ALERT MEMORANDUM

Supreme Court Rejects Private Cause of Action for "Pure Omissions" Under Section 10(b).

April 30, 2024

In a unanimous decision resolving a circuit split over the scope of liability for omissions under Section 10(b) of the Securities Exchange Act of 1934, the Supreme Court ruled in favor of defendant Macquarie Infrastructure Corporation ("Macquarie"), holding that Rule 10b–5(b) does not provide a cause of action for pure omissions. The case centered on Macquarie's alleged omission from its public filings of information about a regulation passed in 2016 that ultimately impacted its profits.[1] Investors, including Lead Plaintiff Moab Partners, L.P. ("Moab"), alleged in part that Macquarie failed to disclose "any known trends or uncertainties" that were likely to have a material impact "on net sales or revenues or income" as required by Item 303 of SEC Regulation S-K, and in violation of Rule 10b–5(b)'s prohibition against "omitting a material fact necessary to make the statements made . . . not misleading."[2] The Supreme Court disagreed with Moab, holding that "[p]ure omissions are not actionable under Rule 10b–5(b)."[3] According to the Court, an action for "failure to disclose information required by Item 303 can support a Rule 10b–5(b) claim *only if* the omission renders affirmative statements made misleading."[4] The Court left unanswered "what constitutes 'statements made'" under Rule 10b–5(b), "when a statement is misleading as a half-truth," or "whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions."[5]

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[1] *Macquarie Infrastructure Corp. v. Moab Partners L.P.*, 2024 WL 1588706 (U.S. Apr. 12, 2024).
[2] *Macquarie*, 2024 WL 1588706 at *3; 17 C.F.R. § 240.10b–5(b) (2022); 17 C.F.R. § 229.303(b)(2)(ii) (2022).
[3] *Macquarie*, 2024 WL 1588706 at *6.
[4] *Id.* at *5 (emphasis added).
[5] *Id.* at *6, n. 2.

Relevant SEC Provisions

Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") provides that it is "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."[6] Its implementing regulation, Rule 10b–5, clarifies that (among other things) it is unlawful for issuers of 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 light of the circumstances under which they were made, not misleading."[7] The Supreme Court "has found a right of action implied in the words of [Section 10(b)] and its implementing regulation."[8]

Section 13(a) of the Exchange Act separately "requires issuers to file periodic information statements."[9] These statements include "'Management's Discussion and Analysis of Financial Condition and Results of Operation' (MD&A), in which companies must '[f]urnish the information required by Item 303 of Regulation S-K.'"[10] Item 303 adds that companies must "[d]escribe 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."[11]

Background and Procedural History

Macquarie, a publicly traded Delaware holding company, owns various infrastructure-related businesses.[12] One of those businesses, a wholly-owned Macquarie subsidiary that operates large "bulk liquid storage terminals" in the United States, handles and stores No. 6 fuel oil,[13] which is a byproduct of the petroleum refinement process.[14]

In 2016, the United Nations' International Maritime Organization adopted a regulation, referred to as "IMO 2020," that capped the sulfur content of fuel oil used in shipping at 0.5% starting in 2020,[15] which is well below the typical sulfur content of No. 6 fuel oil,[16] causing many to believe that 'IMO 2020 w[ould] effectively eliminate the use of No. 6 fuel oil for global shipping.'"[17] Following the adoption of IMO 2020 and in the subsequent years, Macquarie did not discuss the regulation in any of its public offering documents.[18]

But in February 2018, Macquarie announced that the percentage of oil storage capacity contracted for use by customers had dropped, partially due to "the structural decline in the [No.] 6 oil market."[19] Macquarie's stock price fell approximately 41% the same day.[20]

Moab sued Macquarie and other individual defendants alleging, in part, that Macquarie had violated Section 10(b) and Rule 10b–5 by failing to disclose information required under Item 303.[21] Specifically, Moab alleged that Macquarie made "false and misleading" public statements by "conceal[ing] from investors that [its subsidiary's] single largest product," No. 6 fuel oil, "faced a near-cataclysmic ban on the bulk of its worldwide use through IMO 2020."[22]

The district court dismissed Moab's complaint, finding in relevant part that Moab had not "actually plead[ed] an uncertainty that should have been disclosed" or "in what SEC filing or filings Defendants were supposed to disclose it."[23] The Second Circuit reversed on appeal. It applied well-

[6] *Id.* at *2 (quoting 48 Stat. 891, 15 U.S.C. § 78j(b)).
[7] *Id.* (quoting 17 C.F.R. § 240.10b-5(b) (2022)).
[8] *Id.* (quoting *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157, 128 S.Ct. 761, 169 L.Ed.2d 627 (2008)).
[9] *Id.* at *3 (citing 15 U.S.C. §§ 78(m)(a)(1), 78*l*(b)(1)).
[10] *Id.* (quoting SEC Form 10–K; SEC Form 10–Q)).
[11] *Id.* (quoting 17 C.F.R. § 229.303(b)(2)(ii) (2022)).
[12] *Id.*; *City of Riviera*, 2021 WL 4084572 at *1.
[13] *Id.*
[14] *Macquarie*, 2024 WL 1588706 at *3.
[15] *Macquarie*, 2024 WL 1588706 at *3.
[16] *Id.*
[17] *City of Riviera*, 2021 WL 4084572 at *2 (citations omitted) (modifications in original).
[18] *Macquarie*, 2024 WL 1588706 at *3.
[19] *City of Riviera*, 2021 WL 4084572 at *4 (citations omitted); *Macquarie*, 2024 WL 1588706 at *3.
[20] *Macquarie*, 2024 WL 1588706 at *3; *City of Riviera*, 2021 WL 4084572 at *4.
[21] *Macquarie*, 2024 WL 1588706 at *3 (citing *City of Riviera*, 2021 WL 4084572 at *10).
[22] *Id.* (quoting *City of Riviera*, 2021 WL 4084572 at *6) (modified).
[23] *Id.* (quoting *City of Riviera Beach*, 2021 WL 4084572 at *10).

settled Second Circuit law that there are "two circumstances which impose a duty on a corporation to disclose omitted facts":[24] first, when there is "'a statute or regulation requiring disclosure,' . . . such as Ite[m] 303,"[25] and second, "[e]ven when there is no existing independent duty to disclose information, once a company speaks on an issue or topic, there is a duty to tell the whole truth."[26] Finding that Moab had "adequately alleged a 'known trend[] or uncertaint[y]' that gave rise to a duty to disclose under Item 303," the Second Circuit held under the first prong above that Macquarie's "failure to make a material disclosure required by Item 303 can serve as the basis . . . for a claim under Section 10(b)."[27]

In its petition for certiorari, Macquarie asked the Supreme Court to decide whether "a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement."[28]

The Supreme Court's Decision

On April 12, 2024, Justice Sotomayor delivered the opinion for a unanimous Court in favor of defendant Macquarie.[29]

The Court began by clarifying the narrow question presented. While Rule 10b–5(b) prohibits "any untrue statement of material fact," it also prohibits "omitting a material fact necessary 'to make the statements made . . . not misleading.'"[30] The case turned on the second prohibition and whether it bars "only half-truths or instead extends to pure omissions."[31] A "pure omission," the Court explained, "occurs when a speaker says nothing, in circumstances that do not give any particular meaning to that silence."[32] "Half-truths," by contrast, "are 'representations that state the truth only so far as it goes, while omitting critical qualifying information.'"[33]

The Court answered that "[p]ure omissions are not actionable under Rule 10b–5(b)."[34] In statutory and regulatory terms, "the failure to disclose information required by Item 303 can support a Rule 10b–5(b) claim *only if* the omission renders affirmative statements made misleading."[35]

The Court relied on the statutory text and context to reach its holding. The text of Rule 10b–5(b) does not "proscribe pure omissions."[36] It requires instead "identifying affirmative assertions (*i.e.*, 'statements made') before determining if other facts are needed to make those statements 'not misleading.'"[37] Section 10(b) and Rule 10b–5(b) therefore do not, alone, "create an affirmative duty to disclose any and all material information."[38] Reading a prohibition on pure omissions into Rule 10b–5(b) would read the words "statements made" out of the text and improperly shift the focus of the Rule and Section 10(b) "from fraud to disclosure."[39] Put differently, Section 10(b) and Rule 10b–5(b) provide a cause of action only for misleading and fraudulent statements, not to enforce any separate, free-standing duty to disclose.

Regarding the statutory context, the Court reasoned that in drafting Section 11 of the Securities Act of 1933, Congress had previously imposed liability for pure omissions—providing a prohibition against "any registration statement that 'contain[s] an untrue statement of material fact *or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading*'"[40]— and therefore knew how to do so.

[24] *Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, 2022 WL 17815767, *1 (2d Cir. Dec. 20, 2022).
[25] *Id.* (quoting *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015)).
[26] *Id.* (quoting *Meyer v. JinkoSolar Holdings Co.*, 761 F.3d 245, 250 (2d Cir. 2014)).
[27] *Id.* at *2.
[28] Pet. for a Writ of Certiorari at *i, *Macquarie Infrastructure Corp. v. Moab Partners L.P.*, 2023 WL 3778765 (U.S. May 30, 2023).
[29] *Macquarie*, 2024 WL 1588706.
[30] *Id.* at *4 (quoting 17 C.F.R. § 240.10b–5(b)).
[31] *Id.* at *4.
[32] *Id.*
[33] *Id.* (citations omitted).
[34] *Id.* at *6.
[35] *Id.* at *5 (emphasis added).
[36] *Id.* at *4.
[37] *Id.* (citations omitted).
[38] *Id.* at *4 (quoting *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44, 131 S.Ct. 1309, 179 L.Ed.2d 398 (2011) (quoting Rule 10b–5(b))).
[39] *Id.* at *5 (citing *Chiarella v. United States*, 445 U.S. 222, 234-235, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980)).
[40] *Id.* (quoting 15 U.S.C. § 77k(a)) (modifications in original).

But neither Congress in Section 10(b) nor the SEC in Rule 10b–5(b) included the same language.[41]

The Court also addressed Moab's contention that absent "private liability for pure omissions under Rule 10b–5(b)," there would be "'broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose.'"[42] Private parties, the Court noted, can still "bring claims based on Item 303 violations that create misleading half-truths."[43] Moreover, the SEC "retains authority to prosecute violations of its own regulations."[44] It is only private parties that cannot bring claims under Rule 10b–5(b) for pure omissions alone.[45]

Practical Implications

While the Court's decision was narrow, and concerned only "pure omission analysis,"[46] it fundamentally changed the Second Circuit standard that read Section 10(b) as providing a private cause of action for a pure omission whenever an issuer had a duty of disclosure – not just under Item 303. Now, for Section 10(b) liability, the failure by an issuer to satisfy any disclosure duty is never in itself actionable by an investor under Rule 10b–5(b). As the decision makes clear, "silence … is not misleading."[47]

That said, the Rule still holds that once an issuer speaks on an issue or topic, the law requires it to tell the whole truth and not leave investors with a misleading impression. The Court did not opine on "what constitutes 'statements made,'" or "when a statement is misleading as a half-truth."[48] This will continue to be an area of investor litigation under Section 10(b), including "claims based on Item 303 violations that create misleading half-truths."[49]

Finally, the Court said it was addressing only claims under Rule 10b–5(b) and not "whether Rules 10b–5(a) and 10b–5(c) support liability for pure omissions."[50] Therefore, while the decision did not technically foreclose such scheme liability claims for pure omissions, it is also the case, at least in the Second Circuit, that misstatements and omissions alone cannot form the basis for scheme liability.[51] So, for now, it is clear that in the Second Circuit Rules 10b–5(a) and 10b–5(c) should not provide some alternative avenue for a claim based on nothing more than an omission.

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[41] *Id.* at *5.
[42] *Id.* at *5 (quoting Brief for Respondent Moab Partners, L. P. 1.).
[43] *Id.* at *5.
[44] *Id.*
[45] *Id.* at *6.
[46] *Id.* at *6, n. 2.
[47] *Id.* at *5 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 239, n. 17, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988)).
[48] *Id.* at *6, n. 2.
[49] *Id.* at *5.
[50] *Id.*. at *6, n. 2.
[51] *See Sec. & Exch. Comm'n v. Rio Tinto plc*, 41 F.4th 47, 49 (2d Cir. 2022); *see also Lorenzo v. Sec. & Exch. Comm'n,* 139 S. Ct. 1094 (2019).