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Skadden Discusses Scotus Ruling That Omissions Not Actionable Under Section 10(b) of Exchange Act

By Jay B. Kasner, Scott D. Musoff, Susan L. Saltzstein and Michael S. Hines April 18, 2024

Comment

On April 12, 2024, the Supreme Court unanimously reversed and vacated the Second Circuit’s decision in *Macquarie Infrastructure Corporation v. Moab Partners, L.P.* Justice Sonia Sotomayor delivered the opinion for the Court. The issue presented was whether the failure to make a disclosure pursuant to Item 303 of Regulation S-K can serve as the basis for a securities fraud claim under Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), “even in the absence of an otherwise-misleading statement.” The Second Circuit had previously held that a failure to make an Item 303 disclosure constituted an actionable omission that can serve as the basis for a claim under Section 10(b). 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 therefore Item 303 disclosure violations do not necessarily or automatically give rise to Section 10(b) liability.

The petition urged the Supreme Court to resolve the split among the Courts of Appeals, arguing that the Second Circuit’s approach to Item 303 has expanded the scope of the private right of action under Section 10(b), which “is not about the completeness of disclosures,” but about prohibiting “deception.” The petition warned that the Second Circuit’s expansive approach would incentivize over-disclosure to the detriment of issuers and investors. In opposition, the *Moab* plaintiffs argued that “the Second Circuit’s decision did not expand impermissibly the private right of action under § 10(b)” because “plaintiffs must prove both a violation of Item 303 and all the elements of § 10(b).”

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 made ... not misleading,’” which “requires disclosure of information necessary to ensure that statements already made are clear and complete.” In that way, the Rule “covers half-truths, 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*, 563 U. S. 27, 44 (2011), where it stated that “§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 §11(a) of the Securities Act of 1933” by prohibiting “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.’” Section 11(a) therefore expressly “creates liability for failure to speak on a subject at all,” whereas there is no similar language in § 10(b) or Rule 10b-5(b). The Court explained that the lack of any similar language shows 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 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 (i) “private parties remain free to bring claims based on Item 303 violations that create misleading half-truths” and (ii) “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.”

This post comes to us from Skadden, Arps, Slate, Meagher & Flom LLP. It is based on the firm’s memorandum, “Supreme Court Holds Item 303 Omissions Are Not Actionable Under Section 10(b) of Exchange Act,” dated April 12, 2024, and available [here](#).