

SCOTUS: Pure Omissions Do Not Support Securities Fraud Claims Even If the Omissions Violate SEC Disclosure Requirements

Alert

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Today, the U.S. Supreme Court issued a unanimous decision in *Macquarie Infrastructure Corp. et al. v. Moab Partners L.P. et al.*, holding that an omission to make disclosures required by U.S. Securities and Exchange Commission (SEC) rules cannot support a securities fraud claim under the Securities and Exchange Act (Exchange Act) § 10(b) and Rule 10b-5(b) thereunder when that omission does not render any “statements made” misleading. The Supreme Court thus confirmed that a Rule 10b-5 securities fraud claim must always be based on either affirmative misleading statements or half-truths that are misleading absent further disclosure.

SEC regulations require that the Management Discussion and Analysis section of public companies’ periodic reports include the items required by Item 303 of Regulation S-K. Item 303 requires companies to “describe any known trends or uncertainties that have had or are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.” 17 CFR §229.303(b)(2)(ii).

A Macquarie subsidiary operates “bulk liquid storage facilities” that handled, among other things, fuel oil containing roughly 3% sulfur. In 2016, the United Nations’ International Maritime Organization adopted a regulation (IMO 2020) capping the sulfur content of fuel oil used in shipping at 0.5% beginning in 2020. Macquarie made no disclosures about IMO 2020 in its public filings until February 2018, when it announced that the storage capacity contracted by the subsidiary’s customers had dropped in part due to the deterioration of the high-sulfur fuel oil market. Macquarie’s stock price fell about 41% after this news.

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Moab Partners sued under Exchange Act § 10(b) and Rule 10b-5(b), alleging that Macquarie's public filings were misleading because they failed to disclose that the subsidiary's largest product was high-sulfur fuel oil, and that IMO 2020 would ban much of the global use of that product. Moab alleged that Macquarie had a duty to disclose these facts under Item 303, and that its failure to do so was an actionable violation of § 10(b) and Rule 10b-5.

The district court had dismissed Moab Partners' claims, but the Second Circuit reversed, reasoning that a regulation requiring disclosure created a duty to disclose sufficient to support a Rule 10b-5 fraud claim even in the absence of a defendant's affirmative statement amounting to a "half-truth."

The Supreme Court rejected the U.S. Court of Appeals for the Second Circuit's approach and made clear that Rule 10b-5 "covers half-truths, not pure omissions." Slip Op. at 5. The Court contrasted § 10(b) and Rule 10b-5(b) claims with § 11(a) of the Securities Act of 1933, which prohibits any registration statement containing material misstatements *or omissions*. *Id.* at 6 (explaining that "[n]either Congress in §10(b) nor the SEC in Rule 10b-5(b) mirrored §11(a) to create liability for pure omissions").

The Court also rejected the arguments of Moab and the U.S. that an investor-plaintiff should not have to plead and prove a statement rendered misleading by omission because reasonable investors know that Item 303 requires disclosure of known trends and uncertainties (and presumably should be entitled to rely on compliance with those disclosures). The Court noted that accepting this argument would "read[] the words 'statements made' out of Rule 10b-5(b) and shift[] the focus of that Rule and § 10(b) from fraud to disclosure." *Id.* at 7.

Under the Supreme Court's ruling, private plaintiffs in federal securities fraud lawsuits cannot rely on regulatory disclosure requirements to create a duty to disclose. Rather, such plaintiffs must point to an affirmative misstatement or "half-truth" to state a claim under § 10(b) and Rule 10b-5.

For more information on the U.S. Supreme Court's decision, please contact [Sean Colligan](#), [Steve Quinlivan](#) or one of the attorneys listed below or the Stinson LLP contact with whom you regularly work.

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