Supreme Court: Pure Omissions Not Actionable Under Rule 10b-5(b)

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On April 12, 2024, the Supreme Court issued a unanimous opinion holding that a company's failure to make disclosures required by Item 303 of Regulation S-K[1] cannot in itself support a private securities claim under Section 10(b) of the Securities Exchange Act of 1934[2] and Rule 10b-5(b) thereunder[3] where the omission did not render any of the company's affirmative statements misleading. *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, No. 22–1165 (2024) (Sotomayor, J.). "Pure omissions are not actionable under Rule 10b-5(b)." The opinion resolves a circuit split on the issue between the Second Circuit, on the one hand, and the Third and Ninth Circuits, on the other.

Background and Procedural History

In 2016, the United Nations' International Maritime Organization adopted a regulation that would significantly restrict the use of No. 6 fuel oil—a main product of the defendant company's subsidiary—by the beginning of 2020. Following this, the company did not discuss the regulation in its public offering documents. In 2018, the company announced that the amount of storage capacity contracted for use by its subsidiary's customers had dropped in part because of the decline in demand for No. 6 fuel oil as a result of the 2016 regulation. This announcement was followed by a stock drop.

An investor sued alleging that the company's public statements were false and misleading because it concealed from investors that its subsidiary's single largest product was No. 6 fuel oil, which "faced a near-cataclysmic ban on the bulk of its worldwide use through [the regulation]." Plaintiff claimed that, under Item 303, the company had "a duty to disclose" how much of its subsidiary's storage capacity was devoted to No. 6 fuel oil and, by violating that duty, the company violated Section 10(b) and Rule 10b-5.

The district court dismissed the claim, concluding that plaintiff had not actually pled an uncertainty that should have been disclosed or in what SEC filing or filings the company should have disclosed it. The Second Circuit reversed, concluding that the company's Item 303 violation alone was enough to sustain claims under Section 10(b) and Rule 10b-5.

The Court Makes a Distinction Between Half-Truths and Pure Omissions

Justice Sotomayor, writing for the Court, began by examining Rule 10b-5(b), which makes it unlawful to "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."[4]

The Court explained that Rule 10b-5(b), in essence, prohibits false statements and prohibits "omitting a material fact necessary to make the statements made not misleading." The Court stated that the issue was "whether this second prohibition bars only half-truths or instead extends to pure omissions[,]" which occur "when a speaker says nothing, in circumstances that do not give any particular meaning to that silence." The Court concluded that "Rule 10b-5(b) does not proscribe pure omissions."

The Court reasoned that "[l]ogically and by its plain text, the Rule requires identifying

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affirmative assertions (i.e., statements made) before determining if other facts are needed to make those statements not misleading." Citing *Matrixx Initiatives, Inc. v. Siracusano*, 563 U. S. 27 (2011), the Court emphasized that Section 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information, and that disclosure is required under these provisions only when necessary to make statements already made not misleading.

The Court further noted that "[s]tatutory context confirms what the text plainly provides[,]" pointing out that Section 10(b) and Rule 10b-5(b) do not mirror the text of Section 11(a) of the Securities Act of 1933, which does impose liability for pure omissions of material facts required to be stated in a Securities Act registration statement.[5]

The Court rejected plaintiff's argument that without private securities liability for pure omissions under Rule 10b-5(b), issuers that fraudulently omit information that Congress and the SEC require to be disclosed will have broad immunity, noting both that private parties can still bring claims based on Item 303 violations if the omissions create misleading half-truths and that the SEC has broad enforcement authority over violations of its own rules, including failure to comply with Item 303.

Notes

1. Item 303 of SEC Regulation S–K sets forth the requirements for disclosure of "Management's Discussion and Analysis of Financial Condition and Results of Operations" in periodic filings with the SEC by companies that have a reporting obligation under the Securities Exchange Act of 1934 as well as in registration statements filed under the Securities Act of 1933. Among other things, Item 303(b)(2)(ii) requires companies to describe "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."

2. Section 10(b) of the Securities Exchange Act of 1934 makes it unlawful to use or employ any manipulative or deceptive device or contrivance in connection with the purchase or sale of any security.

3. Rule 10b-5 implements Section 10(b) and makes it unlawful, among other things, for any person by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange to "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."

4. 17 CFR §240.10b-5(b).

5. Section 11(a) creates liability for any registration statement that "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *See* 15 U. S. C. §77k(a).