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# Supreme Court Rules Pure Omissions Not Actionable under Rule 10b-5

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On April 12, 2024, the U.S. Supreme Court issued its decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165, 601 U.S. \_\_\_ (Apr. 12, 2024), in which the Court held that pure omissions are not actionable under SEC Rule 10b-5(b), resolving a circuit split concerning whether private securities fraud claims could be based on an issuer's failure to disclose information required under Item 303 of SEC Regulation S-K.

## Legal Backdrop

Section 10(b) of the Securities Exchange Act of 1934 makes it "unlawful for any person ... [t]o use or employ, in connection with the purchase or sale of any security ... [,] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. § 78j(b). The SEC implemented this prohibition in Rule 10b-5(b), which makes it unlawful for issuers of registered securities to "make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5(b).

Separately, Section 13(a) of the Exchange Act requires issuers to file periodic informational statements. 15 U.S.C. §§ 78m(a)(1), 78m(b)(1). These statements contain the information required by Item 303 of Regulation S-K, including a "[d]escription of] any 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." 17 C.F.R. § 229.303(b)(2)(ii).

## Factual Background and Procedural History

Macquarie Infrastructure Corporation ("Macquarie") owns a subsidiary that operates large "bulk liquid storage terminals" in the United States. *Op.*, at \*2. One of the commodities stored in these terminals is No. 6 fuel oil, a fuel oil that typically has a sulfur content of around 3%. *Id.* In 2016, the United Nations' International Maritime Organization formally adopted IMO 2020, a regulation that capped the sulfur content of fuel oil used in shipping at 0.5% by the beginning of 2020. *Id.*

Following the adoption of IMO 2020, Macquarie purportedly did not discuss that regulation in its disclosures. *Id.* at \*2-3. In 2018, Macquarie announced that demand for its subsidiary's storage terminals had dropped in part because of the structural decline in the No. 6 fuel oil market. *Id.* at \*3. This announcement caused Macquarie's stock price to drop by 41%. *Id.*

Following the drop in Macquarie's share price, Moab Partners, L.P. ("Moab") sued Macquarie and various officers alleging, *inter alia*, violations of Section 10(b) and Rule 10b-5. *Id.* Moab argued Macquarie's statements were false and misleading because it failed to disclose the fact that IMO 2020 would have a dramatic impact on its bulk liquid storage business. *Id.*

The district court dismissed Moab's complaint, holding Moab had not "actually plead[ed] an uncertainty that should have been disclosed" or "in what SEC filing or filings the Defendants were supposed to disclose it." *Id.* The Second Circuit reversed the district court's ruling, holding that, because Macquarie allegedly had an obligation to disclose the risks associated with IMO 2020 under Item 303, this omission could, on its own, support Moab's securities fraud claims. *Id.* The Second Circuit's decision was in conflict with decisions from the Ninth and Third Circuits. *Id.* at \*4 n.1. Compare *Stratte-McClure v. Morgan Stanley*, 776 F. 3d 94, 101 (2d Cir. 2015) with *In re Nvidia*, 768 F. 3d 1046, 1056 (9th Cir. 2014); *Oran v. Stafford*, 226 F. 3d 275, 288 (3d Cir. 2000).

### The Opinion

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

The Court explained that Rule 10b-5(b) prohibits any "untrue statement[s] of a material fact," as well as omissions of a material fact necessary "to make the statements made ... not misleading." *Op.*, at \*4. The question before the Court was whether Rule 10b-5(b) bars "pure omissions" in addition to "half-truths." *Id.* at \*5. A pure omission occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence. *Id.* In contrast, a half-truth is a representation that omits critical qualifying information. *Id.* As the Court explained, "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." *Id.*

The Court held that Rule 10b-5(b) does not proscribe pure omissions. *Id.* First, the Court noted that the text of the rule prohibits omitting material facts necessary to make the "statements made ... not misleading." *Id.* As a result, there must be some identifiable affirmative assertion that could be rendered misleading due to omitted facts. *Id.* at \*5-6. Second, the Court compared the language of Rule 10b-5(b) to Section 11(a) of the Securities Act of 1933, which prohibits a registration statement that "contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *Id.* at \*6; 15 U.S.C. §77k(a) (emphasis added). The Court explained that the language in Section 11 concerning omissions of a material fact expressly created liability for pure omissions. *Id.* The lack of such language in Rule 10b-5(b) demonstrated Congress's intent to exclude pure omissions from the scope of that rule. *Id.* at \*6-7. The Court emphasized that Section 10(b) and Rule 10b-5(b) are about fraud—not a failure to disclose, even when that disclosure is required by SEC rule (such as Item 303). *Id.* at \*7.

The Court noted that its ruling would not create "broad immunity" for an issuer's failure to disclose information that Congress and the SEC required to be disclosed, because misleading half-truths would still be subject to liability under Rule 10b-5(b) and the SEC is still empowered to pursue other violations of the securities laws. *Id.* at \*7-8.

### Takeaways

In ruling that pure omissions are not subject to liability under Rule 10b-5(b), the Supreme Court has resolved an important circuit split. Going forward, disclosure violations under Item 303 or other

omissions on their own will not give rise to private liability under Rule 10b-5(b). However, such disclosure violations may still support a claim for securities fraud liability, when plaintiffs are able to allege and prove an otherwise-misleading statement, and such omissions may be subject to other enforcement action by the SEC.



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