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# "Half-Truths," Not "Pure Omissions": Supreme Court Limits Section 10(b) Claims Based on Item 303 Nondisclosure to Omissions That Render Affirmative Statements Misleading

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On April 12, 2024, a unanimous U.S. Supreme Court issued an opinion in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, vacating a Second Circuit judgment that had reinstated claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 based on an issuer's alleged failure to disclose business risks posed by an environmental regulation. The Supreme Court held that the Second Circuit erred in holding that a violation of Item 303 of Regulation S-K, which requires disclosure of known trends or uncertainties that may materially impact results, may serve as the basis for a Rule 10b-5 claim. The Court reasoned that Rule 10b-5(b) prohibits false statements and lies, as well as "half-truths"; it does not prohibit "pure omissions."

*Macquarie* marks a tightening of standards in the Second Circuit, which for almost a decade stood alone in sustaining Rule 10b-5 claims based on Item 303 nondisclosure, even absent an affirmative misleading statement. On the other hand, *Macquarie* will not eliminate Item 303-based Rule 10b-5 claims, which will persist where the nondisclosure renders "statements made" misleading.

**Background**

*Macquarie* arose from a United Nations agency's adoption of a regulation, "IMO 2020," which sought to ban the use of shipping fuels with a sulfur content of .5% or greater by 2020. Plaintiff brought a putative class action against Macquarie Infrastructure Corporation and certain executives for violations of the securities laws, including Section 10(b), alleging that, from 2016 until a February 2018 earnings call, defendants were aware of the "cataclysmic" impact that implementation of IMO 2020 would have on a Macquarie subsidiary's business, but concealed that assessment from investors. Plaintiff theorized that the nondisclosure implicated Section 10(b) liability, including because it violated Item 303, which requires issuers to identify "any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations."

Following dismissal of the suit by the district court, the Second Circuit reinstated plaintiff's Section 10(b) claims. The Court explained that "[t]he failure to make a material disclosure required by Item 303 can serve as the basis for . . . a claim

under Section 10(b) if the other elements have been sufficiently pleaded." The Court, moreover, found that plaintiff adequately alleged an Item 303 violation because "it would not have been 'objectively reasonable' for [d]efendants to determine that IMO 2020 would not likely have a material effect on [Macquarie's] financial condition or operations." The Supreme Court granted certiorari on September 29, 2023.

**The Supreme Court's Decision**

In a unanimous opinion authored by Justice Sotomayor, the Supreme Court framed the issue as "whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any 'statements made' misleading." The Court's answer was no: "Pure omissions are not actionable under Rule 10b-5(b)." Therefore, nondisclosure under Item 303 can only support a Rule 10b-5(b) claim "if the omission renders affirmative statements made misleading."

The Court rooted its decision in the language of Rule 10b-5(b), which makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made . . . not misleading." That language, the Court explained, encompasses two distinct prohibited acts: (1) an "untrue statement" and (2) an omission of a fact necessary to make "statements made . . . not misleading." Both require a "statement" to be made, either: (1) a false statement or lie; or (2) "affirmative assertions (*i.e.*, 'statements made')" as to which "other facts are needed to make those statements 'not misleading.'" In other words, Rule 10b-5(b) prohibits "half-truths"—representations that state the truth only so far as it goes, while omitting critical qualifying information—not "pure omissions." The Court thus vacated the Second Circuit's judgment and remanded the case for further proceedings consistent with its opinion.

**Key Takeaways**

- *Tightened standards for Item 303-related Section 10(b) claims in the Second Circuit*. Since 2015, the Second Circuit has stood alone among circuits in allowing Section 10(b) claims based solely on an Item 303 violation, even absent an affirmative misleading statement. By contrast, the Third, Ninth, and Eleventh Circuits have held that Item 303 and other SEC disclosure requirements do not create an independent "duty to disclose," such that a violation in and of itself can support a Section 10(b) claim. With *Macquarie*, that approach now has decisively won the day, establishing a nationwide rule that *only* Item 303 violations that render affirmative statements misleading can support Section 10(b) liability.

- *Possible reduction in forum shopping and imbalance among Circuits for Item 303-related claims*. Over the last decade, it appears that less demanding pleading standard for Item 303 claims has attracted more Item 303-related litigation to the Second Circuit than elsewhere. For example, in a number of years claims in the Second Circuit have been triple or even quadruple such claims filed in the Ninth Circuit. A possible aftereffect of *Macquarie* could be an evening out in the incidence of Item 303 claims among the Circuits, given that the Second Circuit no longer offers the advantage of a plaintiff-friendly rule allowing claims based on an Item 303 violation alone.

- *Impact on ultimate Section 10(b) liability less clear.* The issue addressed in *Macquarie* is only a small piece of the Section 10(b)/Rule 10b-5 puzzle. Aside from an actionable omission, a plaintiff must plead and prove multiple other elements, including materiality, scienter (intent to deceive), and loss causation. *Macquarie* will only be outcome-determinative where plaintiffs can plead and prove an Item 303 violation, as well as all other Section 10(b) elements, but are unable to identify an affirmative misleading statement tied to the Item 303 nondisclosure. Such cases may be quite rare.

- *Clarity on Item 303-related claims under Section 11 and Section 12(a)(2) of the Securities Act*. *Macquarie* clarifies that, unlike Section 10(b), a violation of Item 303, even absent an affirmative misleading statement, may serve as the basis for a claim under Section 11(a) of the Securities Act of 1933, which prohibits misstatements in registration statements, given the language prohibiting any registration statement that "omit[s] to state a material fact required to be stated therein." Conversely, the Court's conclusions about the limits of Rule 10b-5(b) likely apply equally to Section 12(a)(2) of the Securities Act, which only prohibits prospectuses or oral communications that include, like Rule 10b-5(b), "an untrue statement of a material fact or omit[] to state a material fact necessary in order to make the statements . . . not misleading."

- *Is Macquarie the final word on Rule 10b-5 and Item 303? Macquarie* clearly rules out Rule 10b-5(b) claims based solely on Item 303 violations. However, the opinion explicitly notes that it "does not opine on . . . whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions." Rule 10b-5(a) makes it unlawful to "employ any device, scheme, or artifice to defraud," and 10b-5(c) makes it unlawful to "engage in a[n] act, practice, or course of business" that "operates . . . as a fraud or deceit." It is perhaps unlikely that subsections (a) or (c) would be deemed to extend to nondisclosure under Item 303. Courts generally require deceptive conduct to impose liability under Rule 10b-5(a) and (c), and reject claims where the sole basis is alleged misrepresentations or omissions. On the other hand, *Macquarie* teaches that the holdings of lower courts are not necessarily absolute or permanent, and seemingly established precedent can rise or fall at the Supreme Court's command. Thus, the ultimate fate of Rule 10b-5 and its subsections, (a), (b), and (c), remains to be seen.

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