

United States Court of Appeals For the First Circuit

No. 07-1384

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff, Appellant,

v.

JAMES TAMBONE; ROBERT HUSSEY,

Defendants, Appellees.

Before
Lynch, Chief Judge,
Torruella, Boudin, Lipez and Howard, Circuit Judges.

ORDER OF COURT
Entered: February 23, 2009

The court has under consideration the appellees' petitions for rehearing en banc. In light of the complexity of this case and the seriousness of the issues presented, the court has determined it would be useful to obtain the views of the SEC and of amici, and to permit a response from petitioners, on the question of whether to grant the petitions solely as to the Rule 10b-5 issue. The Rule 10b-5(b) issue focuses on whether primary liability extends, on the basis of an implied statement theory, to underwriters of a mutual fund who are responsible for and direct the firm's efforts to sell shares of the fund and who, in connection with these sales efforts, disseminate prospectuses containing material statements that they knew, or were reckless in not knowing, were false.

In the course of addressing this issue, the briefs should also address several related considerations:

1. Would the panel holding also apply to private party suits and, if so, what principles, if any, would limit the reach of that holding in private party actions under Rule 10b-5?
2. Assuming the SEC has stated a claim for aiding and abetting liability, what purpose is served by expanding the scope of primary liability under Rule 10b-5?
3. What factual information about the role of underwriters in the securities industry is pertinent to the issue?

The SEC brief is due 30 days from the date of this order. Amicus briefs and any responsive briefs from petitioners, shall be due 30 days thereafter. Briefs must comply with otherwise applicable rules concerning format, number of copies, service, and other requirements. No brief may exceed 30 pages.

The Clerk is directed to serve forthwith a copy of this order on certain potential amici organizations, as listed in the attachment hereto. Other amici are welcome to file amicus briefs. All amici must seek leave of the court, as otherwise required by applicable rules.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Hon. Nathaniel M. Gorton, Ms. Sarah A. Thornton, Mr. Pappalardo, Mr. Feldman, Mr. Scherker, Mr. Joralemon, Mr. Sten, Ms. Foster, Mr. Cadigan, Ms. Moore, Mr. London, Mr. Avery, Mr. Libby, Mr. Thomas, & Mr. Commisso, Ms. DeGiacomo, Chamber of Commerce of the United States, Consumer Federation of America, Financial Industry Regulatory Authority, National Association of Shareholder and Consumer Attorneys, North American Securities Administrators Association, Securities Industry and Financial Markets Association, and U.S. Public Interest Research Groups (PIRG).

Appendix
Potential Amici

Chamber of Commerce of the United States, Consumer Federation of America, Financial Industry Regulatory Authority, National Association of Shareholder and Consumer Attorneys, North American Securities Administrators Association, Securities Industry and Financial Markets Association, and U.S. Public Interest Research Groups (PIRG).