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The Post-Macquarie Securities Fraud-By-Omission Landscape

Published by *Law360*

February 6, 2025

On April 12, 2024, the US Supreme Court issued a unanimous decision in *Macquarie Infrastructure Corp. v. Moab Partners LP*, resolving a long-standing circuit split over whether and to what extent securities issuers can be liable for pure omissions under Section 10(b) of the Exchange Act.[1]

While the Supreme Court's opinion ostensibly distinguished inactionable "pure omissions" from actionable "half-truths," the line between the two concepts in practice is far less clear than the Supreme Court's semantic division.

Indeed, a brief survey of recent cases shows that *Macquarie*'s application has presented challenges for lower courts parsing statements that often fall within the gray area of "misleading by omission."

Background

Section 10(b) of the Exchange Act and US Securities and Exchange Commission Rule 10b-5(b) make it unlawful for securities issuers "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."[2]

Historically, securities plaintiffs have alleged Section 10(b) and Rule 10b-5(b) violations by citing purported omissions of information required by Item 303 of Regulation S-K. Item 303 mandates disclosure of "any known trends or uncertainties that have had or … are reasonably likely to have a material favorable or unfavorable impact" on an issuer's sales, revenues or income.[3]

In this regard, a typical complaint would allege that an issuer's failure to disclose "known trends or uncertainties" in accordance with Item 303 violated Rule 10b-5(b), even in the absence of an affirmatively misleading statement.

The viability of this pure omissions theory of liability ended in April 2024, with the justices holding in *Macquarie* that pure omissions are not actionable under Section 10(b) and Rule 10b-5(b).[4]

The Supreme Court observed that Rule 10b-5(b) "prohibits omitting a material fact necessary 'to make the statements made ... not misleading.'"[5] Therefore, the "Rule ... covers half-truths, not pure omissions" and "requires identifying affirmative assertions (i.e., 'statements made') before determining if other facts are needed to make those statements 'not misleading.'"[6]

In so holding, the Supreme Court contrasted Rule 10b-5(b) with Section 11(a) of the Securities Act, which imposes liability for registration statements that "contain[] an untrue statement of [] material fact or omit[] to state a material fact required to be stated therein or necessary to make the statements therein not misleading."[7] The Supreme Court found the absence of "similar language in [Section] 10(b) [and] Rule 10b-5(b)" to be a "telling" indicator of legislative intent, and, in all events, a rejection of pure omissions liability under Rule 10b-5(b).[8]

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While the Supreme Court's ruling foreclosed pleading a Rule 10b-5(b) claim based on pure omissions, the decision did not drastically reduce the number of securities class actions filed in the second half of 2024.[9] This is not entirely surprising, as relatively few securities fraud class action complaints are based solely on purported Item 303 omissions.

Instead, *Macquarie* has affected how Rule 10b-5 omission cases are pled, forcing plaintiffs to redirect their focus toward alleging misleading half-truths rather than pure omissions. However, as the justices themselves pointed out during oral argument, the line between pure omissions and misleading half-truths can be elusive.[10]

Indeed, *Macquarie's* progeny have grappled with the thorny question of whether a complaint pleads misleading half-truths, or pure omissions masquerading as half-truths. Although the decisions to date have been varied, a few guiding principles have emerged.

There must be a meaningful relationship between statements made and those allegedly omitted.

Where omitted statements have no meaningful relationship to affirmative statements, courts have been unwilling to find actionable half-truths.

For example, in *Chew v. MoneyGram International Inc.*, investors alleged that the defendant company misleadingly portrayed its financial outlook and performance metrics by failing to disclose purported compliance shortcomings.[11]

The US District Court for the Northern District of Illinois concluded on Sept. 30 that this alleged omission was not actionable because the company's "statements about [its] overall performance metrics ... bore no meaningful relation to [its] compliance efforts or fraud-detection systems."[12] The court also rejected any fraud claim based on purported Item 303 omissions, because the plaintiffs "d[id] not articulate how Item 303 applies to any particular statement defendants are alleged to have made."[13]

Similarly, in *Crivellaro v. Singularity Future Technology Ltd.*, the US District Court for the Eastern District of New York determined on Dec. 17 that various alleged omissions about the company's internal controls and its CEO were all "untethered to any affirmative statement" by the defendants, and thus could not give rise to an actionable claim.[14]

The alleged omitted information must be material.

Applying prior Supreme Court precedent, decisions since *Macquarie* reflect that courts will only find that an omission creates an actionable half-truth where the undisclosed fact is material, i.e., where there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," according to the Supreme Court's seminal 1988 decision in *Basic Inc. v. Levinson*.[15]

For example, in *Maso Capital Investment Ltd., v. E-House (China) Holdings Ltd.*, the US Court of Appeals for the Second Circuit on June 10 affirmed the lower court's dismissal of a pure omission claim. There, defendants allegedly failed to disclose "parallel projections" purportedly showing higher profits than disclosed management projections.[16]

Quoting *Macquarie*, the Second Circuit stated that "Rule 10b-5(b) does not proscribe pure omissions," but instead prohibits half-truths by "requir[ing] disclosure of information necessary to ensure that statements already made are clear and complete."[17] The allegedly omitted projections did not meet Macquarie's litmus test where plaintiffs "provide[d] no details as to who created [the projections], for what purpose they were prepared, and to whom they were made available."[18]

In other words, the parallel projections did not make the disclosed management projections misleading, let alone materially so, where the plaintiffs had not alleged any facts demonstrating that the parallel projections were created by, or even shared with, the company.

In contrast, in *Alger Dynamic Opportunities Fund v. Acadia Pharmaceuticals Inc.*, the plaintiffs alleged that the defendants misleadingly presented the results of a clinical study by omitting negative information contradicting the studies' favorable findings.[19]

On Oct. 31, the US District Court for the Southern District of California held that because the defendants "state[d] the truth only so far as it goes, while omitting [the] critical qualifying information," the complaint sufficiently alleged that the defendants' statements about the study were actionable half-truths.[20]

Characterizations will be scrutinized.

Disclosures that characterize the breadth or size of an issue can be fodder for an omission claim.

In *Roofers Local No. 149 Pension Fund v. Amgen Inc.*, the plaintiff alleged that the defendants hid the full extent of the liability the company was facing when it omitted that the IRS was seeking billions from it.[21] The defendants argued that their failure to disclose this information could not have been misleading given the company's characterization of the amount in dispute as, among other descriptions, "significant" and "substantial."[22]

In citing *Macquarie*, the US District Court for the Southern District of New York on Sept. 30 disagreed with the defendants, concluding that the defendants' failure to disclose the specific amount the IRS was seeking rendered its disclosure of the tax dispute "neither 'clear' nor 'complete'" because the defendants' "vague characterizations of the amounts the IRS was seeking as 'significant,' 'substantial,' and potentially 'material'" failed to communicate the magnitude of the potential liability.[23]

Item 303 omissions can still be actionable when tied to other statements.

Last, one should not misconstrue *Macquarie* to mean that all Item-303-based omissions are nonactionable. An omission claim will survive a motion to dismiss, even post-*Macquarie*, if it is adequately alleged that the omission of information required to be disclosed under Item 303 renders other affirmative statements misleading.[24]

Ramifications

In sum, while *Macquarie* has narrowed the scope of liability for securities fraud claims premised on omissions, it has not eliminated it, and courts will continue to grapple with differentiating inactionable pure omissions from actionable half-truths.

A court's evaluation of whether a complaint sounds in impermissible pure omissions, and is thus barred by *Macquarie*, or alleges actionable half-truths is a particularized inquiry that turns on the nature, importance and context of the statements purportedly made misleading.

Issuers should, therefore, be cognizant of the risk of nondisclosure when the facts at issue are potentially significant and could be viewed as having a close factual nexus to existing statements. In addition, companies should be thoughtful about the form of disclosure, and weigh the relative costs

and benefits of using descriptors like "significant" and "substantial" against more granular disclosures to describe the magnitude of potentially material events.

Finally, litigants facing Section 10(b) and Rule 10b-5 omission claims should closely scrutinize allegations attempting to cast omissions as excluding critical or significant qualifying information from existing disclosures, and aggressively seek dismissal when the purported omission is insignificant or unrelated to the identified disclosures.

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1 *Macquarie Infrastructure Corp. v. Moab Partners L.P.*, No. 22-1165, 601 U.S. 257, 266 (Apr. 12, 2024).

2 17 C.F.R. § 240.10b-5(b)

3 17 C.F.R. § 229.303(b)(2)(ii).

4 Macquarie Infrastructure Corp., 601 U.S. at 266.

5 Id. at 263.

6 Id. at 264 (citing 6 Oxford English Dictionary 857 (1933) def. 3).

7 Id. (quoting 15 U.S.C. § 77k(a)).

8 Id.at 265.

9 See generally https://securities.stanford.edu/filings.html.

10 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2023/22-1165_9m6j.pdf at 7:21-8:14.

11 *Chew v. Moneygram Int'l Inc.*, No. 18-cv-7537, 2024 WL 4346522, *7 (N.D. Ill. Sept. 30, 2024).

12 Id.

13 Id at *26.

14 *Crivellaro v. Singularity Future Tech. Ltd.*, 2024 WL 5146051, at *3-5 (E.D.N.Y. Dec. 17, 2024).

15 *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988).

16 *Maso Cap. Inv. Ltd. v. E-House (China) Holdings Ltd.*, No. 22-355, 2024 WL 2890968, *2, *4 (2d Cir. June 10, 2024).

17 Id. at *4 (quoting Macquarie Infrastructure Corp., No. 22-1165, 601 U.S. at 264.)

18 Id. at *3.

19 *Alger Dynamic Opportunities Fund et al. v. Acadia Pharm. Inc. et al.*, No. 24-cv-451, 2024 WL 4647297, *12 (S.D.Ca. Oct. 31, 2024).

20 Id. See also *In re: Nat'l Instruments Corp. Sec. Litig.*, 2024 WL 4108011, *5 (S.D.N.Y. Sep. 6, 2024) (dismissing in part Section 10(b) and Rule 10b-5(b) claims premised on undisclosed third-party offers to purchase the issuer that allegedly rendered stock repurchase disclosures misleading because the disclosures did not imply that that the repurchases occurred at the highest possible price, but finding that an insider trading claim under Section 10(b) had been adequately pled).

21 *Roofers Local No. 149 Pension Fund v. Amgen Inc.*, 2024 WL 4354809, *11 (S.D.N.Y. Sept. 30, 2024).

22 Id.

23 Id. at *12.

24 *Sjunde AP-Fonden v. v. Gen. Elec. Co.*, 17-cv-8457, 2024 WL 2124504, *1 (S.D.N.Y. May 10, 2024) (denying application for leave to dismiss omission claim based on Item 303 because plaintiffs had "identified the specific sections of [the] Class Period filings … that they allege were rendered misleading by the alleged Item 303 omissions" such that dismissal was not warranted).

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