

“Half-Truths” and “Pure Omissions”

Article

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On April 12, 2024 the U.S. Supreme Court issued a unanimous decision in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024), holding that “pure omissions” cannot be the basis of an action under Rule 10b-5(b) promulgated by the Securities and Exchange Commission (the “SEC”) under Section 10(b) of the Securities Exchange Act of 1934 (the “1934 Act”).^[i] Unsurprisingly, the Court held simply that Rule 10b-5(b) means exactly what it says – that omissions are unlawful, under clause (b) of the Rule, only if they are “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). Why would guidance from the highest court in the land be required to interpret this seemingly unambiguous language? A brief history of the litigation is necessary for a complete understanding of what the Supreme Court held and what it did not address, as well as related issues addressed in the lower courts.

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[i] Section 10 of the 1934 Act provides in relevant part:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange:

(a) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5 under Section 10(b) of the 1934 Act provides:

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It shall be unlawful for any person, directly or indirectly, 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 employ any device, scheme, or artifice to defraud,
- 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* (emphasis added), or
- To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

In contrast to Rule 10b-5(b), as well as Section 12(a)(2) of the 1933 Act, Section 11(a) of the 1933 Act imposes liability for the omission from a registration statement of a material fact *required to be stated therein*, as well as for statements made that are rendered misleading by omission.