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Investor Alert

The Supreme Court's *Macquarie Infrastructure* Decision: Pure Omissions and Half-Truths

On April 12, 2024, the United States Supreme Court issued a unanimous opinion in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, which vacated a judgment by the United States Court of Appeals for the Second Circuit that had reinstated private securities fraud claims based on allegations of pure omissions under Rule 10b-5(b).[1] Central to the Court's decision was its distinction between the actionability of claims based on pure omissions and those based on half-truths. Delivered by Justice Sotomayor, the Court's opinion held that claims premised on pure omissions—silence on a subject—are not actionable under Rule 10b-5(b) even where an SEC Rule or Regulation requires disclosure. Rather, omissions-based claims require an affirmative or active statement—half-truths that render such statements made misleading—to be actionable.

Through its holding, the Court resolved a longstanding circuit split concerning the actionability of pure omissions under Rule10b-5(b). It also solidified the necessity of pleading such claims by alleging affirmative half-truths impacting the overall veracity of statements made. In this respect, the Court's decision creates consistency in the treatment of claims based on pure omissions in various jurisdictions.

Practically, the Court's decision is narrow in scope. Because relatively few claims allege pure omissions as the sole basis for liability under Rule 10b-5(b), the opinion is unlikely to meaningfully alter the landscape of private securities claims in the near-term. However, the Court declined to opine on important aspects of claims premised on half-truths, as well as the application of its pure omission analysis to other subsections of Rule 10b-5, such as scheme liability. As a result, lower courts will be charged with resolving those issues as they arise. Critically, the decision also carries the potential to disincentivize companies from speaking on a particular troublesome subject matter given that silence alone, when untethered to an affirmative statement, is insufficient to bring a private securities fraud claim under Rule 10b-5(b).

Question Before the Supreme Court

Promulgated under Section 10(b) of the Securities and Exchange Act of 1934, Rule 10b-5(b) makes it unlawful to omit material facts in connection with buying or selling securities when that omission renders "statements made" misleading. In *Macquarie*, the Court addressed the question of whether a failure to disclose information required by Item 303 of SEC Regulation S-K ("Item 303") could support a private action under Rule 10b-5(b), if the failure alleged is a "pure omission" and does not render any "statements made" misleading.[2]

[1] *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 2024 U.S. LEXIS 1575, 601 U.S. ___ (Apr. 12, 2024).

[2] *Id.* at *5-6.

Relevant to the decision, Item 303 requires companies to disclose certain information in periodic SEC filings, including "Management's Discussion and Analysis of Financial Conditions and Results of Operation," often referred to as a company's MD&A. Item 303 requires disclosure of "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[3]

Throughout its opinion, the Court was careful to acknowledge the limited scope of the question before it.[4] Notably, the Court focused its analysis only on its "pure omission analysis" and declined to opine on issues "tangential to the question presented" including the meaning of "statements made" or application of its pure omission analysis to other subsections of Rule 10b-5.[5]

Factual and Procedural Background

Petitioner Macquarie Infrastructure Corporation ("MIC") owns a subsidiary that operates bulk liquid storage terminals within the United States, which handle and store petroleum, biofuels, chemicals, and oil products. One of the liquid commodities stored at these terminals included No. 6 fuel oil, a high-sulfur fuel oil byproduct, with a typical sulfur content close to 3%. In 2016, the United Nations' Internal Maritime Organization ("IMO") formally adopted IMO 2020, a regulation capping the sulfur content of fuel oil used in shipping at 0.5% by 2020.

Despite IMO 2020 impacting MIC's subsidiary's ability to store No. 6 fuel oil due to its sulfur content, MIC did not discuss IMO 2020 in its public offering documents following its 2016 enactment. In February 2018, however, MIC announced a drop in the amount of storage contracted for use by its subsidiary due in part to the decline in the No. 6 fuel oil market. Following this disclosure, MIC's stock price fell 41%.

Moab Partners, L.P. ("Moab") filed suit in the Southern District of New York alleging, among other things, a violation of Section 10(b) and Rule 10b-5(b). Moab alleged that MIC's public statements were false and misleading because MIC concealed from investors that its subsidiary's largest product was No. 6 fuel oil, which had been affected by a "near-cataclysmic ban" through IMO 2020.[6] Moab alleged that MIC had a duty to disclose the extent to which its subsidiary's storage capacity involved No. 6 fuel oil and that MIC violated its disclosure obligations under Item 303, and in turn, Section 10(b) and Rule 10b-5(b), by staying silent on the subject.

The District Court dismissed Moab's complaint, concluding that Moab failed to plead an uncertainty that should have been disclosed and failed to identify filings where MIC should have disclosed the information. The Second Circuit reversed, reasoning that MIC did indeed have a duty to disclose the impact of IMO 2020 pursuant to Item 303. In reversing, the Second Circuit concluded that a failure to disclose under Item

[3] *Id.*
[4] *Id.* at *12, fn. 2.
[5] *Id.*
[6] *Id.* at *7.

303—a pure omission—can support a claim under §10(b) and Rule 10b-5(b) without an otherwise-misleading statement.

Notably, the Supreme Court's decision in *Macquarie* resolved an ongoing circuit split regarding whether staying silent in violation of Item 303's duty to disclose could serve as an independent basis for a securities fraud claim under §10(b) and Rule 10b-5(b), absent a connection to statements already made.[7]

Analysis: Pure Omissions v. Half-Truths

In the context of Section 10(b) cases, pure omissions occur "when a speaker says nothing, in circumstances that do not give any special significance to that silence."[8] Pure omissions occur in a vacuum and do not distort affirmative statements made. By contrast, half-truths, are "representations that state the truth only so far as it goes, while omitting critical qualifying information."[9] Half-truths are affirmative statements that, by omitting a material fact, render that affirmative statement false and misleading. As the Court analogized, "[i]n other words, the difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake and telling them he had dessert."[10]

In deciding the narrow question before it, the Court reasoned that Rule 10b-5(b) does not proscribe pure omissions through its text. Rather, the Rule prohibits omitting material facts necessary to make the "statements made . . . not misleading."[11] Extending the analogy above, the Court interpreted Rule 10b-5(b) as requiring "disclosure of information necessary to ensure that the statements already made are clear and complete (*i.e.*, that the dessert was, in fact, a whole cake)."[12]

By rejecting Moab's argument that a plaintiff need not plead any statements rendered misleading by a pure omission because reasonable investors know that Item 303 requires an MD&A to disclose all known trends and uncertainties, the Court reinforced that the "statements made" portion of Rule 10b-5(b)'s text is central to its private right of action. In support of this point, the Court compared Section 11(a) of the Securities Act of 1933, which purposefully includes an express prohibition against omissions in registration statements, unlike Section 10(b). While foreclosing private actions under Rule 10b-5(b) based on pure omissions, through its holding, the Court clarified that "private parties remain free to bring claims based on Item 303 violations that

[7] *Compare Stratte-McClure v. Morgan Stanley*, 776 F. 3d 94, 101 (2d Cir. 2015) (finding Item 303's affirmative duty to disclose can serve as the basis for a private securities fraud claim under Section 10(b)), with *In re Nvidia*, 768 F. 3d 1046, 1056 (9th Cir. 2014) (finding Item 303's affirmative duty to disclose insufficient to form the basis of a private securities fraud claim under Section 10(b)).

[8] *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 2024 U.S. LEXIS 1575, *3, 601 U.S. ___ (Apr. 12, 2024).

[9] *Id.*

[10] *Id.* at *10.

[11] *Id.*

[12] *Id.*

create misleading half-truths."[13] The Court also emphasized that the SEC retains authority to prosecute violations of its own regulations, even if a private right of action is foreclosed on the basis of pure omissions allegations.

Practical Impact

Though resolving a long-time circuit split, the Court's ruling in *Macquarie* is narrow in scope. It is specific to cases alleging only pure omissions under Item 303 as a basis for liability under Rule 10b-5(b), which is a relatively rare independent basis for a private securities claim. Based on the ruling, pure omissions related to Item 303 can no longer serve as a basis to plead a Rule 10b-5(b) violation. As discussed above, the Court's decision declined to opine on the impact this ruling would have on claims brought pursuant to other subsections of Rule 10b-5, such as scheme liability, as well as the effect that its rejection of pure omissions theories under Rule 10b-5(b) would have on lower court's analysis of actionable half-truths.[14] As a result, lower courts will be left to perform potentially varied analyses with respect to these open issues as they arise. It is likely that the distinction between pure omissions and half-truths will become a meaningful area of interpretation going forward.

From a practical standpoint, the most important aspect of the decision for plaintiffs will be that they must plead an affirmative representation, or half-truth, in connection with omissions-based theories under Rule 10b-5(b). Accordingly, in order to plead their claims effectively, practitioners will need to scour regulatory filings, earnings calls, and other sources of public corporate statements that are sufficiently related to the omitted information to render the statement a half-truth.

The Court's ruling has the potential to incentivize companies to stay silent with respect to troubling topics. Because companies can choose not to speak on a given subject, plaintiffs might have to rely on savvy analysts to ask pointed questions about such topics in order to elicit company responses that plaintiffs can use to plead their claims.

[13] *Id.* at *13.

[14] *Id.* at *13, fn. 2.

Labaton Keller Sucharow's lawyers are available to address any questions you may have regarding these developments. Please contact the Labaton Keller Sucharow lawyer with whom you usually work or the contacts below.

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