



Second Circuit Cites *Macquarie* in Affirming Dismissal of Putative Securities Class Action

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In a summary order issued on June 10, 2024, the Second Circuit Court of Appeals relied on the U.S. Supreme Court's holding in *Macquarie Infrastructure Corp. v. Moab Partners, L.P.*, 601 U.S. 257 (2024), for the first time, demonstrating the relevance of the Court's ruling to securities class actions.

Earlier this year, the Supreme Court ruled unanimously in favor of Macquarie Infrastructure Corporation, which was represented by Winston & Strawn. The Court reversed the judgment of the Second Circuit and held that Securities and Exchange Commission "Rule 10b-5(b) does not proscribe pure omissions"; rather, it "requires disclosure of information necessary to ensure that statements already made are clear and complete." *Macquarie*, 601 U.S. at 264.

The Seventh Circuit became the first federal appeals court to reference *Macquarie* in two decisions issued in April. See *Alcaarez v. Akorn, Inc.*, 99 F.4th 368, 373 (7th Cir. 2024) (citing *Macquarie* as support for the proposition that a securities class action "seeking more disclosure but not contending that any of the existing disclosures is false or materially misleading" "is problematic under federal securities law"); *Appvion, Inc. Ret. Sav. & Emp. Stock Ownership Plan By & Through Lyon v. Buth*, 99 F.4th 928, 942 (7th Cir. 2024) (citing *Macquarie* as support for the proposition that fraudulent concealment necessitates positive acts).

Earlier this month, the Second Circuit applied the holding of *Macquarie* for the first time in *Maso Capital Investments Ltd. et al. v. E-House (China) Holdings Ltd. et al.*, No. 22-355, 2024 WL 2890968 (2d Cir. June 10, 2024). The plaintiff investors alleged that defendants, a real estate company and associated individuals and entities, made materially false or misleading statements surrounding a merger transaction. The plaintiffs argued, in the alternative, that the defendants "had an independent duty" to disclose certain information that was omitted from proxy materials. *Id.* at *4. The Second Circuit rejected that argument, stating, "[t]he Investors' pure-omission arguments ... fail because '[p]ure omissions' are no longer 'actionable under Rule 10b-5[.]'" *Id.* (quoting *Macquarie*, 601 U.S. at 266). For this and other reasons, the Second Circuit affirmed the judgment of the district court granting defendants' motion to dismiss.

Key Takeaway: After *Macquarie*, a "pure omission" does not support a Rule 10b-5 claim. Rather, a plaintiff must specify an affirmative statement that was either false or rendered misleading in a material way by the failure to disclose certain information.

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