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Supreme Court Unanimously Holds that Pure Omissions Cannot Sustain a Private Claim Under SEC Rule 10b-5(b)

On April 12, 2024, the Supreme Court issued a unanimous decision in *Macquarie Infrastructure Corporation* v. *Moab Partners, L.P.*,[1] holding that a failure to disclose information under Item 303 of Regulation S-K, without more, does not create liability in a private action under SEC Rule 10b-5(b). For the first time, the Court held that Rule 10b-5(b) does not extend to so-called "pure omissions," and proscribes only omissions that render other affirmative statements misleading.

I. Factual and Procedural Background

Macquarie Infrastructure Corporation ("Macquarie") owned and operated a network of infrastructure-related businesses, including a subsidiary, International Matex Tank Terminals ("IMTT"), which operated "bulk liquid storage terminals" in the United States.[2] Among the commodities stored by IMTT was "No. 6 fuel oil," which was commonly used in commercial shipping.[3]

In 2016, however, the United Nations' International Maritime Organization adopted IMO 2020, which banned the use of fuel oil containing more than 0.5% sulfur.[4] Because No. 6 fuel oil generally has a sulfur content of around 3%, commentators predicted that IMO 2020 would effectively force commercial shippers to stop using No. 6 fuel altogether.[5]

Following the adoption of IMO 2020, Macquarie's public offering documents did not mention IMO 2020.[6] In February 2018, however, Macquarie management revealed that IMTT had experienced a substantial decline in the usage of its fuel storage facilities, and principally attributed the downturn to the weakening of the No. 6 fuel oil market.[7] The same day, Macquarie's stock price dropped 41%.[8]

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[1] 144 S. Ct. 885 (2024).

[2] *City of Riviera Beach Gen. Emps. Ret. Sys.* v. *Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB), 2021 WL 4084572, at *1 (S.D.N.Y. Sept. 7, 2021).

[3] *Id.* at *2–3.

[4] *Id.* at *2.

[5] *Id.*

[6] *Id.* at *3.

[7] *Id* at *4.

[8] *Id.*

In the wake of the stock decline, Moab Partners, L.P., a Macquarie investor, and others ("Moab") filed a securities fraud class action against Macquarie in the Southern District of New York. The lawsuit characterized Macquarie's public statements before February 2018, which failed to mention IMO 2020, as false and misleading, and alleged that Macquarie had violated Section 10(b) of the Securities Exchange Act of 1934[9] and Rule 10b-5(b)[10], among other provisions, when it failed to disclose IMTT's vulnerability to IMO 2020.[11] Moab argued in relevant part that Macquarie's duty of disclosure stemmed from its obligations under Item 303 of SEC Regulation S-K, which obliges issuers to disclose 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."[12] The District Court dismissed the complaint, finding that while, pursuant to Second Circuit precedent in *Stratte-McClure* v. *Morgan Stanley*,[13] a failure to disclose under Item 303 *could* form the basis of Section 10(b) and Rule 10b-5(b) liability, on the facts presented, Moab had failed to satisfy the necessary requirements set out in *Stratte-McClure*.[14]

On appeal, the Second Circuit reversed, concluding that, *even in the absence of an affirmative misstatement*, Macquarie had a duty to disclose, pursuant to Item 303, which was sufficient to sustain a claim under Section 10(b) and Rule 10(b)-5. The Court found that "IMO 2020's significant restriction of No. 6 fuel oil use was known to [Macquarie] and reasonably likely to have material effects on [Macquarie's] financial condition or results of operations",[15] satisfying the requirements of *Stratte-McClure.*

This Item 303-based theory of Section 10(b) and Rule 10b-5(b) liability, however, had been explicitly rejected by the Ninth Circuit,[16] and implicitly rejected by the Third Circuit.[17] The Supreme Court granted certiorari to address the issue of "whether a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b) and Rule 10b-5(b) in the absence of an otherwise-misleading statement."[18]

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[9] 15 U.S.C. § 78(j)(b) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange. . . [t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

[10] 17 CFR § 240.10b-5(b) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o 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 . . . in connection with the purchase or sale of any security.").

[11] *City of Riviera Beach Gen. Emps. Ret. Sys*., 2021 WL 4084572, at *6.

[12] 17 CFR § 229.303.

[13] 776 F.3d 94, 101 (2d Cir. 2015).

[14] *City of Riviera Beach Gen. Emps. Ret. Sys*., 2021 WL 4084572, at *14, *20-21. Under *Stratte-McClure*, a plaintiff was required to show that "first . . . some "trend, event, or uncertainty" was "actually know[n]" to a company's management "when [the company] files the relevant report with the SEC, " and second, that the omission in violation of Item 303 "was material," which requires "balancing . . . both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *City of Riviera Beach Gen. Emps. Ret. Sys*., 2021 WL 4084572, at *7 (quoting *Stratte-McClure*, 776 F.3d at 95-103) (internal citations omitted). Judge Broderick held that Moab failed to allege both elements.

[15] *Moab Partners, L.P.* v. *Macquarie Infrastructure Corp.*, 2022 WL 17815767, at *3 (2d Cir. Dec. 20, 2022).

[16] *See In re Nvidia,* 768 F.3d 1046, 1056 (9th Cir. 2014).

[17] *See Oran* v. *Stafford*, 226 F.3d 275, 288 (3d. Cir. 2000).

[18] *Macquarie*, 144 S. Ct. at 892.

II. The Supreme Court's Decision

In a unanimous opinion written by Justice Sotomayor, the Supreme Court held that a private Rule 10b-5(b) claim is untenable when based on a pure omission, even when premised on a failure to disclose in violation of Item 303, emphasizing that Rule 10b-5(b) regulates fraud, not issues of disclosure.

The Supreme Court began its analysis by noting that Rule 10b-5(b) prohibits two discrete categories of misconduct: (i) "false statements or lies"; and (ii) omissions of "a material fact necessary 'to make the statements made . . . not misleading.'"[19] The omission prong of Rule 10b-5(b), the Court held, does not extend to so-called "pure omissions"; it only covers "half-truths" *i.e.*, "representations that state the truth only so far as it goes, while omitting critical qualifying information."[20] To explain the distinction, the Court utilized the analogy of a child failing to tell his parents he ate an entire cake (a pure omission) versus telling his parents he had dessert (a half-truth).[21] Rule 10b-5(b), the Court held, prohibits only the latter.

In holding that Rule 10b-5(b) does not extend to pure omissions, the Court first looked to the text of the Rule. The Court noted that "the Rule requires identifying affirmative assertions (*i.e.*, "statements made") before determining if other facts are needed to make those statements 'not misleading.'"[22] The plain text of Rule 10b-5(b), the Court reiterated, does not "create an affirmative duty to disclose *any and all* material information."[23]

Next, the Court considered other provisions of the Securities Act that *do* expressly proscribe pure omissions. The Court noted that Section 11(a), for example, prohibits any registration statement that "omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading"[24]—a provision the Court had previously held applied when "an issuer fail[ed] to make mandated disclosures."[25] The Court observed that Section 11(a)'s express language prohibiting omissions of "material fact[s] required to be stated therein" was conspicuously absent from Section 10(b) and Rule 10b-5(b).[26]

Having established that Rule 10b-5(b) did not extend to pure omissions, the Court considered the impact on the question before it regarding Item 303. While Item 303 may create a duty to disclose, the Court found that liability under 10b-5(b) cannot be sustained by pleading a pure omission alone.[27] Rather, the omission must exist in relation to an affirmative statement that is made misleading by the omission. In so ruling, the Court rejected Moab's argument that "a plaintiff does not need to plead any statements rendered misleading by a pure omission", finding that such a reading ignored the text of Rule 10b-5(b) and improperly characterized Section 10(b) and Rule 10b-5(b) as provisions regulating disclosure, rather than fraud.[28]

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[19] *Id.* at 890 (quoting 17 C.F.R. § 240.10b–5(b)).

[20] *Id.* at 891 (citation omitted) (quotation omitted).

[21] *Id.*

[22] *Id.* (quoting 17 C.F.R. § 240.10b–5(b)).

[23] *Id.* (emphasis added).

[24] 15 U.S.C. §77K(a).

[25] *Macquarie*, 144 S. Ct. at 891 (citation omitted).

[26] *Id.*

[27] *Id.* at 891–892.

[28] *Id* at 892.

III. Conclusion

The question before the Court was limited to whether the failure to disclose information under Item 303 could sustain liability in a *private action* under Rule 10b-5(b). In answering this question, however, the Court did not limit its holding to private actions. Rather, the Court held that "[p]ure omissions are not actionable under Rule 10b-5(b)."[29] As such, the decision will prevent the SEC, like private litigants, from initiating Rule 10b-5(b) enforcement actions on the basis of pure omissions.

Nonetheless, the decision should not significantly alter the calculus of what an issuer should disclose under Item 303. While the decision narrows theories of liability available to *private* plaintiffs who allege a violation of Rule 10b-5(b) on the basis of Item 303 non-compliance, the Court made clear that it does not impact the SEC's ability to enforce standalone violations of Item 303.[30] The SEC has long brought actions alleging Item 303 violations,[31] and will likely continue to do so in the wake of *Macquarie*.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors John S. MacGregor (Partner) at 212. 701.3445 or jmacgregor@cahill.com; Elizabeth Brown (Associate) at 212.701.3237 or ebrown@cahill.com; or Nicholas R. Barile (Law Clerk) at 212.701.3215 or nbarile@cahill.com; or email publicationscommittee@cahill.com.

[29] *Id.*

[30] The Court stated that "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths . . . [while] the SEC retains authority to prosecute violations of its own regulations . . . including Item 303." *Id.*

[31] *See, e.g.*, Complaint, *SEC* v. *XEROX Corporation*, No. 02-272789 (DLC) (S.D.N.Y. Apr. 11, 2002); *In the Matter of Eric W. Kirchner and Richard G. Rodick*, SEC Rel. No. 3877, 2017 WL 2591798 (Jun. 15, 2017).