09-1619-cv

IN THE
United States Court Of Appeals
FOR THE SECOND CIRCUIT

PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, RH CAPITAL ASSOCIATES LLC,

Plaintiffs-Appellants,

PIMCO FUNDS: PACIFIC INVESTMENT MANAGEMENT SERIES, JOSEPH MAZUR, individually and on behalf of all others similarly situated, IRV KREITENBERG, STEVE KREITENBERG, MATTHEW LAWSON, AMERICAN FINANCIAL INTERNATIONAL GROUP-ASIA, LLC, MICHAEL ALBRECHT,

Plaintiffs,

v.

MAYER BROWN LLP AND JOSEPH P. COLLINS,

Defendants-Appellees

(For Continuation of Caption, See Inside Cover)

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE ASSOCIATION OF CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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Defendants.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

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INTERESTS OF AMICUS CURIAE

The Association of Corporate Counsel ("ACC") is a bar association formed more than twenty-five years ago to represent the professional interests of attorneys who practice in the legal departments of corporations and other private-sector organizations.

Today, ACC serves as the voice of the in-house bar on matters affecting both the professional rights of its members and, equally importantly, the representational needs of its members' clients. ACC has over 25,000 in-house counsel members, practicing in the legal departments of more than 10,000 corporations (public, private, and non-profit) in more than 80 countries. Among its numerous internal member committees, ACC's Corporate & Securities Law Committee is comprised of over 8,000 members who have a direct professional interest in—and often professional responsibility for—securities law issues and disclosures.

As *amicus curiae*, ACC offers the Court the perspective of those who serve as the practical connection between their clients and the law. In-house lawyers are trusted, knowledgeable, and institutionally-savvy advisers for the company's business teams and executive leadership, as well as the board. The willingness of ACC's members to provide detailed analysis and their most candid advice is indispensable to the ability of their clients to navigate the difficult issues presented

by securities laws. Further, the open honesty and trust inherent in offering the professional judgment necessary to guide and support tough decisions is crucial to the integrity of corporate financial processes and the capital markets themselves. In addition to offering the perspective of trusted counsel to their clients, ACC members offer this Court the perspective of those who regularly seek and employ the expertise and additional guidance provided by outside counsel for help assisting their clients with securities law issues that are beyond their personal expertise or capacity.

While in-house counsel perform all manner of important compliance roles in their client companies, the involvement of qualified in-house and outside attorneys offering candid advice is nowhere more critical to corporate governance and the health of our economy than in the area of compliance with the securities laws. Because the stakes are so high, it is vital that attorneys be provided appropriate assurances of the scope of their responsibilities and potential liability so that they will not be dissuaded from providing this necessary assistance because of fear of liability of uncertain and unpredictable scope.

Recognizing this, the United States Supreme Court has repeatedly given precisely this type of clear guidance regarding the scope of liability exposure for secondary actors, including attorneys. Such guidance has appropriately fostered needed certainty and predictability. This Court's well-reasoned and uniquely

influential “bright-line test,” grounded squarely upon Supreme Court precedent, has further fostered this needed certainty and predictability.

ACC and its members are deeply concerned that dire consequences that would flow from any decision by this Court to abandon or modify its “bright-line test” in order to adopt the type of unclear “creator” liability standard advocated by the Securities and Exchange Commission.

Both issuers and the investing public will suffer if qualified attorneys, otherwise willing and available to provide legal advice regarding securities law issues, were to become unwilling to provide critical legal counsel to issuers on important financial disclosure matters out of fear of uncertain and potentially vast liability exposure. Likewise, the cost of doing business would increase for all involved in the markets with the adoption of the SEC’s sweeping and amorphous “creator” standard of liability because permitting such easily alleged, but difficult to refute, claims against attorneys based on behind-the-scenes responsibility for the making of statements that are not publicly attributed to them is likely to force attorneys into expensive “defensive lawyering.”

All parties have consented to the filing of an *amicus* brief in this matter by ACC.

ARGUMENT

The SEC's effort to bring into existence a judicially-established "creator" standard of primary liability is just the latest offensive in the SEC's almost fifteen-year war on the U.S. Supreme Court's decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994), and its progeny. The SEC continues to wage this war, even in the face of additional adverse Supreme Court precedent, and clear precedent of this Court. The SEC fights these battles in pursuit of a legal rule that is simply not needed to deter wrongdoing: a wide variety of other provisions and rules already provide the SEC with the power to appropriately pursue and deter secondary actors.

If the SEC's position prevails, the consequences for the nation's marketplace would be dire. ACC members and their outside counsel would be loathe assume the professional risk of giving much needed guidance to issuers with respect to financial disclosures, especially when the matter entails difficult judgment calls. Shareholders and other stakeholders would bear the brunt of drastically increased costs of doing business and for the provision of legal advice. And more issuers would be likely to reconsider their decision to offer securities in our nation's markets.

The district court in this case correctly recognized the overriding importance of the guidance provided by this Court more than a decade ago with respect to the issue of primary liability under Section 10(b) and Rule 10b-5(b):

> If Central Bank is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).

Shapiro v. Cantor, 123 F.3d 717, 720 (2nd Cir. 1997). This Court's view, first expressed in Shapiro and now widely known as the "bright-line test," is well-considered and well-articulated.[1] The SEC's repeated efforts to erase the distinction between primary liability and aiding and abetting have no legal basis. In its amicus curiae brief in this matter, the SEC once again demonstrates its desire to avoid the Supreme Court's clear guidance, as the impact of accepting the SEC's position would be to strip Central Bank of its central meaning.

Just last year, the Supreme Court rejected another similar effort to transform the conduct of secondary actions into a basis for primary liability, so called "scheme liability." Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 128 S. Ct. 761 (2008). Stoneridge's overarching message could not have

[1] See also Lattanzio v. Deloitte & Touche LLP, 476 F.3d 147, 153 (2nd Cir. 2007) ("[A] plaintiff must allege a misstatement that is attributed to the [secondary actor] at the time of its dissemination, and cannot rely on . . . alleged assistance in the drafting or compilation of a filing."); Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2nd Cir. 1998) ("[A] secondary actor cannot incur primary liability under the Act for a statement not attributed to that actor at the time of its dissemination.").

been more clearly articulated—the implied right of action under Section 10(b) "should not be extended beyond its present boundaries." 128 S. Ct. at 773. Stoneridge not only offered further guidance to lower courts by indicating that they must be wary of attempts to transform conduct by secondary actors into claims for primary liability under Section 10(b), but also directly concluded that expansion of the scope of the private right of action under Section 10(b) is simply not needed to deter wrongdoing. Id.

Given the clarity of the guidance in Stoneridge, a reasonable observer might have expected the SEC to cease and desist from its attempts to undermine Central Bank. After all, the "creator" standard that the SEC urges upon this Court would exceed the bounds of what is prohibited by the text of Section 10(b) and amount to an extension beyond the present boundaries of the implied right of action. Instead of abandoning its repeated efforts to create a new standard, which have been repeatedly rejected by the courts, the SEC continues to press for the expansion of the scope of primary liability even if it means misreading or simply ignoring unfavorable and controlling precedents.

A recent example of the SEC's approach can be seen by comparing the SEC's treatment of Stoneridge in SEC v. Lucent Techs., 610 F. Supp. 2d 342 (D. N.J. 2009), with its efforts here. In Lucent Techs., in connection with pursuit of a civil enforcement action, the SEC argued that Stoneridge actually provided a

justification for the New Jersey district court to reconsider its own adoption of this Court's "bright-line test." The New Jersey district court, however, forcefully rejected the SEC's reading of Stoneridge: "Read in its entirety, Stoneridge weakens rather than supports the SEC's position." Lucent Techs., 610 F. Supp. 2d at 355 (explaining that Stoneridge "repudiated the expansive view of primary liability urged by the SEC in this case").

While the SEC is now apparently loathe even to acknowledge Stoneridge in its *amicus* brief to this Court, it goes out of its way to claim support for its position from a 2-1 decision of a First Circuit panel that has been withdrawn and vacated in advance of *en banc* review. SEC v. Tambone, 550 F.3d 106 (1st Cir. 2000).[2] The Tambone case has been the subject of significant controversy since the original panel's ruling. In Tambone, just as in this case, the SEC argued a meaning of the word "make" so sweeping that it would turn the Supreme Court's ruling in Central Bank into little more than a historical footnote. Judge Selya dissented vigorously from the original panel decision, called it a "judicial enlargement of the scope of primary liability," a "rewriting" of Rule 10b-5 that "stretches the concept of primary liability beyond what [he] believe[d] the Supreme Court would

[2] The SEC has relied upon the original panel decision in Tambone in at least two other cases against secondary actors claiming that they should be held primarily liable for what would be, if proven, aiding and abetting liability. SEC v. Uberuaga, No. 08-CV-0625, 2009 WL 569842 (S.D. Cal., Feb. 20, 2009) (relying on Tambone to argue that auditor who reviewed materials that were incorporated into offering materials should have primary liability); SEC v. Sabhlok and Pattison, No. 3:08-CV-04238 (N.D. Cal., Jan. 16, 2009) (relying on Tambone to argue for primary liability for controller involved in backdating of options).

countenance and allows the SEC to cast a wider net than any court has ever thought possible," and a "radical departure" involving "unwarranted usurpation of legislative and administrative authority" that would essentially "give the SEC *carte blanche* to punish under a primary liability framework those whose conduct is not proscribed by the language of the relevant statute or rule." Id. at 150, 153 (Selya, J., dissenting).

By urging that this Court adopt a "creator" standard for primary liability against outside corporate counsel, the SEC seeks nothing short of the transformation of aiding and abetting liability into primary liability. And it seeks to do so despite extremely recent guidance from the Supreme Court making clear that expansion of the scope of liability under Section 10(b) is simply not needed to deter wrongdoing. Stoneridge, 128 S. Ct. at 773 ("Secondary actors are subject to criminal penalties, see, e.g., 15 U.S.C. § 78ff, and civil enforcement by the SEC, see, e.g., § 78t(e). The enforcement power is not toothless.").

That the Supreme Court is correct about the lack of any need to expand Section 10(b) liability is clear. Congress has already provided the SEC with all of the authority it needs to punish those who aid and abet securities fraud. Securities laws already provide a variety of provisions through which the SEC can act to bring enforcement actions or seek criminal penalties against the type of conduct

that the SEC claims needs to be brought within the scope of Section 10(b) through a "creator" standard.

Section 104 of the PSLRA specifically provided the SEC with the power to pursue a civil enforcement action against "any person that knowingly provides substantial assistance to another person in violation of" Exchange Act provisions and rules such as Section 10(b) and Rule 10b-5. Thus, the SEC already can sue secondary actors as aiders and abettors, Section 20(e); the SEC can already sue secondary actors for violation Section 13 relating to the accuracy of corporate books and records. As a result of Rule 13b-2-2(b)(1) which was adopted by the SEC to enforce Section 303(a) of Sarbanes-Oxley, the SEC also can sue a secondary actor who provides false documents to the auditor of an issuer as a primary violator. Furthermore, with respect to lawyers, the SEC already has authority as a result of Sarbanes-Oxley to discipline attorneys appearing and practicing before it.

The SEC has repeatedly failed to make the case that its enforcement efforts are somehow hampered by any inability to pursue primary liability against an aider and abettor that it now identifies as a "creator." In both Central Bank and Stoneridge, the Supreme Court recognized the real risk of ripple effects impacting the marketplace that would flow from uncertainty and the specter of excessive litigation. Central Bank, 511 U.S. 164, 189; Stoneridge, 128 S. Ct. at 772. The

SEC tries to demonstrate its need for such a standard, in part, by pointing to hypotheticals involving anonymous postings in Internet chatrooms as part of a "pump and dump" scheme and a claim that "an attribution requirement would allow significant misconduct to escape liability." Yet, the SEC points to no examples of its inability to punish persons under other provisions of the securities laws who have undertaken such "pump and dump" schemes. In addition, the SEC seems unwilling to recognize the absurdity of challenging the need for an attribution requirement for the implied Section 10(b) private right of action on the basis that "[e]ven when a person disseminating information on the Internet claims a certain identity, the recipients of the information cannot be sure that the person is who that person claims to be" and "cannot be sure that the person is telling the truth." (SEC Amicus Brief at 15, 17.)[3]

The SEC, having already been furnished with enforcement powers that the Supreme Court has concluded are sufficient to deter wrongdoing, wants this Court to give it more, even though the effect of granting this request would mean permitting unscrupulous plaintiffs to sue a seemingly limitless array of secondary actors. Adopting the SEC's "creator" standard would be an unwarranted judicial

[3] If a person receives information disseminated on the Internet and is not sure that the person is who they claim to be or that the person is telling the truth, how could they ever be reasonably justified in relying upon such information in making an investment decision? And, even if circumstances could be imagined where making an investment decision on that basis might be justified, it is simply beyond the pale to inject the type of uncertainty and amorphous risk of liability exposure into the system that would flow from the SEC's "creator" standard based on an argument supported on such a slender reed.

expansion of Section 10(b) and would introduce the very uncertainty and amorphous risk of liability into the system that the Supreme Court has repeatedly indicated is undesirable.

The SEC's "creator" liability standard as applied to lawyers for issuers effectively seeks to turn the normal relationship of principal and agent on its head so that agents would now have to worry about having liability for the statements of their principals. The SEC's proposed standard would lead inexorably to increased liability exposure for what are now routine aspects of corporate practice for in-house and outside counsel alike, such as reviewing or providing text for use in offering documents, press releases, and other public disclosure materials. This threat of expanded liability for lawyers who are willing to provide legal guidance to issuers will, in turn, interfere with the ability of issuers to get effective advice from their in-house counsel with securities expertise and will interfere with the ability of issuers and their inside counsel alike to receive advice on difficult issues involving securities disclosures from outside counsel whose expertise on such issues would otherwise be highly valuable.

In remarks presented on January 18, 2008, SEC Commissioner Paul S. Atkins referenced the existence of "a centuries-long continuity of the legal community working to solve difficult questions in the law as new circumstances arise, and that solutions worked out in one time and place can resonate in other

times and places." *Speech by SEC Commissioner Paul S. Atkins, Remarks at the Federalist Society Lawyers' Chapter of Dallas, Texas*, January 18, 2008 (available at http://www.sec.gov/news/speech/2008/spch011808psa.htm, last accessed on September 11, 2009). Adoption of the SEC's position would greatly endanger this important and vital continuity by chilling the willingness of corporate lawyers, both in-house and outside counsel, to work to solve difficult questions in the law as new circumstances arise.[4]

Nearly every issuer will find itself, at some point in time, in a difficult situation in which it will need disclosure advice from its lawyers, whether in-house counsel, outside counsel, or both. Lawyers have been rightly proud of their central role in providing issuers this kind of important legal service. However, if the price of providing this advice is the risk of massive liability based on allegations involving behind-the-scenes participation—allegations that can only be disproved at great expense and likely only after being subjected to grueling and expensive discovery and irreparable professional reputational harm—then lawyers will quite

---

[4] The SEC has, in the past, recognized the importance of these issues and the important public benefits that flow from securities lawyers not being placed in a position where fear of personal liability will alter the balance of their exercise of independent professional judgment. See, e.g., In re: William M. Carter and Charles J. Johnson, Jr., Exchange Act Release No. 34-17597, 1981 WL 384414, at *25 (Feb. 28, 1981) ("If a securities lawyer is to bring his best independent judgment to bear on a disclosure problem, he must have the freedom to make innocent—or even, in certain cases, careless—mistakes without fear of legal liability or loss of the ability to practice before the Commission. Concern about his own liability may alter the balance of his judgment in one direction as surely as an unseemly obeisance to the wishes of his client can do so in the other. While one imbalance results in disclosure rather than concealment, neither is, in the end, truly in the public interest. Lawyers who are seen by their clients as being motivated by fears for their personal liability will not be consulted on difficult issues.").

rightly be much less inclined to provide these services with respect to their clients' most troubling issues—the very issues for which competent legal advice is most desirable and most beneficial to the issuers and shareholders alike. Facing such exposure, a few firms might continue to offer such advice, but only at unreasonably high rates, commensurate with the risk undertaken, rather than the traditional value of the advice given. Indeed, the SEC's proposed "creator" standard would effectively place outside counsel in a position of being paid like an outside vendor but facing liability exposure under the securities laws like a corporate officer.[5] The message sent by the adoption of the SEC's "creator" standard would be clear: Securities lawyers would personally be better off simply letting issuers figure out for themselves how to handle disclosures and not make drafting suggestions of any sort. This would be a perverse result, and clearly not in the best interest of issuers, shareholders, or our nation's financial system.

Ironically, a clear example of how unwise it would be to adopt the SEC's position is demonstrated by the devastating impact visited on one law firm in a case that the SEC points to as support for its argument. (SEC Amicus Brief at 10 (citing In re Enron Corp. Sec. Derivative & ERISA Litig., 235 F. Supp. 2d 549,

[5] In fact, a significant number of cases that the SEC looks to for support in this matter involves primary liability treatment for corporate officers who were considered to have "made" statements issued by the corporate entities only serves to underscore the severe deleterious impact such a standard would have on the availability of needed legal services. (SEC Amicus Brief at 12-13 (citing In re Scholastic Corp. Securities Litig., 252 F.3d 63, 75 (2nd Cir. 2001); Novak v. Kasaks, 216 F.3d 300, 314 (2nd Cir. 2000)).

585-90 (S.D. Tex. 2002)). In In re Enron, the Texas federal district court adopted the "creator" approach that had been advocated by the SEC to seek to hold a law firm and its lawyers primarily liable for drafting misrepresentations in a company's disclosures. A subsequent bankruptcy examiner's report, however, demonstrated that the defendant law firm's role in the disclosures was quite limited and that it did not in any way have control over Enron's decisions as to what to disclose or not disclose. In re Enron Corp., No. 01-16034 (AJG), Bankr. S.D.N.Y.), *Final Report of Neal Batson, Court Appointed Examiner, Appendix C, Role of Enron's Attorneys*, at 84, 87. Nevertheless, under the SEC's proposed "creator" standard, that law firm was forced to suffer through years of discovery, itself having to produce more than six million pages of documents, with its attendant expense and business disruptions (including having thirteen of its lawyers sit for thirty-nine days of depositions).[6] It was not until 2007, some five years after the district court's decision adopting the SEC's approach, and only after severe harm to its reputation and its financial condition had been done, and while the law firm's summary judgment motion was pending that the law firm was voluntarily dismissed from the lawsuit by the plaintiffs.[7]

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[6] See Brief of Appellant Vinson & Elkins LLP, Regents of the University of California v. Credit Suisse First Boston (USA) Inc., No. 06-20856 (5th Cir.) at 10.

[7] The theory espoused by the SEC in the Enron case was later discredited by the Fifth Circuit in Regents of the University of California v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007).

CONCLUSION

Attorneys, both in-house and outside counsel alike, are an integral and essential part of assuring compliance with securities laws. Their willingness to provide the advice necessary for their clients to navigate difficult disclosure issues is crucial to the integrity of corporate financial processes and to the integrity of the capital markets themselves. Currently, as a result of clear guidance from the Supreme Court and this Court's own "bright-line test," the role of attorneys in this arena is carefully defined in a fashion that balances the needs of all participants in our nation's financial system. The SEC now seeks to upset this careful and wise balance solely for its own convenience in having a larger pool of possible targets. But the cost of such convenience is far too great. It would undermine the availability of, and unnecessarily increase the cost of, qualified attorneys who provide important legal advice, especially those who are asked to exercise their judgment when no clear path or easy answer is available to guide their clients' actions. It would jeopardize clarity, accuracy, transparency, and accountability in the marketplace. Accordingly, this Court should affirm the decision below and reject the SEC's effort to have this Court establish a "creator" standard of liability.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,867 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

/s/ Brian S. Faughnan
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Dated: September 15, 2009

CERTIFICATE REGARDING VIRUS PROTECTION

Pursuant to Rule 25.1(a)(6) of the Local Rules of this Court, I hereby certify that the electronic copy of this brief that is being transmitted to the Court has been scanned for viruses using Symantec AntiVirus Version 10.1.0.396 and that no viruses have been detected.

/s/ Brian S. Faughnan
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CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of September, 2009, I caused a copy of the foregoing Brief for the Association of Corporate Counsel as *Amicus Curiae* in Support of Affirmance to be served by Federal Express, upon:

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