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June 12, 2014

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WLF Asks Court to Require “Subjective Falsity” in All Securities Fraud Suits Over Statements of Opinion

(Omnicare, Inc. v. Laborers District Council)

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—Rich Samp, WLF Chief Counsel

WASHINGTON, DC—The Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to overturn an appeals court decision that authorizes imposition of securities fraud liability when corporate officials express genuinely believed statements of opinion. In a brief filed in support of a corporation that told the Securities and Exchange Commission (SEC) it believed it was operating in compliance with all federal laws, WLF argued that a corporation may not be held liable for a statement of opinion simply because others later deem it to have been incorrect.

Section 11 of the Securities Act of 1933 provides a private remedy to a securities purchaser, if the registration statement filed with SEC contains an “untrue statement of a material fact.” The appeals court mistakenly deemed the speaker’s state of mind irrelevant in an action filed under § 11 (due to its lack of a scienter requirement) and held a plaintiff can demonstrate the falsity of a statement of opinion merely by showing it was objectively wrong. WLF argued plaintiffs must also show a speaker did not genuinely believe the opinion he expressed, because only then may a statement of opinion be found “untrue.” WLF advised the Court to apply that same “subjective falsity” liability standard to opinion statements under all federal securities laws.

WLF argued that while corporations are properly held accountable when stock purchasers act in reliance on false and material information disseminated by the corporation, purchasers readily understand that statements of opinion do not convey factual information on which they may rely—except that they may count on the fact that senior company officials genuinely believe the opinions they express. WLF filed its brief with the substantial *pro bono* assistance of Douglas Greene, Claire Davis, and Kristin Beneski, attorneys with the Seattle office of Lane Powell P.C.

After filing its brief, WLF issued a statement as follows by Chief Counsel Richard Samp: “Shareholders would be harmed by a rule that deters public companies from openly sharing their opinions. Such opinions provide shareholders with valuable information about the company’s business and financial condition. By exposing corporate actors to liability whenever their subjective judgments are later determined to be ‘wrong,’ the appeals court’s decision harms the very shareholders that the plaintiffs’ bar claims to be serving.”

WLF is a public interest law firm and policy center that regularly litigates in support of civil justice reform, to ensure that unwarranted lawsuits do not drive up costs for all consumers.