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

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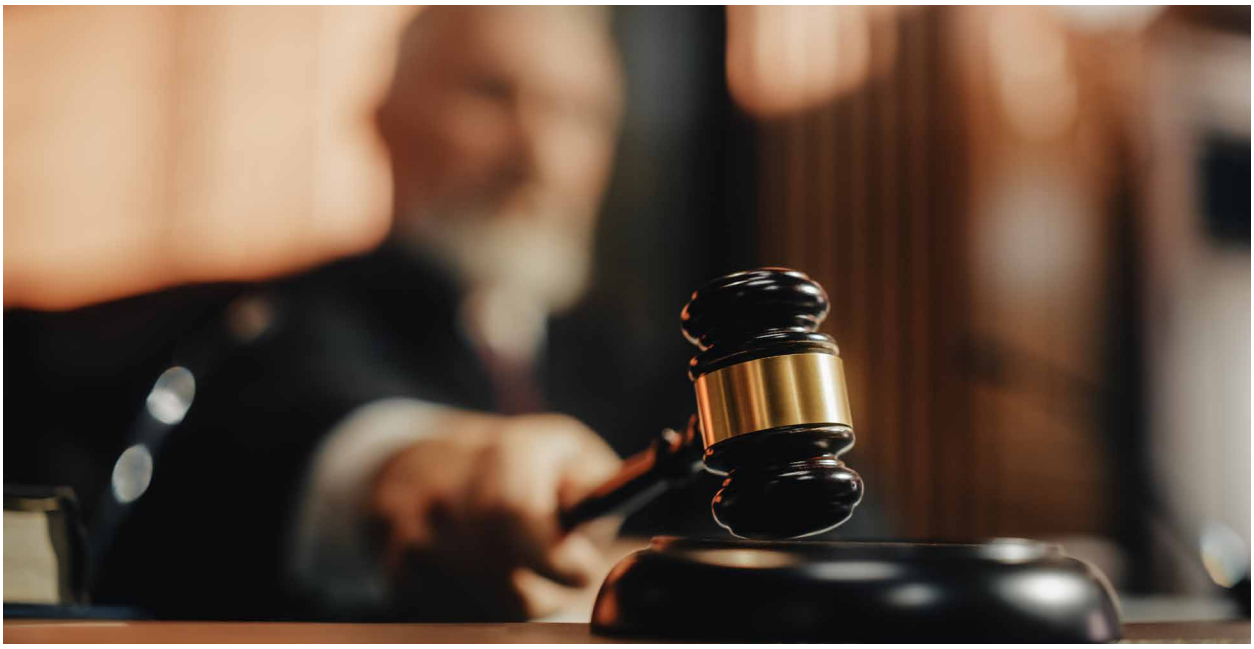

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The United States Supreme Court's unanimous opinion in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.* which held that claims premised on pure omissions are not actionable under Rule 10b-5(b).[1] Rather, actionable omissions must make an affirmative statement a misleading half-truth.

Through its holding, the Court resolved a longstanding circuit split and created consistency. Practically, the Court's decision is narrow because relatively few claims allege pure omissions as the sole basis for liability under Rule 10b-5(b). The decision also carries the potential to disincentivize companies from speaking on a particular troublesome subject matter, given that silence alone cannot give rise to 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.[2] In *Macquarie*, the Court addressed the question of whether a failure to disclose certain known trends and uncertainties 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.[3]

Throughout its opinion, the Court 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.[4]

Factual & Procedural Background

Petitioner Macquarie Infrastructure Corporation ("MIC") owns a subsidiary that handles and stores certain chemicals, including No. 6 fuel oil, a byproduct with a typical sulfur content of 3%.[5] In 2016, the United Nations' International Maritime Organization ("IMO") formally adopted a regulation capping the sulfur content of fuel oil used in shipping at 0.5% by 2020.[6]

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.[7] 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%.[8]

Moab Partners, L.P. ("Moab") filed suit in the Southern District of New York, alleging, among other things, a violation of Rule 10b-5(b) premised on MIC staying silent on IMO 2020's impact despite its Item 303 disclosure obligations.[9] The District Court dismissed Moab's complaint, and the Second Circuit reversed, concluding that a failure to disclose under Item 303—a pure omission—can support a claim under §10(b) and Rule 10b-5(b), without an otherwise-misleading statement.[10]

Analysis: Pure Omissions v. Half-Truths

In the context of Section 10(b) cases, pure omissions occur in a vacuum, "when a speaker says nothing, in circumstances that do not give any special significance to that silence."[11] By contrast, half-truths "state the truth only so far as it goes, while omitting critical qualifying information."[12] 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."[13]

The Court reasoned that Rule 10b-5(b) does not proscribe pure omissions through its text.[14] 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)."[15]

Despite its narrow holding, the Court clarified that private parties remain free to bring claims based on misleading half-truths and the SEC retains authority to prosecute regulatory violations.[16]

Practical Impact

The Court's decision resolved a long-standing circuit split.[17] However, cases alleging only pure omissions under Item 303 as a basis for liability under Rule 10b-5(b) are relatively rare.

Further, the Court declined to opine on the impact this ruling would have on claims brought pursuant to other subsections of Rule 10b-5, including scheme liability. The Court also did not opine on 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.[18] As a result, lower courts will be left to perform potentially varied analyses with respect to these open issues as they arise.

Practically, 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, to plead their claims effectively, practitioners will need to scour publicly available sources that are sufficiently related to the omitted information to render the statement a half-truth.

Further, 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 to elicit company responses that plaintiffs can use to plead their claims. ◆

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Endnotes:

[1] *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024).
[2] *Id.* at 263.
[3] *Id.* at 257.
[4] *Id.* at 266, n.2.
[5] *Id.* at 261.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.* at 261-62.
[10] *Id.*
[11] *Id.* at 263.
[12] *Id.*
[13] *Id.* at 264.
[14] *Id.* at 264-65.
[15] *Id.*
[16] *Id.* at 266, n.2.
[17] 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)).
[18] *Macquarie Infrastructure Corp.*, 601 U.S. at 266, n.2.