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Supreme Court Holds That Pure Omissions Are Not Actionable Under Rule 10b–5(b)

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On April 12, 2024, the U.S. Supreme Court decided Macquarie Infrastructure Corp. v. Moab Partners, L.P.,[1] and held that SEC Rule 10b–5(b)[2] prohibits only affirmative misstatements and half-truths (i.e., an affirmative statement that is misleading because it omits information). It does not prohibit pure omissions.

In our view, this decision should not have a significant practical impact on future securities litigation.

Macquarie Infrastructure Corporation, through its subsidiary International-Matex Tank Terminals ("IMTT"), operated terminals that stored, among other things, No. 6 fuel oil. In 2016, the United Nations International Maritime Organization adopted regulation IMO 2020, which capped the sulfur content of fuel oil used in shipping at 0.5% by the beginning of 2020. No. 6 fuel oil has a sulfur content closer to 3.0%. Macquarie did not discuss IMO 2020 until February 2018, when Macquarie announced that IMTT's contracted storage capacity had dropped in part because of the structural decline in the No. 6 fuel oil market. Macquarie's stock price fell around 41%.

Moab Partners sued Macquarie, alleging violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5(b). Pursuant to the authority in Section 10(b), Rule 10b-5(b) makes it unlawful for persons 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."[3]

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1 601 U.S. 257 (2024).
2 17 C.F.R. § 240.10b-5(b).
3 Id.


Moab alleged that Macquarie's statements were "false and misleading" because Macquarie "concealed from investors that IMTT's single largest product . . . was No. 6 fuel oil," which "faced a near-cataclysmic ban on the bulk of its worldwide use through IMO 2020."[4] Moab alleged, among other things, that (a) Macquarie was required to disclose the impact of IMO 2020 under Item 303 of SEC Regulation S-K, which requires disclosure of "a trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial conditions,"[5] and (b) the omission of this information rendered affirmative statements false and misleading.

The District Court dismissed the complaint. The Second Circuit Court of Appeals reversed and reinstated the complaint. On review of the Second Circuit's decision, the Supreme Court unanimously held that "[p]ure omissions are not actionable under Rule 10b–5(b)."[6] The Court looked to the text of Rule 10b-5, which prohibits omitting material facts necessary to make the "statements made . . . not misleading," and concluded that "[l]ogically and by its plain text, the Rule requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'"[7]

While this decision is important, in our view it is likely to have limited impact. Under Section 11 of the Securities Act of 1933, investors can still allege claims for pure omissions in connection with IPOs, SPOs, and other securities offerings. Section 11 prohibits any 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."[8] As the Court noted when comparing Section 11 to Rule 10b-5, Section 11 creates liability for both half-truths and a "failure to speak on a subject at all."[9] Also, most complaints alleging violations of Rule 10b-5(b) already allege affirmative statements that were rendered misleading due to the defendants' omissions. This is because prior to the Court's decision in Macquarie, there was a circuit split since at least three Courts of Appeals (Third, Ninth, and Eleventh) covering 15 states had ruled that a failure to disclose information required by Item 303 did not support a Rule 10b-5(b) claim.

Further, Macquarie does not address pure omissions under Rule 10b-5(a) or 10b-5(c),[10] which make it unlawful for any person to "employ any device, scheme, or artifice to defraud" or "engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."[11] In 2019, the Supreme Court stated that "[i]t would seem obvious that the words in these provisions are, as ordinarily used, sufficiently broad to include within their scope the dissemination of false or misleading information with the intent to defraud."[12] We expect future securities actions to allege that pure omissions are violations of Rule 10b-5(a) and 10b5-(c), and for courts to opine whether these rules are broad enough to include claims for pure omissions.

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4 Macquarie, 601 U.S. at 261 (quoting City of Riviera Beach Gen. Emps. Ret. Sys. v. Macquarie Infrastructure Corp., 2021 WL 4084572, *6 (S.D.N.Y. Sept. 7, 2021)).
5 17 C.F.R. § 229.303(a)(3)(ii).
6 Macquarie, 601 U.S. at 266.
7 Id. at 264.
8 15 U.S.C. § 77k.
9 Macquarie, 601 U.S. at 264.
10 Id. at 266 n.2.
11 17 C.F.R. § 240.10b-5.
12 Lorenzo v. SEC, 587 U.S. 71, 78 (2019).

About the Authors

Joshua W. Ruthizer, Partner

Joshua Ruthizer was lead counsel in the securities class action litigation against Microchip Technology Inc. related to Microchip's alleged false statements concerning the acquisition of Microsemi Corporation. In 2022, the litigation resulted in a settlement of $9 million for investors in Microchip common stock. In 2017, Josh and Wolf Popper recovered $43.75 million in settlement for investors in Amedisys, Inc. common stock. This securities fraud litigation alleged Amedisys was engaged in an undisclosed Medicare fraud scheme by which it improperly inflated Medicare reimbursements by pressuring and intimidating nurses and therapists to provide unnecessary treatment to trigger higher fees. Josh and Wolf Popper also recovered $280 million for investors in Residential Mortgage Backed Securities issued by an affiliate of JPMorgan, and also secured a $45 million recovery for the State of New Jersey, Division of Investment in its opt-out litigation against Merrill Lynch.

Prior to joining Wolf Popper, Josh spent six years practicing commercial, securities, and intellectual property litigation at Proskauer Rose LLP. Josh also participated in a six month public interest externship with the Corporation Counsel of the City of New York, first chairing more than fifteen jury trials in New York Supreme Court, Bronx County.

Antoinette ("Debi") Adesanya, Associate

An associate at Wolf Popper LLP since February 2019, Antoinette ("Debi") Adesanya is a graduate of the University of Bristol, U.K. (LL.B., 2014), Georgetown University Law Center, U.S.A. (LL.M., Dean's list, with distinction, 2016), and the Nigerian Law School, Nigeria (B.L., 2017). Prior to joining the firm, Antoinette ("Debi") interned in the legal department of a multi-national company based in Nigeria, and subsequently at two respected firms in New York, specializing in securities and antitrust litigation, and cross-border disputes with China-based companies doing business in the U.S., respectively. An avid volunteer, Antoinette ("Debi") regularly works with pro bono legal organizations within the City.

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