

U.S. Supreme Court: "Pure" Omissions Are Not Actionable Under Rule 10b-5

Corporate News: A Legal Update

By Daniel Spungen on April 16, 2024

On April 12, 2024, the United States Supreme Court issued a unanimous ruling in *Macquarie Infrastructure Corp. et al v. Moab Partners, L.P., et al.* which held that omissions, by themselves, are not subject to private rights of action under Rule 10b-5, but omissions can support an action if they make other statements materially misleading.

In *Macquarie*, Macquarie Infrastructure Corporation, an SEC reporting company under the '34 Act ("Macquarie"), did not disclose in its public filings the impact of a new regulation on the revenue of its subsidiary. The subsidiary operates terminals used to store bulk liquid commodities. One of these commodities, No. 6 fuel oil, had a sulfur content of close to 3%. In 2016, the United Nations' International Maritime Organization formally adopted IMO 2020, which capped sulfur content of fuel oils at 0.5% by 2020. Macquarie did not disclose any information related to the impact of IMO 2020 on revenue in any of its public filings. Subsequently, the revenue of Macquarie's subsidiary dropped substantially as the demand for No. 6 fuel oil decreased. When its revenue was reported, Macquarie's share price dropped by 41%. An investor, Moab Partners, L.P. ("Moab"), subsequently sued Macquarie under SEC Rule 10b-5(b) for omitting the information from its public filings.

Rule 10b-5(b) makes it unlawful for any person "to make any untrue statement of a material fact or 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." 17 CFR § 240.10b-5(b). The Court held that a pure omission on its own is not actionable, but an action can be sustained if the omission makes other statements materially misleading. In this case, Moab did not plead that any other statements were misleading as a result of the omission.

While this case applies to an SEC reporting company, it is applicable to all companies that issue securities, as Rule 10b-5 applies to both public and private offerings. For companies that issue securities, it is still vital to provide complete and accurate disclosure. Although this case was decided in favor of the issuer, Macquarie could still be subject to SEC enforcement actions for its omission. Further, a more detailed pleading where Moab identified specific statements that were materially misleading in light of the omission may have succeeded. For

investors suing based on omissions, it is now vital to identify statements that are materially misleading as a result of an omission, instead of merely identifying an omission, in order to maintain a private right of action.

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