Bond Case Briefs

Municipal Finance Law Since 1971

Lies and Half-Truths and Omissions, Oh My! Considering Rule 10b-5(b) after Macquarie Infrastructure Corp. v. Moab Partners L.P. from a Public Finance Perspective - Bowditch

SEC Rule 10b-5(b) makes it unlawful, in connection with the offer and sale of securities, for any person to make any untrue statement of material fact or omit to state a material fact when the omission renders any statements made misleading. In *Macquarie Infrastructure Corp. v. Moab Partners L.P.*, No. 22-1165, 601 U.S. ___, slip op. at 2 (Apr. 12, 2024), Moab Partners sued Macquarie Infrastructure Corporation, alleging that Macquarie violated Rule 10b-5(b) in failing to disclose certain information under Item 303 of SEC Regulation S-K. Item 303 requires companies to disclose known trends or uncertainties that are reasonably likely to have a materially positive or negative financial impact on operations. Moab Partners claimed that Macquarie's omission negatively affected Macquarie's stock price.

In April of 2024, a unanimous United States Supreme Court issued a decision in Macquarie, holding that a "pure omission" does not support a private cause of action under Rule 10b-5(b), settling a long-standing federal circuit split in the process. Although the background of the case deals with the SEC filings submitted by a public company, the decision offers a window into the Court's thinking relative to Rule 10b-5(b) generally. This is significant, as the statements made by municipal issuers, if those statements are likely to be heard and relied upon by the securities market, are also subject to regulation by the SEC under Rule 10b-5. As such, Macquarie can serve as a useful practice pointer for municipal issuers and their attorneys in preparing offering documents and making public statements in connection with the offer and sale of municipal securities.

SUPREME COURT'S DECISION

In issuing its decision, the Court focused on the narrow issue of whether the failure to disclose information required by Item 303 is actionable under Rule 10b-5(b). The Court stated that the Rule only requires disclosure of information when it is necessary to ensure that statements already made are clear and complete. Therefore, a claim of a "pure omission" of information, absent a showing that the omission rendered any affirmative statements to be materially misleading, is not actionable under Rule 10b-5(b).

RULE 10B-5

Rule 10b-5 is designed to combat fraud in the offer or sale of securities. Specifically, Rule 10b-5(b) provides a private cause of action for investors by making it unlawful for a public company or governmental issuer to either: (i) make an untrue statement of a material fact or (ii) omit to state a material fact that is necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As determined by the Court in *Stoneridge Inv. Partners v. Sci-Atlanta, Inc.*, the six elements necessary to claim a Rule 10b-5 violation are: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation.

Regarding the first element, although Rule 10b-5(b) expressly prohibits the making of material misrepresentations (i.e., an untrue statement of a material fact), its prohibition on omissions of material facts has caused confusion and mixed results in the lower courts. Where there is no material misrepresentation but rather an omission at issue, the Court in Macquarie held that the omission cannot exist in a vacuum. Rather, the omission must be tied to an affirmative statement that was already made by the defendant. Thus, in bringing forth a Rule 10b-5 claim on an omission theory, the plaintiff must identify at least one underlying statement that was made misleading by the omission.

PURE OMISSIONS VS. HALF-TRUTHS

In its decision, the Court distinguished between "pure omissions," which are not actionable under the Rule, and "half-truths," which are actionable under the Rule. A pure omission occurs when a speaker says nothing and, under the circumstances, the silence itself is not particularly meaningful. In other words, the failure to disclose information (i.e., the "silence") does not otherwise render any underlying affirmative statements materially misleading. In contrast, a half-truth states the truth but omits critical qualifying information, rendering the statement, although technically true, to be also substantively misleading. Justice Sotomayor, writing for the Court, distinguished the two concepts as follows: "…the difference between a pure omission and a half-truth is the difference between a child not telling his parents he ate a whole cake [a pure omission] and telling them he had dessert [a half truth]." In contrast to the first statement (the pure omission), the second statement (the half truth) requires disclosure of additional information necessary to ensure that the statement that was already made is clear and complete.

Therefore, to bring a successful cause of action for a violation of Rule 10b-5(b), the plaintiff must first identify the defendant's affirmative statements (the "statements made" component of the Rule) and then show how other facts were omitted that rendered the statements materially misleading. In Macquarie, the defendant's silence in omitting certain information from its Item 303 filing, without an underlying affirmative statement rendered misleading by that silence, was therefore not actionable under Rule 10b-5(b).

As noted above, the Court's decision was narrowly focused, leaving open to lower courts related questions regarding what constitutes "statements made," when a statement is misleading as a half-truth, or whether a pure omission is actionable under Rules 10b-5(a) and 10b-5(c) (i.e., "scheme liability").

TAKEAWAYS FOR MUNICIPAL ISSUERS AND PUBLIC FINANCE PROFESSIONALS

Although addressing the SEC filings of a public company, the Macquarie decision can serve as a useful tool for municipal issuers and public finance professionals. First, any statements (whether included in an issuer's offering document, available in investor presentations or on an investor website, or otherwise released publicly) that are reasonably expected to reach investors can potentially expose an issuer to liability under Rule 10b-5, regardless of the intended audience or delivery method. Second, in evaluating the accuracy or completeness of such statements, the omission of certain information, without a causal link to those statements, would not necessarily lead to a Rule 10b-5 violation. Nevertheless, in light of *Macquarie*, prior to making any such statements, issuers, in consultation with their attorneys, should carefully consider the possibility for half-truths and identify any qualifying facts that could cause the statements being made to be materially misleading. Such increased scrutiny will only improve the issuer's disclosures in any event.

BY NEAL R. PANDOZZI • JUNE 13, 2024

BOWDITCH & DEWEY

Copyright © 2026 Bond Case Briefs | bondcasebriefs.com