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U.S. Supreme Court Rules on Liability for Item 303 Omissions in Shareholder Suits

Court Holds Nondisclosure of Information Required by SEC Item 303 Cannot, Without More, Form the Basis of a Private Shareholder Lawsuit Under Rule 10b-5(b)

SUMMARY

The U.S. Supreme Court ruled today in *Macquarie Infrastructure Corp.* v. *Moab Partners, L. P.*, 601 U.S. ___, 2024 WL 1588706 (2024), that a violation of Securities and Exchange Commission Item 303—which requires public companies to disclose "known trends or uncertainties" that could impact their income—cannot, in the absence of an otherwise misleading statement, support a private lawsuit brought under SEC Rule 10b-5(b), a regulation that implements Section 10(b) of the Securities Exchange Act of 1934. In a unanimous opinion by Justice Sotomayor, the Court ruled in favor of Macquarie, reversing the Second Circuit's decision allowing such claims to survive a motion to dismiss.

The Court's ruling resolves a circuit split and changes the law in the Second Circuit, which in 2015 held that an Item 303 violation standing on its own *could* form the basis of a 10b-5(b) claim. *See Stratte-McClure* v. *Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015). After *Macquarie*, a plaintiff must identify a "statement" rendered misleading by the omission. The Court declined, however, to resolve questions about the scope of "statements" that could be rendered misleading by such an omission.

BACKGROUND

Macquarie Infrastructure Corporation, now privately held, was a publicly traded business that operated "bulk liquid storage terminals," which it contracted to store commodities including a high-sulfur fuel called No. 6 fuel oil.[1] As a public securities issuer, Macquarie was required to file periodically SEC forms 10-K and 10-Q, which are public informational disclosures about its securities offering.[2] As relevant here, these disclosures must comply with SEC Item 303, which mandates that the "Management's Discussion and

Analysis" (MD&A) in a 10-K or 10-Q include a description of "any known trends or uncertainties that have had or that are reasonably likely to have" an impact on sales, revenues, or income.[3]

In 2016, the International Maritime Organization finalized IMO 2020, a regulation that would cap sulfur content at a level far below the typical level in No. 6 fuel oil at the beginning of 2020.[4] Macquarie did not discuss this regulation or the impact on its business in the MD&A sections of its public offering documents.[5] In 2018, Macquarie announced that its storage contracts had fallen sharply in response to a decline in the No. 6 fuel oil market, and its stock price fell 41%.[6]

Moab Partners L. P., a shareholder in Macquarie, filed suit under Rule 10b-5(b), which makes it "unlawful" to make "any untrue statement of material fact" or "omit to state a material fact necessary in order to make the statements made . . . not misleading." Moab argued that Macquarie's public statements in the period after the finalization of IMO 2020 were false and misleading because Macquarie violated its duty to disclose a known trend under Item 303.[7] The District Court dismissed the case, but the Second Circuit reversed. In an unpublished opinion, the Second Circuit held that because Moab "adequately alleged a 'known trend[] or uncertainty[]' that gave rise to a duty to disclose under Item 303," it had stated a claim.[8]

THE SUPREME COURT'S DECISION

Writing for a unanimous court, Justice Sotomayor vacated the Second Circuit's decision. The Court's opinion began by examining the text of Rule 10b-5(b)—particularly its repeated references to "statements"— and held that the Rule "does not proscribe pure omissions."[9] The Rule instead covers (i) untrue statements and (ii) half-truths, the latter of which are statements omitting "material facts necessary to make the 'statements made . . . not misleading.'"[10] "[L]ogically and by its plain text," Rule 10b-5(b) "requires identifying affirmative assertions," and does not itself "create an affirmative duty to disclose any and all material information."[11]

The Court found that statutory context supported its conclusion. Section 11(a) of the Securities Act of 1933 prohibits registration statements that "omit[] to state a material fact required to be stated therein."[12] The Court found that the absence of similar language in Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5(b) indicated that neither Congress nor the SEC meant to impose similar liability outside of registration statements.[13]

The Court rejected Moab's contention that reversing the Second Circuit would create "broad immunity" from liability for the non-disclosure of negative business trends.[14] For one, even absent a private right of action, the SEC retains authority over violations of Item 303. Further, "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths."[15]

IMPLICATIONS

The Court's decision in *Macquarie* eliminates a circuit split and provides a heightened standard for plaintiffs seeking liability under Rule 10b-5 based on information omitted from issuers' public filings. Shareholders will not be able to survive dismissal or summary judgment without pointing to a "statement" rendered misleading by the alleged omission.

As the Court noted, however, the SEC can still bring enforcement actions against individuals and companies for Item 303 violations. And the Court's decision explicitly leaves unresolved several arguments the plaintiffs and SEC had raised in the case, including the question of what constitutes a "statement made" under 10b-5(b).[16] It remains to be seen how lower courts will construe the breadth of the "statement made" under 10b-5(b) following the Court's decision. For example, at oral argument, counsel for the SEC argued for the broad construction that "the entire MD&A is the statement" and would be rendered misleading by omitting the required Item 303 disclosure.[17]

In light of this legal uncertainty and the SEC's authority, careful attention to Item 303's requirements remains imperative in order to limit public companies' exposure to costly litigation and enforcement actions.

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ENDNOTES

1 *Macquarie*, 2024 WL 1588706, at *3.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 *Moab Partners, L.P.* v. *Macquarie Infrastructure Corp.*, No. 21-2524, 2022 WL 17815767, at *2-3 (2d Cir. Dec. 20, 2022) (citing *Stratte-McClure*, 776 F.3d at 101).

9 *Macquarie*, 2024 WL 1588706, at *4.

10 *Id.* (quoting 17 C.F.R. § 240.10b-5(b)).

11 *Id.* (quoting *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 44 (2011)).

12 *Id.* at *5 (quoting 15 U.S.C. § 77k(a)).

13 *Id.*

14 *Id.*

15 *Id.*

16 *Id.* at *5 n.2 ("The Court does not opine on issues that are either tangential to the question presented or were not passed upon below, including what constitutes "statements made," when a statement is misleading as a half-truth, or whether Rules 10b-5(a) and 10b-5(c) support liability for pure omissions.").

17 Transcript of Oral Argument at 51-52, *Macquarie Infrastructure Corp.* v. *Moab Partners, L. P.*, 601 U.S. ___ (2024) (No. 22-1165).

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