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High Court to Review Disclosure Omissions Case

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Jay A. Dubow

Jay Dubow, co-leader of Troutman Pepper's Securities Investigations + Enforcement Practice Group, was quoted in the October 23, 2023 *Pensions & Investments* article, "High Court to Review Disclosure Omissions Case."

Previously, other circuit courts including the 3rd, 9th and 11th have rejected this position and have all held that only untrue or misleading statements are grounds for Section 10(b) liability and, thus, allegedly omitted disclosures under Item 303 do not give rise to a cause of action under Section 10(b), noted Jay A. Dubow, partner at Troutman Pepper Hamilton Sanders who co-leads the firm's securities investigations and enforcement practice group.

"The SEC disclosure (rules) have a lot of different requirements and provisions and what all the other circuits are saying is just the fact that you omitted something under one of those requirements doesn't by itself give rise to a private action for fraud," Dubow said.

Macquarie held the position that by allowing an Item 303 violation to serve as the premise for a Section 10(b) claim, the 2nd Circuit eliminated the fraudulent intent requirement of Section 10(b), which requires that defendants have acted with scienter- a state of mind embracing intent to deceive, manipulate or defraud, Dubow explained.

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Added Dubow, "I think it's more likely that the Supreme Court is going to reject the 2nd Circuit view but if for some reason the Supreme Court goes the other way and accepts the 2nd Circuit position, I think that opens up companies to a lot more risk of litigation surviving motions to dismiss."

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