CLIENT ALERT

No Statement? Then No Liability Under Rule 10b–5.

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AUTHORS

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On April 12, 2024, the Supreme Court of the United States issued its much-anticipated decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22-1165. In a unanimous decision authored by Justice Sotomayor, the Court vacated a Second Circuit decision and ruled in favor of Macquarie Infrastructure Corp., holding that pure omissions cannot support private claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b–5 thereunder, even where such an omission could give rise to a violation of Item 303 of Securities Exchange Commission Regulation S-K. This decision resolves a split among courts of appeals and further narrows the scope of public companies' liability for private rights of action under the federal securities laws.

Background

Macquarie Infrastructure Corporation ("Macquarie") was a publicly traded company that owned and operated a number of infrastructure-related businesses, including a domestic liquid storage operator that stored "No. 6 fuel oil."[1] In 2008, the International Maritime Organization (the "IMO"), a United Nations agency charged with regulating global shipping, adopted a regulation known as "IMO 2020" that sought to ban the use of fuels such as No. 6 fuel oil by the beginning of 2020. Nevertheless, Macquarie did not publicly acknowledge the threat of IMO 2020 or its predicted adverse impact on Macquarie's business.

[1] Petition for Writ of Certiorari at 10, *Macquarie Infrastructure v. Moab Partners, L.P.*, No. 22-1165 (May 30, 2023) (hereinafter, "Petition for Writ of Certiorari").

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Following a financial decline Macquarie attributed to a decrease in demand for storage of No. 6 fuel oil, securities class action litigation ensued. Moab Partners, L.P. ("Moab"), the lead plaintiff, asserted claims under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b–5 against Macquarie (among others), alleging that the defendants made material misrepresentations and omissions concerning IMO 2020's likely impact on Macquarie and its financial performance.[2]

Central to Moab's allegations was the claim that defendants' disclosures were materially false and misleading because Macquarie "failed to predict and disclose that IMO 2020 would have a material negative impact on [Macquarie's] overall financial performance."[3] Moab argued that defendants had a duty to disclose this information under Item 303 of Securities and Exchange Commission Regulation S-K ("Item 303"), which requires companies to disclose information concerning "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."[4]

Defendants moved to dismiss Moab's complaint, which the United States District Court for the Southern District of New York granted in full. On appeal, the United States Court of Appeals for the Second Circuit reversed. Notably, the Second Circuit held that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for [private] claims under . . . Section 10(b) [of the Exchange Act] if the other elements have been sufficiently pleaded."[5] The decision deepened a circuit split with the Third, Ninth, and Eleventh Circuits over "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."[6]

In September 2023, the Supreme Court granted certiorari to resolve the circuit split on this issue.

Pure Omissions Do Not Give Rise to Section 10b–5 Liability

Today, the Supreme Court vacated the Second Circuit's ruling and remanded, broadly holding that "[p]ure omissions are *not* actionable under Rule 10b–5(b)," and that liability under Section 10(b) and Rule 10b–5 attaches only when an omission renders affirmative statements misleading. 601 U.S. ___, 1, 7 (2024) (emphasis added). The Court explained that Rule 10b–5(b) prohibits only "false statements" (that is, *lies*) and "half-truths" (that is, "representations that state the truth only so far as it goes, while omitting critical qualifying information"). *Id.* at 5.[7]

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2 *See City of Riviera Beach Gen. Employees Ret. System v. Macquarie Infrastructure Corp.*, No. 18-CV-3608 (VSB), 2021 WL 4084572, at *1 (S.D.N.Y. Sept. 7, 2021), *vacated and remanded sub nom. Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, No. 21-2524, 2022 WL 17815767 (2d Cir. Dec. 20, 2022).

3 Petition for Writ of Certiorari at 8–9.

4 *See* 17 C.F.R. § 229.303(a)(3)(ii) (2018).

5 *Moab Partners, L.P. v. Macquarie Infrastructure Corp.*, No. 21-2524, 2022 WL 17815767, at *2 (2d Cir. Dec. 20, 2022), *cert. granted sub nom. Macquarie Infrastructure v. Moab Partners, L.P.*, 216 L. Ed. 2d 1312 (Sept. 29, 2023).

6 Petition for Writ of Certiorari at i.

7 The Court illustrated the distinction as "the difference between a child not telling his parents he ate a whole cake and telling them he had dessert." *Id.* at 5.

Because Rule 10b–5(b) prohibits omissions only when a defendant neglects to "state a material fact necessary to make *the statements made* . . . not misleading," the Court reasoned that it could not logically extend to pure omissions, since a statement is required. *Id.* at 5 (emphasis added). The Court found support for its textual interpretation in statutory context, contrasting Section 10(b) of the Exchange Act to Section 11(a) of the Securities Act of 1933, which extends liability where a registration statement "omit[s] to state a material fact required to be stated therein." *Id.* at 6. No such language is present in Section 10(b) or Rule 10b–5. The Court also cautioned that its ruling does not create "broad immunity" for issuers who fraudulently omit information subject to disclosure, as "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths" under the Exchange Act. *Id.* at 7.

Conclusion

The Supreme Court's decision is a significant victory for public companies. Securities plaintiffs now have one less tool in their arsenal, restricting their ability to bring strike suit litigation that is untethered to actual false or misleading statements, which was a growing trend (no pun intended). By requiring that plaintiffs plead affirmative false or misleading statements, the Court has materially narrowed the scope of Section 10(b) liability.

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