# The Moving Pieces of Corporate Disclosure: Truth, Falsity, and Half-truths in Between

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## INTRODUCTION

Long ago, in *Laidlaw v. Organ*, the United States Supreme Court addressed the duty to disclose information in business transactions.[1] A merchant, Organ, learned that the War of 1812 had ended, which would surely increase the market price of tobacco.[2] He bought a large amount of tobacco from Laidlaw, another merchant, without disclosing his inside information.[3] Chief Justice Marshall rejected *Laidlaw*'s claim that there was a duty to disclose, a holding characterized ever since by judges and scholars as an embrace of *caveat emptor*.[4] But law students who study the case soon discover that there was a second claim because Laidlaw had asked Organ if there was any news about the tobacco market. Organ, we are told, remained silent. On that second claim, the Chief Justice remanded for further proceedings as to whether Organ's response or lack thereof impermissibly "imposed" on Laidlaw.[5] That shows that the law was open to variations on duty distinct from *caveat emptor*. And notwithstanding the presumption of "no duty," the doctrinal fog hasn't lifted much at all over the last two centuries, even as markets and their regulation have grown exponentially and become more complex. Given all the noise, as *Laidlaw* teaches, we must recognize that pure silence is quite rare.[6]

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1. Laidlaw v. Organ, 15 U.S. 178 (1817).
2. *Id.* at 178.
3. *Id.*
4. *Id.* at 194.
5. *Id.* at 195.
6. For theoretical perspectives on nondisclosure, see generally Anthony T. Kronman, *Mistake, Disclosure, Information and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); Gregory Klass, *Meaning, Purpose and Cause*

The public corporation's duty to disclose under Rule 10b-5 of the Securities Exchange Act of 1934 emerged inadvertently and inelegantly. From the late 1960s to 1980, the law was creeping uneasily toward creating a corporation's affirmative duty based on investors' right to invest on an informationally equal playing field.[7] But this was a time when the Supreme Court had become wary of overregulation via 10b-5 enforcement. In *Chiarella v. United States*, the Court said that the duty to disclose under Rule 10b-5 requires a pre-existing obligation such as (and perhaps limited to) a fiduciary nexus.[8] But that was an insider trading case, posing a host of different issues because of the true silence and anonymity that characterize open-market securities trading. Insider trading could easily have been cabined off as *sui generis*, leaving corporate disclosure a separate puzzle to be solved.[9] Unfortunately, the Court took the opportunity in a footnote of pure dicta in *Basic Inc. v. Levinson* to quote *Chiarella* and demand that there be an identical pre-existing duty before 10b-5 liability attaches to corporate nondisclosure. [10] That was not a problem when the corporation voluntarily chose to speak—then, the Court said, it must tell the truth. However, there is also a presumptive right to remain silent and thereby avoid disclosure. How and when was not clear, other than to say the ball was in the SEC's court to set the disclosure mandates for investors and other stakeholders. Not coincidentally, the SEC was at this same time rapidly expanding the list of what must be fully disclosed.[11] This is where our main story begins, and it bears a surprising likeness to *Laidlaw*'s ancient two steps.

This Article expresses concern over the presumption in Rule 10b-5 in favor of nondisclosure, especially to the extent that it unnecessarily protects the ability of public companies to conceal troubling truths and risks. Whether this is optimal or not for reasons that have been debated for more than two centuries, my claim here is that any such presumption must be supported by robust limits that apply when silence isn't quite an apt description of the relationship between sender and recipient. The half-truth doctrine is the best exemplar here, made operational in the common statutory and rule-based admonitions in the securities laws not to omit "material fact[s] necessary in order to make . . . statements made . . . not misleading . . . ."[12] This doctrine cabins the temptation to exploit the privilege of nondisclosure through what has been called "artful paltering."[13] Unfortunately, the evolu-

*in the Law of Deception*, 100 GEO. L.J. 449, 458 (2012); *see generally* Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707 (2018). For an empirical inquiry, see generally Kimberly D. Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission*, 91 VA. L. REV. 1795, 1799 (2005).

7. *See* Donald C. Langevoort, *From* Texas Gulf Sulphur *to* Chiarella*: A Tale of Two Duties*, 71 SMU L. REV. 835, 848–51 (2018) (discussing the "affirmative duty to disclose").

8. Chiarella v. United States, 445 U.S. 222, 228 (1980).

9. *See* Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1675 (2004) (discussing insider trading cases and the confusion in case law).

10. Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).

11. To be clear in all that follows, the question is not whether the SEC presumptively has the authority to set disclosure requirements (it does), but whether Rule 10b-5 provides fraud-based grounds for a larger sanction via an implied private right of action enforceable via a large class action.

12. Donald C. Langevoort, *Half-truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 90 (1999) (discussing the half-truth doctrine).

13. *See generally* Todd Rogers et al., *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others*, 112 J. PERSONALITY & SOC. PSYCH. 456, 457 (2017) (discussing the concept of paltering as "actively making truthful statements to create a mistaken impression" and coining the phrase "artful paltering").

tion of the half-truth doctrine has been more of a poor stepsister than a muscular companion. It carries less than a full load in the complex ecosystem that exists for public company disclosure today.[14] And it is woefully undertheorized and widely misunderstood. To this end, I trace this duty as it has developed so haphazardly in the Supreme Court, showing how the Court may have missed opportunities to do better. Our attention will mainly be devoted to a recent 2024 case (*Macquarie*),[15] which is bookended by the Court's initial effort to describe the doctrine as it applies to statements of opinion (*Omnicare*)[16] and its ill-fated effort to address the temporal dynamics of risk disclosure (*Facebook*),[17] where the Court declared that certiorari was improvidently granted after hearing oral argument.

## I. PUTTING THE DISCLOSURE PIECES TO WORK UNDER THE '34 ACT

Seeing the big picture of corporate disclosure helps clarify what is happening as information travels from inside out. Such an effort helps us understand how snippets of words or sentences can rarely be enough to pose, much less answer, the question of whether there was fraud liability under Rule 10b-5.

We start with a brief overview of the disclosure apparatus, which will be familiar material to practitioners and scholars immersed in these matters: they can safely skip over this first part and move on. Publicly-traded companies are obliged to make four filings over the course of their fiscal year, providing both financial information and narrative discussion of their financial performance and condition during the past reporting period.[18] The annual report (10-K) is the most extensive and looks back at the entire fiscal year recently completed, with the attestation of an independent auditor that the financials conform to generally accepted accounting principles and "fairly present" the issuer's condition and results of its operations. Thereafter, the three 10-Qs periodically bring the financial information forward over the course of the following quarters, through to the next 10-K. The SEC's mandatory narrative content of the 10-K and/or 10-Qs is found in Regulation S-K, the

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"Paltering" as a descriptive category is attributed to Fred Schauer and Richard Zeckhauser. *Id.* at 457. That includes but is not limited to half-truths. *See* Fred Schauer & Richard Zeckhauser, *Paltering*, *in* DECEPTION: FROM ANCIENT EMPIRES TO INTERNET DATING 38, 39–54 (Brooke Harrington ed., 2009) (focusing on the paltering chapter).

14. Prior to this essay I have written three times for the *Journal of Corporate Law*, each in some way addressing corporate disclosure and its associated litigation risks. One contributed to the Journal's celebration of former Harvard Law School Dean Robert C. Clark's seminal book CORPORATE LAW, which contains a thought-provoking discussion of corporate accountability in systemic terms and presenting the task of oversight by thinking of corporations that result. Donald C. Langevoort, *Internal Controls After Sarbanes-Oxley: Revisiting* Corporate Law's *'Duty of Care as Responsibility for Systems*, 31 J. CORP. L. 949 (2006). This image persists today in the lively state and federal litigation over internal controls and disclosure in advance of often tragic corporate disasters. *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J. 967 (2019) [hereinafter Langevoort, *Disasters and Disclosures*].

15. Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024).

16. Omnicare Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175 (2015).

17. *In re* Facebook, Inc. Sec. Litig., 87 F.4th 934 (9th Cir. 2023), *cert. granted*, 2024 WL 2883752 (June 10, 2024). Facebook subsequently changed its name to Meta. The Supreme Court heard argument on the case in November 2024 before dismissing it. *See* Facebook, Inc. v. Amalgamated Bank, 604 U.S. 4, 4 (2024).

18. There is also an 8-K "current" reporting obligation for specific matters that have arisen outside of normal business operations, and an obligation of public disclosure under Regulation FD when the issuer has intentionally or inadvertently made selective private disclosures to certain favored constituents. JAMES D. COX ET AL., SECURITIES REGULATION: CASES AND MATERIALS 511–12 (10th ed. 2021).

common body of instructions for these disclosures. The highlight of the four quarterly reports is the earnings disclosure on a per share basis, the best available (from an accounting standpoint) expression of the company's profitability. Volumes have been written about this disclosure process; the marching orders may seem pro forma. But Reg S-K is hardly that, and now a battling ground over not simply the content of '34 Act disclosure but its basic legitimacy. Courts have been striking down SEC additions to S-K at an enhanced pace on constitutional, administrative law, and securities law grounds following the demise of the *Chevron* doctrine.

If we look behind the curtain, much is going on in determining whether and/or when the company must make some disclosure.[19] The most senior executives will have to certify that to the best of their knowledge the disclosure is accurate and fairly presents the condition and results of operation of the company; to achieve a high level of confidence in what they are being told, they must put in place a system of disclosure controls and controls over financial reporting to increase the reliability of the constant flow of information. Usually, a high-level committee is given responsibility for deciding the hard disclosure questions. Meanwhile, an independent audit committee of the board of directors has its own set of tasks in overseeing the external audit function (including whistleblower protection and the refereeing of disputes between management and the auditors). Lawyers guide the process of formulating disclosure sourced from all this information. They and the auditors have (slightly different) up-the-ladder obligations to report to higher ups if they spot anything seriously amiss.[20]

Looming over all this is the threat of enforcement. On the outside, the SEC reviews company disclosures on a sampling basis to make sure disclosure choices are securities law-abiding. Should there be evidence of wrongdoing from any source, the Enforcement Division may be brought in to seek some sort of remedy, which can be financially (and perhaps reputationally) painful. And, of course, there is the risk of private securities litigation wherein courts assess the meaning of what was said and not said, to which we shall turn shortly.

Most of a 10-K or 10-Q is meant to convey the performance and condition of the company as of the end of the relevant fiscal period. Presumably, this kind of information is known (or knowable) as of that date. Since two line-items are decidedly forward-looking, Item 105 requires that management discuss the material factors that make an investment in the company speculative or risky, though not necessarily the probability that such an event will come about. This is a warning light for those who are concentrating on the upside. More textured is Item 303, Management's Discussion and Analysis of the company's financial condition and result of operations.[21] This requires management to present information known to it about trends and uncertainties that would be reasonably likely to cause reported financial information not to be indicative of future results or conditions. A significant portion of class actions targeting company disclosure point to these two line-items as the source of the alleged fraud.

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19. For a useful survey-based study of contemporary disclosure processes, see Andrew K. Jennings, *Disclosure Procedure*, 82 MD. L. REV. 920 (2023).

20. On lawyers, see COX ET AL., *supra* note 18, at 811–21.

21. *See id.* at 535–46.

There is a point here that we will come back to later in this essay. We are about to see that many courts—unfortunately, to my mind—interpret the disclosure this system produces at the level of words and sentences but not dialogue or conversation. But the disclosure ecosystem does not work that way. The filing of a 10-K or 10-Q is in some ways a conversation starter, an assessment supported by the standard process wherein companies "voluntarily" hold an open conference call for the benefit of analysts and others who have a list of questions about the earnings and other accounting metrics, and especially the extent to which good earnings are sustainable or disappointing earnings soon reversible or instead a portent of worse to come.[22] A large and fascinating body of empirical evidence shows that there is much "new" to be learned by moving on from the filed data and having a dialog between management and buy- or sell-side analysts. Stock prices move, in other words, based on assessments of managements' answers to questions, even at the level of facial expression or vocal inflection. While no SEC rule demands it, these analyst calls' results are as important to price formation as much as what is within the virtual four corners of an online filing.[23]

## II. Discourse and Discord

The point thus far is that mandatory disclosure is necessarily incomplete and judgmental, not a disclosure obligation simply because reasonable investors would like—or need—to have access to information simply because it is material. There is a game of strategy going on in what to say and when to say it, to which we now turn.

If a corporation speaks, whether voluntarily or under some legal duty, it must speak truthfully (assuming the information in question is material). The company's interest in confidentiality can be waived or forfeited by its choice to speak.[24] Hence the dilemma, or maybe the opportunity. When material nonpublic information is exposed inside a company, it must be released accurately or not at all, unless the SEC has taken away the discretion to conceal in its disclosure rules (i.e., the 10-K, 10-Q or 8-K).[25] Those line-item instructions must be addressed in adherence with the filing timetables. But as we have seen, the SEC does not require disclosure of all material information. Secrets can be kept indefinitely if there is no disclosure rule broken by the nondisclosure.

In other words, proprietary information can be protected, which is often a good thing. But materiality applies to matters where the company can be harmed and not helped, and what is concealed may often be self-serving. So, for example, when the corporation pays bribes to get business (risky and often unsustainable in the long run), that may well be

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22. *See* Lisa Fairfax, *Dynamic Disclosure: An Exposé on the Mythical Divide Between Voluntary and Mandatory ESG Disclosure*, 101 TEX. L. REV. 273, 278 (2022) (seeking to shift the discourse of disclosures and recognize the value of mandatory and voluntary disclosures).

23. *See* Lawrence D. Brown et al., *Managing the Narrative: Investor Relations Officers and Corporate Disclosure*, 67 J. ACCT. & ECON. 58, 59 (2019) (discussing the value, nature, and timing of private communication between investor relations officers, analysts, and investors); Langevoort, *Disasters and Disclosures*, *supra* note 14, at 979–80 (describing corporate disasters). On the propensity to manipulate during these calls, see Gang Hu et al., *Do Buy-Side Analysts in Earnings Conference Calls Manipulate Stock Prices?*, 89 J. CORP. FIN. 102652, 102652 (2024).

24. Under Regulation FD the SEC insists that selective disclosure (telling the truth only to some recipients) is generally unlawful for public companies. Regulation FD, 17 C.F.R. § 243 (2020).

25. *Id.*

material to investors. But it may not have to be disclosed. And a company may be facing a sudden unexpected drop in revenues or sales, which can also be hidden for a while, until the next 10-K or 10-Q filing is due.

This is problematic for investors and analysts, who must make their investment decisions or recommendations somewhat in the dark, not knowing what, if anything, is being hidden from them. Here, we come to a common litigation fact-pattern involving corporate disclosure. Assume that there has been a sharp drop in the largest customers' purchases due to dissatisfaction with product quality standards; management at the seller knows this is potentially serious but maybe rectifiable. On the other hand, maybe it's a business disaster. Investors would want to know, even if current shareholder investors might not because they would have to absorb the stock price decline that would likely ensue. Management very much wants to avoid prompt disclosure if possible because (a) the problem might soon be solved and go away; (b) the jobs of senior management thus might be at risk immediately; and (c) this may be a self-fulfilling prophecy, wherein disclosure would cause additional customer defections that cause a cash-flow process that makes everything worse. That natural managerial instinct is to keep quiet, buy time, and hope for the best.[26]

For reasons that should be clear from the last section, Items 105 and 303 are likely to be disclosure-forcing when the relevant filing comes due. That must be carefully vetted, of course, but if this meets the reasonably likely standard, this is likely the kind of "known trend or uncertainty" investors need to evaluate the company's prospects going forward.[27] And no doubt that would generate some severe questioning from the business community, journalists and money managers. As to Item 105 (risk disclosure), there is certainly an element of risk here that requires a heads-up. But the disclosure must be fulsome: not just the risk of something possible, but facts (the customer's complaint) indicating that this story has already turned from risk to reality.[28]

Filings, however, have up to 90-day lead times, which may offer some breathing room for the issuer. To make things more challenging, imagine that the CEO of the company is set to make a presentation about the company next Tuesday at an investor conference. The now-problematic product was going to be a focal point, as would be a new unrelated product line about which there is genuine excitement, and its careful cash management strategies. The CEO wants to stick with the presentation, focusing solely on the two bona fide developments. All mention of the customer problem will be avoided, she promises.

No doubt there will be discord among those with disclosure responsibilities. But it will likely be set in the context that assumes the legitimacy of nondisclosure, the legacy of the initial holding in *Laidlaw*.[29] Amateurs might characterize this as prospecting for loopholes, but the search calls for deep expertise and experience. Over time, moreover, the skill of rationalization comes to dominate the discourse encompassing all the moving pieces of corporate disclosure. The issuer's self-interest—cognitively inseparable from managerial

26. On the dilemmas here, see Langevoort, *Disasters and Disclosures*, *supra* note 14, at 1002–03.

27. *See* 17 C.F.R. § 229.303(b)(2)(ii) (2021) (requiring that the MD&A disclosure identify any "known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations").

28. This is one of the issues in the ill-fated handling by the Supreme Court that led to the conclusion that certiorari was improvidently granted. *See infra* Part VI.

29. Laidlaw v. Organ, 15 U.S. 178, 190 (1817).

self-interest—becomes part of a defensive corporate culture unless there is something pushing back against the dissembling.[30]

## III. Half-truths at Work

We could say much more about disclosure biases, but that is not the focus of this Article. Instead, we turn to the judiciary's inclination to enable these biases by inflating the privilege of concealment and deflating the scope of disclosure duties. The half-truth doctrine is a good example. This makes fraudulent any statement of fact that omits a material fact necessary to make what was said not misleading. What was said on other matters may be true, but their implications for the issuer's future would likely be overly optimistic. Psychology research suggests that ordinary people think half-truths are less blameworthy than bald-faced lies and have significantly less guilt because what they were saying is "technically true."[31] As stated in a seminal article, telling these kinds of falsities is a common business tactic "because deceivers have abundant opportunities to palter and because paltering is relatively easy to self-justify."[32] However, the law on its face makes no such concessions. The doctrine is well-established in the common law[33] (perhaps the basis for *Laidlaw*'s second claim) and found in the federal securities laws in both primary anti-fraud prohibitions in the '33 and '34 Acts (sections 11 and 10b-5) as well as the SEC's disclosure mandates.[34]

A venerable doctrine, then, but also puzzling. In an arms-length setting, why would a reasonable person ever assume anything more than the truth of what was explicitly states. This is especially so when the counterparty has an incentive to avoid disclosure. A more reasonable course of action, if available, instead is to assume that there might be more to the disclosure and seek clarification, not to go forward with the transaction unless or until more is forthcoming.

Trust plays a role in this. If there are grounds for trust and no obvious bargaining, the half-truth rule simplifies and facilitates common interactions by putting the burden of the whole truth on the speaker. A useful non-legal example would be when a stranger comes into a small town in search of a restaurant and asks a local for directions. The local responds with accurate directions but omits to say that the restaurant is closed. While not necessarily fraudulent in these circumstances, this is at least contrary to ethical precepts, illustrating what ethicists call the cooperativeness principle: if one acts without any apparent incentive

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30. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. Pa. L. Rev. 101, 120 (1997) ("[I]f material information must pass through a number of different relay points in a hierarchy, the message can change . . . . Subordinate managers will be tempted to vary the message to conform to their self-interest.").

31. *See* Rogers et al., *supra* note 13 at 456.

32. *Id.* at 457.

33. *See, e.g.*, Commodity Futures Trading Comm'n. v. Donelson, 115 F.4th 791, 799 (7th Cir. 2024) ("'[C]ommon-law fraud has long encompassed certain misrepresentations by omission' . . . These 'half-truths' are 'representations that state the truth only so far as it goes, while omitting critical qualifying information . . . .'").

34. 15 U.S.C. § 77k(a) (1998) ("In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading . . . ."); 17 C.F.R. § 240.10b-5(b) (1951) ("It shall be unlawful for any person, directly or indirectly . . . 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 . . . .").

to take advantage of another and provides information, there is an obligation to add in good faith all information necessary to assist the recipient with his or her course of action.[35]

This, then, makes the half-truth doctrine useful in corporate disclosure. When corporate actors speak to investors about their condition or performance, it seems more consonant with the purpose of the securities laws to presume cooperativeness and put the burden on the corporate speaker to avoid or warn of the risk of misleading. This is especially so when there is little or no practicable way for listeners connected to the market (e.g., analysts) to seek assurances that the disclosures are not only true but complete. There are indeed cases that trigger the duty to disclose when the corporate speaker puts the issue in question "in play."[36] But mandatory disclosure might be different—potentially forcing disclosure that the corporation has reason to avoid. Courts are not consistent with their handling of these issues, often avoiding hard problems via simplistic heuristics. In turn, skilled corporate lawyers learn to draft corporate publicity (voluntary or not) using language to take advantage of observed patterns of liability or non-liability. Compliance becomes wordplay, disconnected from the investor protection interest at stake.

Is this too cynical a prediction? Not at all. Consider research about how disclosure decisions are made to reduce or eliminate loss causation principles. Often, via bundling good or bad news in the same filing or press release reduces the ability of courts to distinguish information that addresses prior fraud from new, unrelated news.[37]

## IV. JUDICIAL PRELUDE: *OMNICARE*

As we have just seen, once the Supreme Court held that silence is not actionable under Rule 10b-5 absent an identifiable duty to speak, it sent lower courts on a hunt for duty in cases that were not claiming that defendants' statements themselves were false. This went hand in hand with *Basic*'s other powerful holding that if there was a breach of duty, and as a result, price distortion in an efficient market in which trading occurred, then plaintiffs who bought or sold during the class period during which the distortion occurred could invoke a class-wide presumption of reliance.[38] That inflation of the class, coupled with a generous measure of damages for each eligible class member, created a massive liability threat. The doctrine surrounding "fraud on the market" liability thus invited greater judicial scrutiny.

The battling in the Supreme Court became ferocious soon after *Basic*. Most of the case law generated in these was procedural, exploring the meaning of the *Basic* presumption. The corporate duty line was acknowledged by the Court but not tested outside of its most important manifestation in the law of insider trading.

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35. *See* PAUL GRICE, STUDIES IN THE WAY OF WORDS 22–40 (1989).

36. *See* Craftmatic Sec. Litig. v. Kraftsow, 890 F.2d 628, 641 n.17 (3d Cir. 1989) (noting that beyond material duties mandated by law, when a defendant "voluntarily disclose[s] information, they have a duty to disclose additional material facts only to the extent that the volunteered disclosure was misleading as to a material fact").

37. *See* Barbara A. Bliss, Frank Partnoy & Michael Furchtgott, *Information Bundling and the Securities Laws*, 65 J. ACCT. & ECON. 61, 63–68 (2018) (examining how bundling positive or noisy information with corrective disclosures reduces litigation risk by confounding loss causation requirements, leading to lower settlement amounts and higher dismissal rates).

38. Basic v. Levison 485 U.S. 224, 245–48 (1988).

In 2015, the Court finally took an interesting duty case, though it was about Section 11, not Rule 10b-5.[39] Section 11 addresses materially false statements or omissions in an effective registration statement for a public offering of securities.[40] Omnicare was a seasoned issuer and thus eligible to have its '34 Act disclosures incorporated by reference into its registration statement. In Items 105 and 303, the company identified the risk that a field like public health care could generate of civil or criminal liability, for example, but then stated that "we believe our contract arrangements with other healthcare providers, our pharmaceutical suppliers and our pharmacy practices are in compliance with applicable federal and state law."[41] The government later brought a costly lawsuit against Omnicare.[42] Purchasers of Omnicare stock in the public offering brought a securities lawsuit for concealment of the seriousness of the risk the issuer had identified.[43]

The *Omnicare* court, in a remarkably readable opinion by Justice Kagan, found two distinct claims in the complaint.[44] The first was that "we believe" was itself false.[45] But that was disclaimed by plaintiffs.[46] The other was a half-truth claim: that the statement of belief was rendered misleading by the absence of disclosure of internal concerns among lawyers at Omnicare about the risk that did ultimately come to pass.[47] The Court remanded the case for a careful look into the facts relating to these doubts or uncertainties, to determine whether reasonable investors would consider their disclosure necessary to understand Omnicare's statements (no small task, she said).[48] Here, the Court emphasizes the rigors of the '33 Act as one reason investors might well find comfort in the expression of opinion about the company's potential for liability, noted earlier, and so be misled by omission of facts demonstrating more concern than that. It is hard to quarrel with the opinion except for the "no small task" tone (perhaps meant to accommodate other members of the Court to join the majority) that half-truth liability is somehow unusual or the test for it especially

39. Courts have applied *Omnicare* in 10b-5 cases. *See, e.g.*, Tongue v. Sanofi, 816 F.3d 199, 209 (2d Cir. 2016) (considering the *Omnicare* decision in the context of a claim under Rule 10b-5 for making false and misleading statements by omission).

40. *See* 15 U.S.C. § 77k(a) (1998) (creating a cause of action for purchasers of securities "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein").

41. Omnicare Inc. v. Laborers Dist. Council Pension Fund, 575 U.S. 175, 179 (2015).

42. *Manhattan U.S. Attorney Files Lawsuit Against Omnicare*, U.S. ATT'Y'S OFF. S. DIST. N.Y. (Dec. 17, 2019), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-files-lawsuit-against-omnicare-country-s-largest-long-term-care [https://perma.cc/LX2F-UG66].

43. Danielle Brown, *Investors' Lawsuit Claiming CVS-Omnicare Improprieties Is Dismissed*, MCKNIGHT'S (Feb. 17, 2021), https://www.mcknights.com/news/investors-lawsuit-claiming-cvs-omnicare-improprieties-is-dismissed/ [https://perma.cc/UF3R-QWQM].

44. For an overview of how the Court read the complaint, see Hillary A. Sale & Donald C. Langevoort, *'We Believe':* Omnicare*, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 767–73 (2016); James D. Cox, *'We're Cool' Statements After* Omnicare*: Securities Fraud Suits for Failures to Comply with the Law*, 68 SMU L. REV. 715, 716–19 (2015).

45. *Omnicare*, 575 U.S. at 192–93.

46. *Id.*

47. *Id.*

48. *Id.* at 193–95.

exacting.[49] It is an antifraud liability tool of great potential precisely because so many frauds are concealed by cover-up employing artful wordplay.[50]

## V. CONFUSION: *MACQUARIE*

Nearly a decade later, the duty issue made its way back to the Court.[51] As the Court described it, the question presented was "whether the failure to disclose information required by Item 303 can support a private action under Rule 10b-5(b), even if the failure does not render any 'statements made' misleading."[52] The end of the sentence indicates that this is *not* a half-truth case, a point later confirmed in a footnote at the end of the opinion.[53] But the opinion does discuss the half-truth doctrine in some detail in ruling that cases of "pure omission" are not actionable under part (b) of Rule 10b-5.[54] And it proceeds on the assumption that this is such a case. That's the troubling part, rendering it a false and misleading half-opinion.

The case involved a reporting company, Macquarie, a subsidiary of which was in the business of storing bulk liquid commodities with relatively high (3%) sulfur content.[55] In 2016, a United Nations maritime authority capped the sulfur content for No. 6 oil at 0.5%.[56] The market for No. 6 oil collapsed, and in 2018 Macquarie announced the adverse impact these had on its business.[57] The stock price dropped 41%.[58] Investors brought a fraud-on-the-market lawsuit under Rule 10b-5 based on the nondisclosure of the large threat brought about by the maritime authority.[59]

By this time, an apparent split in the circuits had emerged. The Second Circuit had developed a principle that the duty requirement for securities fraud nondisclosure cases is met when the nondisclosure violated an SEC disclosure requirement.[60] The plaintiffs thus argued that Macquarie violated the MD&A line-item because the truth was a known trend or uncertainty known by the management and reasonably likely to cause its market price

49. *Id.* at 195.

50. For a decision that is unusually thoughtful in its use of *Omnicare*, see City of Westland Police & Ret. Sys. v. MetLife Inc., 129 F. Supp. 3d 48, 66 (S.D.N.Y. 2015).

51. *See generally* Macquarie Infrastructure Corp. v. Moab Partners, L.P., 601 U.S. 257 (2024) (litigating a claim by shareholders that statements from a chemical company were violative of Rule 10b-5 based on omissions).

52. *Id.* at 260.

53. *Id.* at 266 n.2.

54. *Id.* at 263, 265.

55. *Id.* at 261.

56. *Macquarie*, 601 U.S. at 261.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See* Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 102 (2d Cir. 2015) (citing Langevoort & Gulati, *supra* note 9, at 1680–81). In part, at least, the issues here had previously been argued before the Supreme Court but dismissed as moot. For a discussion of how that argument played out, see generally Matthew C. Turk & Karen E. Woody, *The* Leidos *Mixup and the Misunderstood Duty to Disclose in Securities Law*, 75 WASH. & LEE L. REV. 957 (2018). The precedent at the time of *Macquarie* is discussed in Antonio R. Partida, *Reviving a Rule 10b-5 Private Action for MD&A Violations After* Macquarie, SEC. REG. L.J. (forthcoming, 2025).

not to be indicative of future performance.[61] The lower court of appeals found sufficient evidence of an Item 303 violation for the case to go forward.[62]

Courts in other circuits believed that allowing cases like these effectively created implied private rights of action for Item S-K and other SEC rules, ignoring that such implied rights are disfavored and rarely granted.[63] To resolve this apparent split, the Court took the case to determine whether *pure* silence can be the basis for a 10b-5(b) claim based on an SEC disclosure rule like Item 303.[64] Unanimously, the Court said that it cannot and remanded the case to the lower court to determine whether there was an alternative ground for liability (including, as noted above, a half-truth).[65]

Justice Sotomayor wrote the opinion.[66] From an investor protection standpoint, an affirmative misrepresentation about No. 6 oil or a half-truth is fraudulent, but concealment is not.[67] Where is the sense in that? The decision heads in the direct of high formalism when it looks past the obvious: that a federal agency carrying out its legislative authority (or a rule derived from that authority) demands disclosure of the kind of information here in question, thereby creating a disclosure duty, supplemented by an instruction in Rule 12b-20 to tell not only the truth, but the whole truth, using the "omit to state a material fact necessary in order to make statements made . . . not misleading" rubric.[68] What Macquarie did via silence was clearly a violation of Section 13(a) of the '34 Act.[69] But that was not the question: rather, it was whether such "silence" violated Rule 10b-5(b).[70]

The Second Circuit's approach was to treat this violation as fraudulent so long as plaintiffs could also show the other substantive elements a 10b-5 cause of action, i.e., materiality and scienter.[71] Simply a violation would not be enough. Here, we must concede one point to Justice Sotomayor: that liability for a 10b-5(b) violation would not be present if a corporate issuer responded to Item 303 by saying that it was simply not going to provide some or all information required by it. Or maybe that they are skipping their 10-K and -Q obligations entirely. This would be wrongful and harmful, presumably, but not deceptive. Investors know that there is more to the issuer's situation, and, thus, they are not being misled. So, it is not the case that a line-item violation *necessarily* creates liability as the Second Circuit seemed to assume.[72]

But that would be an unusual case, to be sure, and was not the situation here. First, take Justice Sotomayor's example involving "the seller who reveals that there may be two

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61. *Macquarie*, 601 U.S. at 262.

62. *Id.*

63. *Id.*

64. *Id.* at 262–63.

65. *Id.* at 266.

66. *Macquarie*, 601 U.S. at 258.

67. *See id.* at 266 (holding that "pure omissions are not actionable under Rule 10b-5(b)" but "private parties remain free to bring claims based on . . . misleading half-truths").

68. Employment of manipulative and deceptive devices, 17 CFR § 240.10b-5(b) (1951).

69. There is no private right of action under Section 13(a), rather, it "requires issuers to file periodic informational statements." *Macquarie*, 601 U.S. at 260. Plaintiffs claim was that they were seeking no such thing, but rather a ruling that a violation of Item 303 would be violation of Rule 10b-5(b) if it were material, deceptive, and made with scienter. My focus here is on the element of deception.

70. *Id.* at 262–63.

71. Stratte-McClure v. Morgan Stanley, 776 F.3d 94, 103 (2d Cir. 2015).

72. *Id.*

new roads near a property he is selling, but fails to disclose that a third potential road might bisect the property."[73] Liability under the half-truth principle would follow here because there is an implied representation *in the statements made about the first two roads* that are misleading. The buyer is entitled to assume the statement made was the whole truth. This is a classic half-truth case, where what is omitted and what is said address the same substantive matters.[74]

Now, flip the situation to what was at issue in *Macquarie*.[75] Assume that the company had a fulsome and seemingly compliant set of disclosures in its MD&A relating to two significant trends or uncertainties. But nothing was said about the third threat, No. 6 oil and the devastating market impact of the new regulations. Is there any substantive difference between the two cases? Both buyers (whether of land or securities) are making inferences that turn out to be costly to them. Both could have asked for clarification or more information, but neither was more reasonable or unreasonable than the other. If anything, the land buyer could have found out more readily than the investors. The nature of the half-truth doctrine that is found in so many provisions of securities law is to allow reasonable assumptions that they are getting the whole truth unless the speaker informs them otherwise.

In other words, the MD&A is a template on which issuers must reveal each known trend or uncertainty that satisfies the instructions. In the face of incomplete disclosure in violation of the instructions, investors have been deceived. We have all the elements of a half-truth: the omission of a material fact (the drop in value of the No. 6 oil) necessary to make statements made (the entirety of responses within the four corners of Macquarie's MD&A) not misleading. The opinion suggests that what is going on here is to "read [] the words 'statements made' out of Rule 10b-5."[76] But it does no such thing. Rather, it makes the MD&A in its entirety the "noisy" vehicle for the deception.

As noted, Justice Sotomayor wrote a very narrow opinion in *Macquarie*.[77] She clearly ruled in defendant's favor on "pure silence" but then made clear that this ruling said nothing one way or the other about whether plaintiffs otherwise had a good half-truth case, or one under 10b-5's other prongs.[78] Indeed, "private parties remain free to bring claims based on Item 303 violations that create misleading half-truths."[79] What I have done here, of course, is to argue that Macquarie violated Rule 10b-5(b) because it perpetrated a different kind of half-truth. But, as pointed out earlier, the Court explicitly limited the grant of certiorari to "pure silence" and left the half-truth claim to remand.[80] That was my reaction when first reading the opinion, but, on reflection, I think damage is done. By explicitly quashing the pure opinion grounds as per the Second Circuit's holding otherwise, defense-side litigants

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73. *Macquarie*, 601 U.S. at 263 (quoting Universal Health Servs., Inc. v. United States *ex rel.* Escobar, 579 U.S. 176, 188 (2016)).

74. The Court cites *Universal Health Servs. Inc.*, 579 U.S. at 188 as the most relevant contemporary half-truth precedent outside the securities laws. *Macquarie*, 601 U.S. at 263. In a silly aside, Justice Sotomayor gave as an example the difference between a small child who tells his parents that he had dessert but not that he ate a whole cake. *Id.* at 264.

75. *Id.* at 261.

76. *Id.* at 265.

77. *Id.* at 262–63.

78. *See generally Macquarie*, 601 U.S. 257 (avoiding a decision on half-truths or other theories).

79. *Id.* at 266.

80. *See supra* notes 47–48 and accompanying text.

will likely claim that the Supreme Court limited half-truth claims to exclude the category of those like *Macquarie*, where the omitted fact does not substantively relate to what was said (i.e., No. 6 oil had nothing to do with the other trends or uncertainties revealed in the MD&A), in contrast to the land example Justice Sotomayor invoked. That reading would not bode well for plaintiffs on remand.[81] On the other hand, a court inclined to find liability based on the arguments here could reposition the claims to half-truths and simply deny that this is a pure silence case at all.

There are three other things to say about the case. First, the opinion makes a very weak claim that its mere silence holding does not undermine either compensation or deterrence, noting that the SEC retains the direct authority to go after violations without needing Rule 10b-5.[82] True, but misleading. The principal sanctions for disclosure violations reference the antifraud cause of action, i.e., 10b-5. Civil penalties come in three tiers, two of which require a showing of fraud to justify more painful penalties.[83] Injunctions and officer-director bars are read to demand a showing of likelihood of repetition of the wrongdoing, the main factor of which is the degree of scienter.[84] And the blockbuster: the fraud-on-the-market cause of action for private plaintiffs is now totally out of reach in pure silence cases. In fraud-on-the-market terms, such pure omissions can be unlawful deceptive acts or practices with the capacity to distort market prices. To be sure, the defense-side community celebrates this, and I acknowledge there is profound disagreement about the efficacy of the presumption of reliance and the high-stakes class actions that ensue.

Second, there was a dubious invocation of Section 11 of the Securities Act in the Court's reading of Rule 10b-5(b).[85] The text of that right of action, discussed earlier, enlarges the triggering language to include any omission of facts "required to be stated therein," so that under this express private remedy there is a statutory duty to disclose whatever the SEC mandates.[86] But Rule 10b-5(b), adopted nearly a decade later, has no such provision. Thus, the argument that the drafters of the SEC rule intended there not to be such liability; otherwise, they would have included it in the now-famous text. As to actual intent, there is ample evidence that, acting very quickly to deal with alleged fraud in the purchase of a security, the SEC and staff famously took Section 17(a) of the Securities Act as its drafting model, changing a few key words.[87] The scope of their work-product was designed to cover the entirety of fraud and manipulation in connection with the purchase or sale of any security. It could have inserted "information required to be stated," but it was not drafting a statute for the specialized harms associated with false corporate disclosure filings, but that was not what it was working on. Indeed, there was no private right

81. Two appellate cases decided after *Macquarie* were knee-jerk applications of the narrow reasoning. Alcarex v. Akorn, Inc., 99 F.4th 368, 373 (7th Cir. 2024); Appvion Inc. Ret. Sav. & Emp. Stock Ownership Plan v. Buth, 99 F.4th 928, 942 (7th Cir. 2024).

82. *Macquarie*, 601 U.S. at 265–66.

83. *See* Jonathan N. Eisenberg, *Calculating SEC Civil Money Penalties*, HARV. L. SCH. F. CORP. GOVERNANCE (Jan. 24, 2016), https://corpgov.law.harvard.edu/2016/01/24/calculating-sec-civil-money-penalties/ [https://perma.cc/79GM-RB4J] (outlining the three tiers of civil penalties under federal securities law).

84. Philip F.S. Berg, *Unfit to Serve: Permanently Barring People from Serving as Officers and Directors of Publicly Traded Companies After the Sarbanes-Oxley Act*, 56 VAND. L. REV. 1871, 1876 (2003).

85. *Macquarie*, 601 U.S. at 264–65.

86. 15 U.S.C. § 77k (1998).

87. *See* COX ET AL., *supra* note 18, at 836 (citing Milton Freeman, *Colloquium Forward—Happy Birthday Rule 10b-5*, 61 FORDHAM L. REV. S1 (1993)).

action at all for securities violation until later in the decade, and nothing akin to Regulation S-K or the MD&A until decades after that. The idea that the SEC intentionally left this snippet of a sentence out of Rule 10b-5(b) on policy grounds is a formalist interpretation that is laughably disconnected from history.

The final observation comes in the form of a question: could the SEC revise the signature and/or certification requirements for 10-Ks and 10-Qs (or maybe just Items 105 and 303) to require the signatory to attest or certify that, to his or her knowledge, there has been no material omission of information required to be stated therein?[88] To those familiar with the '34 Act eco-system, this is not far at all from executive certifications required today, which demand, among other things, that the line-item disclosures "fairly present in all material respects the financial condition, [and] results of operation of the issuer."[89] If the signatory knows that a trend or uncertainty required to be disclosed has intentionally been omitted, then there is not only noncompliance but an affirmative misrepresentation, obviating the pure silence and duty problems. This would be controversial, of course, and susceptible to the charge that Congress should make the rules of liability (as largely happened when the Sarbanes-Oxley Act was adopted),[90] not the SEC on its own. But it would plug a loophole that is otherwise difficult to justify.

## VI. IMPROVIDENCE: *FACEBOOK*

Shortly after *Macquarie* was decided, the Supreme Court announced that it granted certiorari in another duty/falsity case. As noted at the outset, Facebook (now Meta) suffered a significant customer privacy breach after sharing data with an entity in Great Britain, Cambridge Analytica, which in turn had connections to the elections looming in the United States in 2016. There are three alleged false statements at issue, of which the first is particularly interesting. As is commonplace in cases such as these, the discovery of the breach did not immediately bring clarity to its scope and/or the degree of harm Facebook would suffer or had already suffered. In February 2017, the company filed its 10-K. In the Risk Factors section (Item 105), it addressed privacy concerns by treating the possibility of a breakdown as hypothetical, e.g., "[a]ny failure to prevent or mitigate . . . improper access to or disclosure of our data or user data . . . which could harm [Facebook's] business and reputation, and diminish our competitive position."[91] In the months that followed, there were additional disclosures about privacy practices that still did not reveal the nature or the threatened harm to Facebook and its users until the second quarter 2018 earnings call but

88. Ann Lipton raised this possibility. *See* Ann Lipton, *Here We Go Again*, BUS. L. PROF. BLOG (Oct. 6, 2023), https://lawprofessors.typepad.com/business_law/2023/10/here-we-go-again.html (on file with the *Journal of Corporation Law*).

89. *Certification of Disclosure in Companies' Quarterly and Annual Reports*, SEC https://www.sec.gov/rules-regulations/2002/08/certification-disclosure-companies-quarterly-annual-reports (on file with the *Journal of Corporation Law*).

90. Michael L. Zuppone, *Section 302 of the Sarbanes-Oxley Act of 2002*, MONDAQ (Nov. 4, 2002), https://www.mondaq.com/unitedstates/charges-mortgages-indemnities/18535/section-302-of-the-sarbanes-oxley-act-of-2002 [https://perma.cc/GG6S-ZWC9].

91. Facebook, Inc., Annual Report (Form 10-K) (Feb. 1, 2017).

did announce negative information of various sorts (including but not limited to the Cambridge Analytica scandal) that was followed by a 19% stock price drop.[92]

On this core issue, the plaintiffs' claim was simple: to state a Risk Factor in hypothetical terms when knowing that it was now materializing is itself false and misleading.[93] There is a long history of such holdings, but their resolution is inevitably fact specific (and under the Private Securities Litigation Reform Act, plaintiffs must plead falsity with greater specificity). The Ninth Circuit panel split 2-1 in favor of the plaintiffs.[94] "There is a big chasm between 'absolute security' and sidestepping the reality of what Facebook allegedly knew about the compromised data," said the majority.[95]

The dissenting judge (Bumatay) gives us a good sense of the dueling contentions apart from the purely factual squabble over precisely how much harm, or lack thereof, Facebook could anticipate as of the date the 10-K was filed. He took the matter head-on:

> Taken together, Facebook's risk factor statements warn about harm to its 'reputation' and 'business' that may come to light . . . . These statements do not represent that Facebook was free from significant breaches at the time of the filing. And if a reasonable investor thought so based on Facebook's 10-K statement, that 'reasonable' investor wasn't acting so reasonably.[96]

Note a few things here. First, neither the majority nor the dissenter thought of this as a half-truth matter, though it might have been useful to do so. The cluster of facts about the threat posed by the misuse of data was surely an omission of facts necessary to make the 10-K statement not misleading. As we saw when examining the half-truth doctrine, it is always the case that a savvy reader or listener should not take corporate disclosure as the whole truth unless the speaker says so. But the long-standing availability of the doctrine and its plain language, invoked in corporate disclosures and elsewhere, indicates that reasonable people are entitled to rely on the natural and normal *implication* of statements made, unless there is an even louder signal that such reliance would be unwise.

So where does this sit along the interpretive continuum? My instinct is that by the time of the 10-K filing, this was no longer just a Risk Factor but instead a known trend or uncertainty requiring that the issue get full MD&A treatment. That underscores a connection between *Facebook* and *Macquarie*, and to the extent that the issue is now in play because of Facebook's 10-K and -Q disclosures, this would be easier than "pure silence." Never mind, however: as noted earlier, the Supreme Court took the case and, after hearing oral argument, dismissed it as improvidently granted.

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92. Rupert Neate, *Over $119bn Wiped off Facebook's Market Cap After Growth Shock*, THE GUARDIAN (July 26, 2018), https://www.theguardian.com/technology/2018/jul/26/facebook-market-cap-falls-109bn-dollars-after-growth-shock (on file with the Journal of Corporation Law).

93. *In re* Facebook, Inc. Sec. Litig., 87 F.4th 934, 946 (9th Cir. 2023).

94. *Id.* at 951.

95. *Id.*

96. *Id.* at 959–60.

## CONCLUSION

Lawyers commenting on *Macquarie* have invoked Bloomberg's Matt Levine's often-repeated rhetorical meme asking "[I]s *everything* securities fraud?"[97] and suggested that the Supreme Court was finally ready to say no. I understand the point, but I differ in my assessment. The meme is about how many securities fraud cases are at first glance about something entirely distinct from the world of securities and corporate finance—plane crashes, the way sexual harassment is handled in so many firms, oil rig explosions, etc.[98] But it does not take much to see that if corporate officials intentionally misrepresented the risk of the harm that came about, then it's not much different from a misstated income statement. There are non-investor victims as well, but that does not detract from the reality of market price distortion. There would be two sets of injuries that deserve attention. In any event, what Macquarie concealed was a principal (but now impaired) asset, hard to fit into the lament about too many marginal lawsuits.

The law about corporate disclosure has thus come to an unsatisfying place. The Supreme Court has not tended these grounds as it should, and through apparent disinterest or ideological instinct failed to embrace the task of investor protection with any enthusiasm. The lemons problem persists, and whether anyone cares that much about issuer specific matters beyond controller power and conflicts is debatable.

Up until *Chiarella* and *Basic*, there was a sensible but futile effort to create a corporate duty to disclose with a temporary right to remain silent where disclosure would be value-destroying. The abandonment of this approach was inadvertent—it was the victim of a sharp turn in insider trading law followed, unnecessarily, by a footnote in *Basic* meant only to say that companies generally have the right to say "no comment" when asked voluntarily to disclose something of major significance. Beyond that, the footnote said that companies must tell the truth; any protection for lying is for Congress, not the courts.

However, lower courts jumped on footnote and in the process flipped the presumption from disclosure to a right to remain silent, which was certainly helpful in protection of intellectual property and other value but allowed firms to bury wrongdoing and embarrassment just as easily. There was no social gain in *Macquarie* from hiding the environmentally impaired tanks of No. 6 oil.

In this flipped world of corporate disclosure, the work of the ecosystem is directed at artful paltering, risk factors that bespeak caution and say little, or other means to avoid what senior management wants to avoid. Word skills too often enable the corporate curtain to be closed, open only for celebrations. This feeds the fundamental attribution bias that exists in so many firms: good news is trumpeted, bad (if possible) is someone else's or no one's fault. Worse, it presents nondisclosure as a right that management can exercise with or without good reason. To be sure, there are many times when events force disclosure, or the SEC requires it. But even then, as *Macquarie* shows, there is little or no serious penalty for pure silence when investors were kept in the dark. Chief Justice Marshall's second

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97. Matt Levine, *Everything Everywhere is Securities Fraud*, BLOOMBERG (June 26, 2019), https://www.bloomberg.com/opinion/articles/2019-06-26/everything-everywhere-is-securities-fraud?embedded-checkout=true (on file with the *Journal of Corporation Law*).

98. On the premise underlying Levine's question, see Emily Strauss, *Is Everything Securities Fraud?*, 12 U.C. IRVINE L. REV. 1331, 1339–42 (2022) (asserting that "event-driven" securities litigation has become increasingly common in recent years).

holding in *Laidlaw* was quietly forgotten. All the formalism pointed in this direction, and so the Court chose the slippery path to no 10b-5(b) liability.