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Supreme Court Clarifies That No Private Cause of Action Exists Under Rule 10b-5 for Pure Omissions, Only Uncorrected Half-Truths

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On April 12, 2024, the U.S. Supreme Court issued its opinion in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, resolving a circuit split among the Second, Third, and Ninth Circuits over whether plaintiffs could pursue private causes of action under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 for an issuer's failure to disclose information required by Item 303 of Regulation S-K where that omission does not render any statement made misleading. The court held that a private cause of action under such circumstances does not exist because Rule 10b-5 guards against half-truths that make an affirmative statement misleading, not against pure omissions. **Background** Macquarie owns infrastructure-related businesses, including one subsidiary that operates storage terminals for various liquid commodities like biofuels and petroleum. One such commodity was No. 6 fuel oil, which, in short, was phased out of market by United Nations regulation "IMO 2020," due to the fuel's high sulfur content. In the years between IMO 2020's adoption and its implementation, Macquarie did not discuss IMO 2020 in its public offering documents. In 2018, however, "Macquarie announced that the amount of storage capacity contracted for use by its subsidiary's customers had dropped in part because of" the decline in the No. 6 fuel market. Subsequently, Macquarie's stock price fell by 41%. This litigation followed. Shareholder Moab alleged that Macquarie violated Rule 10b-5(b) by concealing from investors that No. 6 fuel oil was its subsidiary's largest product and that IMO 2020 was likely to have a material impact on Macquarie's financial condition, thereby violating its disclosure obligation under Item 303. Item 303 requires public companies to disclose any "trend, demand, commitment, event or uncertainty" that is "presently known to management and reasonably likely to have material effects on the registrant's financial conditions or results of operations." Accordingly, Moab argued that Macquarie had a duty to disclose the omitted information and that the failure to do so violated Rule 10b-5(b)'s prohibition

against making any untrue statement of material fact or omitting "to state a material fact necessary in order to make the statement made, in light of the circumstances under which they were made, not misleading." On a motion to dismiss, the U.S. District Court for the Southern District of New York dismissed Moab's complaint. The District Court held that Moab failed to plead an uncertainty that should have been disclosed or identify an SEC filing in which such information should have been disclosed. The Second Circuit Court of Appeals reversed, holding that Item 303 imposed a duty to disclose a known trend or uncertainty reasonably likely to have an impact on Macquarie's financial condition and, further, that Moab alleged that Macquarie failed to do just that in connection with IMO 2020. The appeals court sustained Moab's Section 10(b) and Rule 10b-5 claim. Macquarie petitioned for certiorari. **High Court's Opinion** The U.S. Supreme Court reversed the Second Circuit in a unanimous opinion, holding that, notwithstanding Item 303, Rule 10b-5(b) does not proscribe pure omissions. The court observed that Rule 10b-5 "requires disclosure of information necessary to ensure that statements already made are clear and complete . . . ." Thus, the Supreme Court noted that an affirmative statement must be identified "before determining if other facts are needed to make those statements 'not misleading.'" The Court emphasized that Rule 10b-5 does not create any affirmative duty to disclose all material information but imposes a duty to disclose only when necessary to make statements already made not misleading. The Court further ruled that "the failure to disclose information required by Item 303 can support a Rule 10b-5(b) claim," but "only if the omission renders the affirmative statements made not misleading." The Court contrasted Section 10(b) and Rule 10b-5 with Section 11(a) of the Securities Act of 1933, explaining that only the latter "imposed liability for pure omissions" by barring "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.'" (emphasis added). When Congress wants to bar pure omissions, it knows how to do so. Reprinted with permission from the *American Bar Association* Litigation Section.

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