

## Securities: Is Rule 10b-5 The “Mother Of All Litotes”?

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Yesterday’s post addressed the use of [litotes](#) in California’s broker-dealer suitability rule. Litotes can be an effective rhetorical device, but as Judge [Frank H. Easterbrook](#) observed, it is also ambiguous. ***Associated Randall Bank v. Griffin, Kubik, Stephens & Thompson, Inc.*** 3 F.3d 208 (7th Cir. 1993) (“‘Not unlike’ can mean almost anything; although the listener may cancel the negatives to obtain ‘like,’ the author may want to convey some difference between ‘like’ and ‘not unlike.’”).

For securities lawyers, the most notorious use of litotes can be found in Rule 10b-5(b) which declares it unlawful for any person 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*” in connection with the purchase or sale of any security. Similar language can be found in Section 11 of the Securities Act of 1933 and Sections 25401 and 25504.2 of the California Corporations Code.

Having read and heard Rule 10b-5 so many times, it is hard to imagine a formulation of the rule without the use of “not misleading”. If litotes is eschewed, the rule might read “omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, true”. This, of course, begs the question of whether “true” is the equivalent of “not misleading”. It seems to me that they may not be. After all, would someone rather be described as pretty or not ugly?

The California legislature also appears to believe that “true” is not the exact equivalent of “not misleading”. Corporations Code Section 25164 provides: “Neither (1) the fact that an application for qualification under this law has been filed nor (2) the fact that such qualification has become effective constitutes a finding by the commissioner that any document filed under this law is true, complete, or not misleading.”

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