

Macquarie Ruling Raises The Bar For Securities Fraud Claims

By **Michael Hines, Susan Saltzstein and Scott Musoff** (April 17, 2024)

On April 12, the U.S. Supreme Court unanimously reversed and vacated the U.S. Court of Appeals for the Second Circuit's decision in *Macquarie Infrastructure Corp. v. Moab Partners LP*.

The issue presented was whether the failure to make a disclosure pursuant to Item 303 of the U.S. Securities and Exchange Commission's Regulation S-K can serve as the basis for a securities fraud claim under Section 10(b) of the Securities Exchange Act, "even in the absence of an otherwise-misleading statement."

Section 10(b) and Rule 10b-5 make it unlawful for an issuer to "omit a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading." Item 303 of Regulation S-K requires an issuer to disclose "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact" on the issuer's "financial condition or results of operations."

The plaintiffs alleged that Macquarie had made material misstatements and omissions concerning the potential impact of new international fuel regulations on the company's fuel storage business, in violation of both the Securities Act and the Securities Exchange Act.

In support of their claims under Rule 10b-5, the plaintiffs alleged that, under Item 303, Macquarie had a duty to disclose that the company's most profitable subsidiary stood to lose a significant amount of its fuel storage business as a result of impending regulations, known as IMO 2020.

The U.S. District Court for the Southern District of New York granted Macquarie's motion to dismiss, holding that the plaintiffs had failed to plead an actionable misstatement or omission, a violation of Item 303, and scienter.

In an unpublished summary order, the Second Circuit reversed in part, holding that the plaintiffs pled adequately that Macquarie made affirmative misstatements in the form of "half-truths" that required disclosure, and that Macquarie violated Item 303. As to the latter, the panel ruled that failing to make a material disclosure required by Item 303 can serve as a predicate for a Section 10(b) claim, so long as the claim's other elements are well pled.

The Second Circuit's decision created a circuit split with the Third, Ninth and Eleventh Circuits, which had held that Item 303 does not create a duty to disclose under Section 10(b), and that therefore, Item 303 disclosure violations do not necessarily or automatically give rise to Section 10(b) liability.

The Supreme Court held that Rule 10b-5(b) does not proscribe pure omissions. Rather, the plain text of the rule prohibits omitting material facts necessary to make the statements



Michael Hines



Susan Saltzstein



Scott Musoff

made not misleading, which "requires disclosure of information necessary to ensure that statements already made are clear and complete."

In that way, Rule 10b-5 covers half-truths and not pure omissions. Relying both on logic and the plain text of the rule, the court held that the rule "requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'"

The court emphasized its prior decision in *Matrixx Initiatives Inc. v. Siracusano*, where it stated in 2011 that "[Section] 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. Disclosure is required under these provisions only when necessary 'to make ... statements made, in the light of the circumstances under which they were made, not misleading.'"

The court also reasoned that statutory context confirms its plain text reading of the rule. The court explained that Congress imposed liability for pure omissions in Section 11(a) of the Securities Act by prohibiting any registration statement that contains an untrue statement of a material fact, or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

Section 11(a) therefore expressly creates liability for failure to speak on a subject at all, whereas there is no similar language in Section 10(b) or Rule 10b-5(b). The court explained that the lack of any similar language shows that neither Congress in Section 10(b) nor the SEC in Rule 10b-5(b) mirrored Section 11(a) to create liability for pure omissions.

The court rejected the argument that without private liability for pure omissions under Rule 10b-5(b), there will be "broad immunity any time an issuer fraudulently omits information Congress and the SEC require it to disclose" because "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths" and "the SEC retains authority to prosecute violations of its own regulations."

In short, the court held that "[p]ure omissions are not actionable under Rule 10b-5(b)." The court explained that its decision "confirms that 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."

Macquarie is a major setback for the plaintiffs bar, which is now foreclosed from predicating Section 10(b) claims on pure omissions. While the court's opinion specifically addressed Item 303, the ruling should apply to other disclosure obligations under Regulation S-K, including those concerning climate-related information.

Further litigation will focus on the impact of omitted information to previously made statements. In that regard, courts are likely to be skeptical of plaintiffs who attempt to end run the Supreme Court's unanimous ruling by dressing up an omissions case as one alleging a purported half-truth.

Similar to private plaintiffs, the court's opinion also bars the SEC from pursuing enforcement actions under Section 10(b) and Rule 10b-5 based on pure omissions. However, the court specifically acknowledged the SEC's ability to investigate and pursue alleged violations of Item 303 and other disclosure-related rules.

Michael S. Hines is a partner at Skadden Arps Slate Meagher & Flom LLP.

Susan L. Saltzstein is a partner at the firm, and co-deputy of its nationwide securities litigation group.

Scott D. Musoff is a partner at the firm, leads the firm's New York complex litigation and trials group, and is co-deputy head of the firm's nationwide securities litigation group.

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