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Supreme Court Decides Pure Omissions Are Not Actionable Under Rule 10b-5(b) in *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.*

On April 12, 2024, the Supreme Court issued its decision in *Macquarie Infrastructure Corp.* v. *Moab Partners, L.P.,*[1] unanimously holding that a failure to disclose information required by Item 303 of Regulation S-K cannot support a private claim under Rule 10b-5(b) in the absence of an otherwise-misleading statement. The decision confirms that "pure omission" claims are not actionable under Rule 10b-5(b), meaning that plaintiffs claiming an "omission" of a material fact under Rule 10b-5(b) must show that the omission rendered statements made by the defendant misleading.

Background

Section 10(b) of the Securities Exchange Act broadly prohibits deception in connection with the purchase or sale of securities. Rule 10b-5(b) provides a private cause of action for investors and shareholders to sue a public company if it "make[s] any untrue statement of a material fact or [ ] omit[s] to state a material fact necessary in order to make the statements . . . not misleading." Item 303 of the SEC's Regulation S-K requires public company management to provide investors with an understanding of how market trends or changes may affect the company's financial performance. Specifically, Item 303 requires public companies to disclose "a[ny] trend, demand, commitment, event or uncertainty" that is both "*presently known to management* and *reasonably likely to have material effects* on the registrant's financial conditions or results of operations." Item 303 does not provide shareholders or investors with a private cause of action for alleged violations of its disclosure requirements. The SEC may, at its discretion, choose to sue a public company to enforce investors' rights under Item 303.

In this case, defendant Macquarie Infrastructure Corporation is a former publicly traded company that owns and operates a large portfolio of businesses related to infrastructure. One of these portfolio companies was International-Matex Tank Terminals ("IMTT"), a bulk liquid storage service that is used to store refined petroleum products. IMTT primarily stores a fuel

[1] Paul, Weiss represents defendant-respondent Barclays Capital Inc. in this matter.

type called No. 6 fuel oil. In 2020, the International Maritime Organization adopted a new regulation, known as "IMO 2020," that significantly restricted the use of No. 6 fuel oil by applying a cap on the allowable level of sulfur in fuel oil and banning the use of fuels with sulfur contents of 0.5% or more.

In February 2018, Macquarie missed its financial projections and announced that IMTT's storage tank capacity use had dropped and that the falling sale price of No. 6 fuel oil had led to many of IMTT's customers terminating its storage contacts. The stock price fell around 41%.

In response, Moab Partners L.P., representing a class of Macquarie investors, brought suit, alleging that Macquarie defrauded its investors from 2016 to 2018 by failing to predict and disclose the high material risk of the proposed IMO 2020 regulation on IMTT's business. In particular, Moab argued that Macquarie failed to disclose IMTT's high level of reliance on No. 6 fuel oil.

Proceedings Below

Moab sued Macquarie and various other defendants in the Southern District of New York, alleging that Macquarie violated Rule 10b-5(b) by concealing from investors the extent to which IMTT relied on No. 6 fuel oil and the likely material effects of IMO 2020 on its financial condition. Moab argued that Macquarie had a duty to disclose this information under Item 303, and that this pure omission constituted a misrepresentation of material fact under Section 10(b) of the Exchange Act. The district court granted Macquarie's motion to dismiss, holding that (1) Moab did not plead any *actionable misstatements* by Macquarie that would give rise to liability under Rule 10b-5(b), and (2) Macquarie was not obligated under Item 303 to make disclosures about IMTT's reliance on No. 6 fuel oil storage.

The Second Circuit vacated the district court's judgment. The Second Circuit reasoned that Moab did plead actionable omissions under Section 10(b), and that Macquarie did have an obligation under Item 303 to make the IMTT-related disclosures because Macquarie and its officers were aware of the impact that IMO 2020 may have on its financial performance. The Second Circuit is the only circuit court to hold that omissions of Item 303 disclosures, without any accompanying affirmative statement, could serve as the basis for private actions under Section 10(b). The Third, Ninth, and Eleventh Circuits have all rejected this argument, holding that Section 10(b) liability requires untrue or misleading statements, so allegedly omitted disclosures under Item 303 do not give rise to a Section 10(b) private cause of action.

The Supreme Court granted certiorari on the question of whether the Second Circuit erred in holding that a failure to make a disclosure required under Item 303 of SEC Regulation S-K can support a private claim under Section 10(b) of the Securities Exchange Act of 1934, even in the absence of an otherwise misleading statement.

Supreme Court Decision

In a unanimous opinion written by Justice Sotomayor, the Supreme Court held that pure omissions are not actionable under Rule 10b-5(b).

The Court reasoned that Rule 10b-5(b) requires plaintiffs to identify affirmative statements, i.e., a "statement made," before determining if other facts are needed to make those statements "not misleading." Focusing on the text of the Rule, the Court explained that it required disclosure of information only when necessary to ensure that statements already made were clear and complete. The Court compared that language to the language of Section 11(a) of the Securities Act of 1933, which the Court interpreted expressly to create liability for a pure omission where the regulated party has a duty to speak.

The Court also rejected Moab's argument that a failure to disclose information required by Item 303 of SEC Regulation S-K can support a private 10b-5(b) claim in the absence of an otherwise misleading statement. The Court held that an omission is only actionable if the omission renders otherwise-made affirmative statements misleading. In particular, the Court distinguished between "pure omissions"—which it held are not actionable under Rule 10b-5(b)—and "half-truths"—which are actionable under Rule 10b-5(b). The Court noted that private parties can still bring a claim for Item 303 violations that create misleading half-truths, and that the SEC can still prosecute violations of Item 303.

The Court's decision clarifies the scope of actionable "omissions" under Rule 10b-5(b), confirming that, at least under Rule 10b-5(b), even an independent duty to disclose does not automatically render silence misleading. The Court's ruling addresses the circuit split and changes the law in the Second Circuit—home to the greatest number of securities lawsuits among circuit courts. The Court's decision also resolves any uncertainty in the circuits that had yet to address this question. Notably, while the parties in briefing and at oral argument at the Supreme Court had argued over the proper analysis to apply to "half-truths," the Court declined to provide further guidance on when a statement is misleading as a half-truth, or whether Rules 10b-5(a) and 10b-5(c)—the "scheme liability" subsections—would support liability for pure omissions. Courts at the trial and appellate level regularly address when omissions of fact render affirmative statements misleading "half-truths," so public companies still have precedent to draw on in crafting disclosures.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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