

Vital Briefing

Supreme Court decision in *Macquarie* clarifies “pure omissions” in securities fraud

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Key takeaways

- To show fraud, investor actions under Rule 10b-5(b) will now need to identify misleading statements.
- The Supreme Court unanimously ruled that “pure omissions” are not actionable under Rule 10b-5(b) in the absence of a misleading statement.
- Further, failure to disclose information required by Item 303 of Regulation S-K cannot support a private action under Rule 10b-5(b) if the failure does not render any statements misleading.
- Private Item 303 actions are still possible for misleading “half-truths” and the SEC retains authority to prosecute violations of its own rules and regulations, including Item 303.
- The decision resolved a circuit split in which the Second Circuit allowed Item 303 claims while the Third, Ninth, and Eleventh Circuits did not.
- Consumer advocates and the SEC argued that Item 303 disclosures provide important information for investors, but industry groups said that allowing these claims would flood the courts and dilute meaningful disclosure.

The new Supreme Court decision in [Macquarie Infrastructure Corp. v. Moab Partners, L.P.](#) clarifies the law on securities fraud, ruling that investors in private actions under Rule 10b-5(b) must show an affirmative misleading statement.

Plaintiff Moab Partners, an institutional investor, claimed that Macquarie Infrastructure Corp. materially misled investors by failing to disclose that a new environmental regulation would likely have a negative impact on its revenues. Moab argued that Macquarie violated a duty to disclose the anticipated impact under Item 303 of Regulation S-K, which requires disclosure of trends and uncertainties.

The Supreme Court ruled that a 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.

The unanimous decision was issued April 12, 2024.

Prior proceedings. As relevant to the Supreme Court proceedings, Moab asserted in its complaint filed in the Southern District of New York that Macquarie failed to make required affirmative disclosures under Item 303. Moab also alleged affirmative misstatements and claims under the Securities Act, which were not at issue in the petition.

- The district court [dismissed](#), finding that Moab did not actually plead an uncertainty that should have been disclosed under Item 303, nor in what SEC filing or filings the defendants were supposed to disclose it. Even if a known trend or uncertainty had been identified, it was not alleged that the probability of that uncertainty combined with its anticipated magnitude was enough to make it material in the context of Macquarie’s total activity.
- The Second Circuit [vacated and remanded](#), determining that the possible impact of the impending regulation should have been disclosed under Item 303. Citing a two-part test articulated in a [1989 SEC interpretive release](#), the panel concluded that the impending regulation’s restriction on fuel oil was known to the defendants and reasonably likely to have material effects on Macquarie’s financial condition or results of operation.
- In its [petition for certiorari](#), Macquarie asked whether the Second Circuit erred in holding—in conflict with the Third, Ninth, and Eleventh Circuits—that a failure to make a disclosure required under Item 303 can support a private claim under Section 10(b), even in the absence of an otherwise-misleading statement.
- At [oral argument](#), Supreme Court justices questioned whether Item 303 should be available in private actions.

Supreme Court’s reasoning. The court based its ruling on the text of Rule 10b-5(b) under Section 10(b) of the Exchange Act, 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, in the light of the circumstances under which they were made, not misleading.”

“Rule 10b-5(b) does not proscribe pure omissions,” the court wrote. “Logically and by its plain text, the Rule requires identifying affirmative assertions (i.e., “statements made”) before determining if other facts are needed to make those statements ‘not misleading.’”

In contrast, Section 11(a) of the Securities Act creates liability for failure to speak. Section 11(a) prohibits any registration statement that “omit[s] to state a material fact required to be stated therein.”

“Neither §10(b) nor Rule 10b-5(b) contains language similar to §11(a), and that omission is telling,” the court wrote.

Pure omissions v. half-truths. The court explained the difference between omissions and half-truths:

- A pure omission occurs when a speaker says nothing in circumstances that do not give any particular meaning to that silence.
- Half-truths are representations that state the truth only so far as it goes, while omitting critical qualifying information.

An example of a pure omission would be if a company fails entirely to file a Management’s Discussion & Analysis disclosure, said the court. The omission of particular information required in the MD&A would have no special significance because no information was disclosed.

As an actionable half-truth, the court gave an example of a seller revealing there may be two new roads near a real estate property, but fails to disclose that a third potential road might bisect the property.

Policy considerations. Backed by consumer advocates, the SEC, and the U.S., *Moab* contended that Item 303 disclosures provide important information

for investors about reasonably likely future occurrences.

Supported by major industry groups and nonprofit organizations, *Macquarie* argued that allowing “pure omissions” liability in private actions would flood the courts with litigation second-guessing management decisions. This might lead companies to disclose too much, resulting in less meaningful disclosure for investors overall.

Impact. Plaintiffs in securities fraud actions claiming violation of Rule 10b-5(b) or Item 303 of Reg S-K will now need to identify misleading statements or “half-truths” by the defendants. “Pure omissions” will not be actionable in the absence of a misleading statement.

The SEC retains authority to prosecute violations of its own rules and regulations, including Item 303.

Disputes in securities fraud actions under Rule 10b-5(b) are now likely to shift to whether alleged omissions relate to any statements and if so, whether they rendered the statements misleading.