm[s] the accuracy” of the financial statements.³¹ Others have disagreed because “auditors do not ‘certify’ a company's financial statements in the sense that they ‘guarantee’ or ‘insure’ them.”³² In light of the SEC's definition of “certified,” *Omnicare* should have ended this debate—the auditor's statements in the audit report that (a) the financial statements comply with GAAP, (b) the audit complies with PCAOB standards, and (c) the audit provides a reasonable basis for the auditor's opinion on the financial statements are all statements of opinion.

³¹ *In re OSG Secs. Litig.*, 971 F. Supp. 2d 387, 400 (S.D.N.Y. 2013) (“It is difficult to imagine what Congress might have meant by an accountant's certification if not an audit affirming the accuracy of the documents in question.”); *cf. In re Lehman Bros. Secs. and Erisa Litig.*, No. 09-MD-2017 LAK, 2015 WL 5514692, at *11 (S.D.N.Y. Sept. 18, 2015) (“[W]hile I would rephrase that statement [in *In re OSG Secs. Litig.*] to reflect the fact that an auditor's GAAP opinion expresses the view that the issuer's financial statements fairly present the issuer's financial position and the results of its operations as distinguished from ‘affirm[ing] the [] accuracy’ of the financial statements the basic point remains the same.”).

³² *Deephaven*, 454 F.3d at 1174 (citations omitted).

That the auditor's statements are labeled as opinions matters under *Omnicare*. Labeling or forming a statement as an opinion expresses uncertainty: “[A]lthough a plaintiff could later prove that opinion erroneous, the words ‘I believe’ themselves admitted that possibility, thus precluding liability for an untrue statement of fact.”³³ Statements of fact express certainty; statements of opinion do not.³⁴

³³ *Omnicare*, 135 S. Ct. at 1326.

³⁴ *Id.* at 1325.

An audit report expresses uncertainty by labeling its conclusions on the financial statements as opinions and beliefs. It further makes clear that these statements fit the

definition of opinions and beliefs because they “rest on grounds insufficient for complete demonstration”:³⁵

- “Our responsibility is to express **an opinion** on these financial statements based on our audit.”
- “[PCAOB] standards require that we plan and perform the audit to obtain **reasonable assurance** about whether the financial statements are free of material misstatement.”
- “An audit includes examining, **on a test basis**, evidence supporting the amounts and disclosures in the financial statements.”
- “**We believe** that our audits provide a **reasonable basis** for **our opinion**.”
- “**In our opinion**, the financial statements referred to above present fairly, in all material respects, the financial position of X Company as of [at] December 31, 20XX, and the results of its operations and its cash flows for the year then ended in conformity with accounting principles generally accepted in the United States of America.”³⁶

³⁵ *Id.* (“[A]n opinion ‘rest[s] on grounds insufficient for complete demonstration.’” (citation omitted)).

³⁶ PCAOB AU §508.08(j) (emphasis added).

PCAOB standards further underscore the uncertainty inherent in an audit opinion:

- “Because of the nature of audit evidence and the characteristics of fraud, the auditor is able to obtain reasonable, but not absolute, assurance that material misstatements [in the financial statements] are detected.”³⁷
- “Since the auditor’s opinion on the financial statements or internal control over financial reporting is based on the concept of obtaining reasonable assurance, the auditor is not an insurer and his or her report does not constitute a guarantee.”³⁸
- “Some degree of uncertainty is implicit in the concept of ‘a reasonable basis for an opinion’ referred to in the third standard of field work. The justification for accepting some uncertainty arises from the relationship between such factors as the cost and time required to examine all of the data and the adverse consequences of possible erroneous decisions based on the conclusions resulting from examining only a sample of the data. If these factors do not justify the acceptance of some uncertainty, the only alternative is to examine all of the data. Since this is seldom the case, the basic concept of sampling is well established in auditing practice.”³⁹

³⁷ *Id.* at §110.02.

³⁸ *Id.* at §230.13.

³⁹ *Id.* at §350.07.

Considered in context, reasonable investors should understand that the audit opinion on the financial statements does not express certainty. As a result of this uncertainty, the audit report cannot mean that the auditor is named as having certified the accuracy of the company's financial statements.

3. The Auditor Does Not Express Certainty Regarding Compliance With PCAOB Standards

PCAOB standards also require an auditor to describe the nature of an audit in the scope paragraph and to state that the auditor conducted the audit in accordance with the standards.⁴⁰ The audit report typically satisfies the latter requirement in the first sentence of the scope paragraph with what appears to be a declarative statement: "We conducted our audits in accordance with the standards of the [PCAOB]." ⁴¹ Courts have previously disagreed on whether this is a statement of fact or a statement of opinion. ⁴² The contextual analysis mandated by *Omnicare* demonstrates that the reasonable investor should understand the statement to express the auditor's judgment or opinion that the audit complied with the standards.

⁴⁰ PCAOB AS 1, ¶ 3; PCAOB AU §508.08(d).

⁴¹ PCAOB AS 5, ¶ 87.

⁴² See *Oaktree Capital Mgmt., L.P. v. KPMG*, 963 F. Supp. 2d 1064, 1086 (D. Nev. 2013) (reviewing cases).

While the form of the statement is important under *Omnicare*, at least equally important is the context of the statement, including all surrounding text, hedges, disclaimers, apparently conflicting information and the customs and practices of the relevant industry.

⁴³ This contextual approach comports with common law:

⁴³ 135 S. Ct. at 1330.

A statement that is in form one of positive assertion of a fact may be made under such circumstances that it must be understood as conveying only an expression of the maker's belief, not free from doubt. ⁴⁴

⁴⁴ Restatement (Second) of Torts §538A, comment (d) (Am. Law Inst. 1977).

Common law also recognizes that a representation is one of opinion if it expresses only a matter of judgment. ⁴⁵ *Omnicare* reprised this theme in holding that Section 11 "does not allow investors to second-guess inherently subjective and uncertain assessments." ⁴⁶

⁴⁵ *Id.* at §538A.

⁴⁶ 135 S. Ct. at 1327.

In context, an assessment of whether an audit complied with PCAOB standards is a matter of considerable judgment on many levels. As an initial matter, the standards themselves state that their nature "requires the auditor to exercise professional judgment in applying them." ⁴⁷ "Many of those standards are couched in rather general and in some cases inherently subjective terms. They require, for example, that the auditor plan the audit engagement properly, use 'due professional care,' exercise 'professional skepticism,' and

'assess the risk of material misstatement due to fraud'—all matters as to which reasonable professionals planning or conducting an audit reasonably and frequently could disagree."

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⁴⁷ PCAOB AU §150.04.

⁴⁸ *In re Lehman Bros. Secs. & Erisa Litig.*, 799 F. Supp. 2d 258, 300-01 (S.D.N.Y. 2011).

The need for judgment continues from there. To comply with the applicable PCAOB standards, the auditor must also "exercise his judgment in determining which auditing procedures are necessary in the circumstances to afford a reasonable basis for his opinion."

⁴⁹ In reaching an audit opinion, "[t]he objective of the auditor is to evaluate the results of the audit to determine whether the audit evidence obtained is sufficient and appropriate to support the opinion to be expressed in the auditor's report."⁵⁰

⁴⁹ PCAOB AU §110.05. "Auditing procedures differ from auditing standards. Auditing procedures are acts that the auditor performs during the course of an audit to comply with auditing standards." PCAOB AU §150.01.

⁵⁰ PCAOB AS 14, ¶ 2.

The auditor sums up these multiple levels of judgment in the last sentence of the scope paragraph: "We believe that our audit provides a reasonable basis for our opinion."⁵¹ Read with this statement and in the context of PCAOB standards, an auditor's statement of PCAOB compliance is simply an expression of an auditor's judgment that the audit was conducted in compliance with the standards. Determining whether the audit complied with the standards "would not be easily answerable as true or false, but would likely instead require reference to the opinions of other auditors."⁵² As the California Supreme Court recognized in *Bily v. Arthur Young & Co.*, "Although ultimately expressed in shorthand form, the [audit] report is the final product of a complex process involving discretion and judgment on the part of the auditor at every stage."⁵³ Its form notwithstanding, the auditor's statement of PCAOB compliance is thus a statement of opinion.⁵⁴

⁵¹ PCAOB AU §§508.08(g), (j).

⁵² *Buttonwood Tree Value Partners, LP v. Sweeney*, No. 10-000537-CJC, 2012 WL 2086607, at *2 (C.D. Cal. June 7, 2012).

⁵³ 3 Cal. 4th 370, 400 (1992).

⁵⁴ *See also Buttonwood Tree Value Partners, LP v. Sweeney*, 910 F. Supp. 2d 1199, 1208 (C.D. Cal. 2012) ("[A]n auditor's GAAS and GAAP assertions are statements of professional judgment and opinion, not verifiable fact.").

B. Omnicare's Material Omission Analysis Is Generally Inapplicable to an Audit Report

Omnicare held that a statement of opinion could also mislead reasonable investors by omission: "[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, then §11's omissions clause creates liability."⁵⁵ It does not appear, however, that this aspect of *Omnicare* has much application in the context of audit reports.

⁵⁵ 135 S. Ct. at 1329.

Omnicare focused in particular on the notion that “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.” ⁵⁶

⁵⁶ *Id.* at 1328.

For example, “an unadorned statement of opinion about legal compliance” could be misleadingly incomplete if made without consulting a lawyer because investors would be likely to expect that the assertion would rest on some meaningful legal inquiry. ⁵⁷

⁵⁷ *Id.*

In contrast, whether an auditor had a proper basis for the opinions in the audit report would not be a matter of omission. PCAOB standards require the auditor to affirmatively state opinions that the audit (a) was conducted in accordance with PCAOB standards, and (b) provided a sufficient basis for the auditor's opinion on the financial statements. ⁵⁸ There is thus no omission as to the basis for the auditor's opinions in this regard. If the auditor's opinions are incorrect, the question of liability must be analyzed under *Omnicare's* guidance on opinions, not its guidance on omissions.

⁵⁸ PCAOB AU §508.08(j).

Omnicare stated that liability could also attach where the opinion does not fairly align with information in the issuer's possession at the time. ⁵⁹ However, an opinion statement is not necessarily misleading simply because the speaker “knows, but fails to disclose, some fact cutting the other way.” ⁶⁰ “Reasonable investors understand that opinions sometimes rest on a weighing of competing facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty.” ⁶¹

⁵⁹ 135 S. Ct. at 1329.

⁶⁰ *Id.*

⁶¹ *Id.*

PCAOB standards make clear that reasonable investors may not infer from an audit report that there were no facts cutting against the auditor's opinions or even that the auditor would have uncovered all such facts in the course of the audit. The standards formalize this understanding as to audits in several respects. The standards recognize that an audit may uncover doubtful or conflicting audit evidence but also recognize that the auditor may perform audit procedures necessary to resolve the matter ⁶² and that “in the great majority of cases, the auditor has to rely on evidence that is persuasive rather than convincing.” ⁶³ PCAOB standards further emphasize that an audit may not necessarily even uncover such competing facts:

⁶² PCAOB AS 15, ¶ 29 (“[T]he auditor should perform the audit procedures necessary to resolve the matter.”). Under PCAOB rules, “[t]he word ‘should’ indicates responsibilities that are presumptively mandatory,” unless the

auditor can demonstrate that alternative actions were sufficient or that the compliance with the specified responsibility was not necessary. PCAOB Rule 3101(a)(2).

⁶³ PCAOB AU §230.11.

[T]he subsequent discovery that either a material misstatement, whether from error or fraud, exists in the financial statements or a material weakness in internal control over financial reporting exists does not, in and of itself, evidence (a) failure to obtain reasonable assurance, (b) inadequate planning, performance, or judgment, (c) the absence of due professional care, or (d) a failure to comply with the standards of the [PCAOB]. ⁶⁴

⁶⁴ PCAOB AU §230.13.

The standard forms of audit report prescribed under PCAOB standards do not discuss or disclose such inconsistent, unreliable or unconvincing facts. Thus, for example, when an auditor who otherwise would issue an unqualified opinion on an entity receives information that raises substantial doubt about the entity's ability to continue as a going concern, PCAOB standards require specific explanatory language. ⁶⁵ When an auditor gives a qualified opinion, PCAOB standards require specific explanatory information in the audit report about the reason for the qualification, such as a scope limitation, ⁶⁶ departure from GAAP, ⁶⁷ or adverse or disclaimed opinion. ⁶⁸ An auditor's failure to provide the PCAOB-required disclosures in any of those situations would support a "material omission" claim. Otherwise, under current PCAOB standards, reasonable investors should not expect that audit reports will convey information not required by PCAOB standards such as information cutting against the auditor's opinion. ⁶⁹

⁶⁵ PCAOB AU §508.11.c.

⁶⁶ PCAOB AU §508.22.

⁶⁷ PCAOB AU §508.35 through .57.

⁶⁸ PCAOB AU §508.58 through .63.

⁶⁹ In response to requests from investors and others for auditors to provide additional information to investors in their reports, in 2013 the PCAOB issued a highly controversial proposal to require auditors to discuss "those matters the auditor addressed during the audit of the financial statements that involved the most difficult, subjective, or complex auditor judgments or posed the most difficulty to the auditor in obtaining sufficient appropriate audit evidence or forming an opinion on the financial statements." PCAOB Release No. 2013-005 at 6 (Aug. 13, 2013). The September 30, 2015 Standard-Setting Agenda issued by the PCAOB's Office of the Chief Auditor notes that the "staff anticipates recommending that the [PCAOB] issue a reproposal of the auditor's reporting standard for public comment in the first quarter of 2016." See <http://pcaobus.org/Standards/Documents/201509-standard-setting-agenda.pdf>.

Reasonable investors would also not expect an auditor to give an unqualified opinion where the auditor (a) did not believe that he or she had conducted an audit in accordance with PCAOB standards, or (b) believed that he or she should issue a different form of opinion that contained such limitations, qualifications, explanations or disclaimers. Again, however, this would not be a matter of omission. The auditor's decision that he or she could issue an unqualified opinion appears in the audit report as a positive assertion of opinion. The auditor's decision not to issue another form of report is based on the auditor's opinion that

the audit was conducted in accordance with PCAOB standards, that the auditor was able to apply all procedures the auditor considered necessary in the circumstances,⁷⁰ that the financial statements comply with GAAP, and that applicable PCAOB standards required no additional information in the report. Similarly, “[t]he auditor's decision to qualify his or her opinion or disclaim an opinion because of a scope limitation depends on his or her assessment of the importance of the omitted procedure(s) to his or her ability to form an opinion on the financial statements being audited.”⁷¹ In other words, the auditor's opinion that the auditor conducted an audit in accordance with PCAOB standards that provided sufficient basis for the opinion that the auditor issued, (accompanied by any required PCAOB explanatory information) is also an opinion that no other form of report was required. A claim that a different form of report was required should therefore be analyzed under *Omnicare* also as a matter of opinion and not one of omission.⁷²

⁷⁰ PCAOB AU §508.22.

⁷¹ PCAOB AU §508.23.

⁷² The district court in *In re Lehman Bros. Securities and Erisa Litigation* (see note 31 above) recently stated broadly that “[t]he logic of *Omnicare* indicates that an auditor, like any other speaker, may omit matter from its opinions on a company's financial statements and its compliance with GAAS that would render those opinions materially misleading to an informed reader.” 2015 WL 5514692, at *10 (citations omitted). As discussed above, however, informed readers should not expect under current PCAOB standards that an audit report will contain disclosures beyond the auditor's opinions in the form prescribed by those standards.

Conclusion

In the wake of *Omnicare*, a reasonable investor's understanding of a statement as one of opinion, and the existence of any material omission relating to such a statement, depend on both the form and the context of the statement. Audit reports are replete with the language of opinion, and PCAOB standards underscore the multiple layers of opinion and judgment ultimately expressed. PCAOB standards also make the basis for each of the opinions in the audit report a matter of affirmative opinion rather than omission, and clarify that reasonable investors may not expect an audit report to disclose facts or doubts cutting against the opinions. In form, substance, and context, the audit report on a company's financial statements is, at its core, a series of opinions. Therefore, under *Omnicare*, an auditor's opinions are not subject to Section 11 liability unless the auditor does not actually hold those opinions or omits from the report material information that is required to be stated under PCAOB standards.

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