Stoneridge: Did it Close the Door to "Scheme Liability"?

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As Mark Twain might have said, reports of the death of scheme liability may have been greatly exaggerated.

On January 15, 2008, the Supreme Court issued its decision in the closely-watched case of *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761 (2008), which presented the question of whether third parties who do not issue public statements can nevertheless be held liable under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder for participation in a fraudulent scheme. While the Court rejected liability of the third parties involved in *Stoneridge*, the Court's opinion did not eliminate the possibility that in future cases with different facts, third parties could be held liable for participation in a deceptive scheme. To the contrary, the Court's opinion — a 5-3 decision[2] that was based on a relatively narrow ground — left behind enough loose ends for future plaintiffs to latch onto in efforts to sue participants in fraudulent schemes who have not made a public statement.

I. The Statutory Framework

The issue in *Stoneridge* concerned the reach of Section 10(b) and Rule 10b-5. The Supreme Court has stressed that in attempting to determine the scope of liability under Section 10(b), the Court must "turn first to the language of § 10(b), for '[t]he starting point in every case involving [the] construction of a statute is the language itself.'" *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)).

Section 10(b) itself makes no reference to statements or omissions, but rather contains a broad prohibition against the use of any "manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." Specifically, the statute provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
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> *   *   *   *
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.[3]

Pursuant to the authorization granted to it in Section 10(b), in 1942 the Securities and Exchange Commission promulgated Rule 10b-5, which provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) to employ any device, scheme, or artifice to defraud,
>
> (b) 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, or
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> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.[4]

Plainly, only subpart (b) specifically requires a misstatement or omission by the defendant; subparts (a) and (c), which proscribe any scheme to defraud or any conduct which operates as a fraud or deceit, on their face do not. See *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 152-53 (1972) ("To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted."); see also *Benzon v. Morgan Stanley Distributors, Inc.*, 420 F.3d 598, 610 (6th Cir. 2005) ("A plain-language reading" of Rule 10b-5 supports the view that "a defendant not liable under Rule 10b-5(b) for failure to disclose … may still be held liable under Rule 10b-5(a) and Rule 10b-5(c) as a participant in [an] allegedly fraudulent scheme") (internal quotation marks omitted).; *Ceres Partners v. GEL Associates.*, 918 F.2d 349, 360 (2d Cir. 1990) (Rule 10b-5 claim "may be established not only by proof of a materially misleading misstatement or omission, but also by proof of, e.g., a device, scheme, or artifice to defraud, or of any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person").

However, this is far from dispositive as to the scope of liability under Section 10(b) and Rule 10b-5, because the scope of Rule 10b-5 "cannot exceed the power granted the Commission by Congress under § 10(b)." *Hochfelder*, 425 U.S. at 214. Therefore, the ultimate issue is what conduct is encompassed by Section 10(b).

II. The Caselaw Prior to *Stoneridge*

Prior to the Supreme Court's Stoneridge decision, there had been several Supreme Court decisions that had upheld claims under Rule 10b-5 for participation in deceptive schemes. In *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971), which involved a complicated series of transactions whereby the defendant purchased a corporation's stock with the corporation's own assets, the Court held that the plaintiff stated a claim under Section 10(b) and Rule 10b-5 because there "was an 'act' or 'practice' within the meaning of Rule 10b-5 which operated as 'a fraud or deceit'" on the seller of securities.[5]

The Court further stated:

> We believe that § 10(b) and Rule 10b-5 prohibit all fraudulent schemes in connection with the purchase or sale of securities, whether the artifices employed involve a garden type variety of fraud, or present a unique form of deception. Novel or atypical methods should not provide immunity from the securities laws.[6]

Affiliated Ute involved a scheme whereby certain holders of stock were deceived into disposing of their shares at less than fair value through the creation of a false impression of the market for the shares. The Court held that "the Court of Appeals erred when it held that there was no violation of the Rule unless the record disclosed evidence of reliance on material fact misrepresentations by [the defendant bank employees]. We do not read Rule 10b-5 so restrictively."[7]

Most recently, in *SEC v. Zandford*, 535 U.S. 813 (2002), the Court reversed the dismissal of a Rule 10b-5 claim against a broker who had converted proceeds from sales of his customers' securities to his own use, even though the broker was "able to carry out his fraudulent scheme without making an affirmative misrepresentation,"[8] because allegations that he had "engaged in a fraudulent scheme" and a "course of business that operated as a fraud or deceit" were sufficient to state a claim.[9]

There were also many lower court cases upholding scheme liability claims, including several court of appeals cases. For example, in *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1052 (9th Cir. 2006), *vacated sub nom. Avis Budget Group, Inc. v. California State Teachers' Retirement System*, 128 S. Ct. 1119 (2008), the Ninth Circuit stated: "We conclude that conduct by a defendant that had the principal purpose and effect of creating a false appearance in deceptive transactions as part of a scheme to defraud is conduct that uses or employs a deceptive device within the meaning of § 10(b)."[10] Similarly, the Sixth Circuit stated in Benzon, 420 F.3d at 610, that "Rules 10b-5(a) and (c) encompass conduct beyond disclosure violations … We therefore conclude that the district court's determination that Defendants complied with their disclosure obligations does not dispose of Plaintiffs' claims under Rule 10b-5(a) and (c)."[11]

On the other hand, there were also decisions in which lower courts had rejected claims for scheme liability. Such decisions generally were based on the Supreme Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), which held that there is no private civil claim for aiding and abetting under Rule 10b-5. Courts dismissing claims for scheme liability generally held that such claims amounted to mere aiding and abetting claims precluded by *Central Bank*. But mere citation to *Central Bank* was not sufficient to exclude the possibility of liability for participation in a deceptive scheme, as *Central Bank* itself had left the door open for claims against so-called "secondary actors" by recognizing that they are subject to liability under Section 10(b) when they commit primary violations of that statute, including violations involving acts other than the making of false statements:

> The absence of §10(b) aiding and abetting liability does not mean that secondary actors in the securities markets are always free from liability under the securities Acts. Any person or entity, including a lawyer, accountant, or bank, who employs a manipulative device or makes a material misstatement (or omission) on which a purchaser … relies may be liable as a primary violator under 10b-5 . . . . In any complex securities fraud, moreover, there are likely to be multiple violators…

Central Bank, 511 U.S. at 191 (emphasis added). Under *Central Bank*, there could thus be liability if a person employed a manipulative device, even if he or she did not make a material misstatement. The question, of course, was what does it mean to employ a manipulative device.

Illustrative of the cases relying on *Central Bank* to defeat scheme liability claims is *Regents of the University of California v. Credit Suisse First Boston (USA), Inc.*, 482 F.3d 372 (5th Cir. 2007). In that case, which arose out the collapse of Enron Corporation, the plaintiffs alleged that certain banks entered into transactions with Enron designed to allow Enron to remove liabilities from its books and to falsely reflect revenue in its financial statements. Addressing the issue of whether the banks could be held liable under Rule 10b-5(a) and (c), the Fifth Circuit explicitly rejected the approach that the Ninth Circuit had adopted in *Simpson v. AOL*.[12] The Fifth Circuit observed that the banks conduct could not be said to be "manipulative," as that term is used in Section 10(b), because that word is "'virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.'"[13] In particular, the court stated that manipulation refers to practices "'such as wash sales, matched orders, or rigged prices.'"[14] The court further concluded that deceptive conduct, as that term is used in Section 10(b), must involve either a misstatement or a failure to disclose by a person having a duty of disclosure.[15] Finding none of these requirements satisfied by the banks, the court held that the conduct sued upon amounted to mere aiding and abetting not actionable under Section 10(b) and Rule 10b-5.

III. The *Stoneridge* Decision

One of the lower court decisions rejecting scheme liability was *In re Charter Communications, Inc. Securities Litigation*, 443 F.3d 987 (8th Cir. 2006), the decision that gave rise to the Supreme Court's *Stoneridge* case. In *Charter*, two companies that supplied Charter with cable boxes — Scientific-Atlanta and Motorola — were alleged to have participated in a fraudulent scheme to help Charter inflate its financial statements. Charter allegedly overpaid the suppliers for cable boxes, with the understanding that the suppliers would return the overpayment by purchasing advertising from Charter at above-market prices. Charter recorded the payments it received for the advertising as revenue and capitalized its payments for the purchases of the cable boxes. Documents were backdated to make it appear as if the cable box purchases and the sale of the advertising were unrelated transactions. Through this scheme, Charter was able to overstate revenue and cash flow in its financial statements.

The District Court for the Eastern District of Missouri granted the suppliers' motion to dismiss for failure to state a claim upon which relief can be granted and the Eighth Circuit affirmed. In its affirmance, the Court of Appeals stated, *inter alia*, that "any defendant who does not make or affirmatively cause to be made a fraudulent statement or omission, or who does not directly engage in manipulative securities trading practices, is at most guilty of aiding and abetting and cannot be held liable under § 10(b) or any subpart of Rule 10b-5."[16] In granting certiorari, the Supreme Court indicated that the question presented was:

> Whether this Court's decision in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164 (1994), forecloses claims for deceptive conduct under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a) and (c), 17 C.F.R. 240.10b-5(a) and (c), where Respondents engaged in transactions with a public corporation with no legitimate business or economic purpose except to inflate artificially the public corporation's financial statements, but where Respondents themselves made no public statements concerning those transactions.

Although the Supreme Court affirmed the dismissal of the complaint, it did ***not*** hold that Section 10(b) claims are foreclosed by *Central Bank* unless the defendant made a public statement. Indeed, in light of its prior decisions in *Superintendent of Insurance and Affiliated Ute*, it would have required overruling significant precedent to so hold. To the contrary, to the extent that the Supreme Court's opinion answered the question presented by the certiorari petition, the Court held that *Central Bank* does not foreclose liability if the defendant made no public statement. The Court stated unequivocally that if the Eighth Circuit's decision in *Charter* "were read to suggest that there must be a specific oral or written statement before there could be liability under Section 10(b) or Rule 10b-5, it would be erroneous."[17] As the Court further stated, "[c]onduct itself can be deceptive."[18]

Instead, the Supreme Court's basis for rejecting the Rule 10b-5(a) and (c) claims asserted in *Stoneridge* was that the plaintiff could not demonstrate reliance on the allegedly deceptive acts of the secondary-actor defendant. The Court noted that a rebuttable presumption of reliance could be found (a) if there was "an omission of a material fact by one with a duty to disclose," or (b) under the "fraud-on-the-market" doctrine if the matters at issue were publicly disclosed.[19] The Court in *Stoneridge* found that neither basis was satisfied, as the defendants in that case (who were not involved in the securities business and had no direct dealings with the market for the subject securities) owed no duty of disclosure to the plaintiff and "[n]o member of the investing public had knowledge, either actual or presumed, of respondents' deceptive acts during the relevant times."[20]

IV. The Implications for the Future

Appraising the impact of the Supreme Court's decision in *Stoneridge*, it is important to bear in mind what the Court held, what it did not hold, and what clues it provided as to arguments that might be employed in support of future claims under Rule 10b-5(a) and (c).

First, the Court affirmed that an implied private right of action under Section 10(b) comes from the text of the Securities Exchange Act itself, not merely from the SEC's rules promulgated thereunder: "Though the text of the Securities Exchange Act does not provide for a private cause of action for 10(b) violations, the Court has found a right of action implied in the words of the statute and its implementing regulation."[21] This aspect of the Court's holding is vitally important because it makes clear that the SEC cannot through its rulemaking authority somehow limit the ability of shareholders to bring private claims under Section 10(b), which has been discussed as one of the goals of the "roundtable" discussions the SEC has promised to schedule this year.

Second, as noted above, the Court explicitly did not hold that *Central Bank* forecloses the possibility of liability under Section 10(b) unless the defendant made a false statement or material omission.[22] Thus, assuming that a showing of reliance on the deceptive acts of the defendant can be made, the Court's decision clearly suggests that there could be liability even if the defendant did not make a misrepresentation or omission.

The Court stated that the requisite reliance could be found either when the defendant breached a duty of disclosure or under the fraud-on-the-market doctrine if the deceptive acts are communicated to the public.[23] With respect to a duty of disclosure, there are numerous contexts involving claims against third parties where a duty of disclosure to the plaintiff might be held to exist. For example, where a bank serves as an underwriter of securities, the law imposes disclosure obligations,[24] and the same is true where a bank is the placement agent in private placements.[25] Plaintiffs may well be able to allege the requisite duty of disclosure where a defendant bank serves in one of those roles while, at the same time, participating in deceptive transactions with the issuer.

Where lawyers are involved in the fraudulent scheme, it may be that the requisite duty of disclosure can be found in ethical rules, such as Rule 4.1 of the American Bar Association's Model Rules of Professional Conduct, which provides that "[i]n the course of representing a client, a lawyer shall not knowingly … (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client…"[26]

With respect to basing reliance on the fraud-on-the-market doctrine, the key issue is whether the plaintiff "had knowledge, either actual or presumed, of [defendant's] deceptive acts."[27] In *Stoneridge* itself, there had been no public disclosure whatsoever of the transactions that were allegedly deceptive. Often, however, there will be some public disclosure. For example, a press release might be issued announcing a large transaction. If the transaction is claimed to be deceptive, because there are concealed buy backs or puts or other side agreements, such a press release might be sufficient to provide the needed disclosure of the deceptive acts so that the fraud-on-the-market presumption of reliance can be invoked. Similarly, the transaction might be partially disclosed in the company's annual reports or financial statements.

While the Supreme Court in *Stoneridge* indicated that public disclosure of the allegedly deceptive acts is required for reliance to be premised on the fraud-on-the-market doctrine, the Court did not explicitly state by whom such disclosure needs to be made. Thus, if the press release or financial statements containing the disclosure are made by the issuer, would such disclosure be sufficient under *Stoneridge* if the Rule 10b-5(a) and (c) claim is asserted against the other parties to the transaction, such as a bank or counterparty? Generally, the fraud-on-the-market doctrine does not require that the defendant be the one who directly communicates to the public information about or through the deceptive statements or acts. In fraud-on-the-market cases, it is common that the information is introduced to the market by persons or entities other than the defendant, such as analysts or journalists.[28] Therefore, under *Stoneridge*, for purposes of reliance on the fraud-on-the-market doctrine, what matters is that "news" of the deceptive acts somehow "reached the ears of investors,"[29] not that a statement be made directly to the public by the defendant.

Another possible argument that plaintiffs may assert concerning disclosures that persons other than the defendant make relates to any role that the defendant may have played in drafting the disclosure. In *Stoneridge*, the Court stressed that the defendants "had no role in preparing or disseminating" the issuer's disclosure statements.[30] It may be the case, however, that the scheme defendant does play a role in drafting press releases or financial statement disclosure of deceptive transactions to which it is a party. The fact that the *Stoneridge* opinion stressed that the scheme defendants in that case played no such role suggests that if the situation were otherwise, that would help bolster a claim that the disclosures are sufficient under *Stoneridge* to invoke the fraud-on-the-market theory of reliance.

Another question not answered in *Stoneridge* is whether the disclosure of the deceptive acts needs specifically to mention the defendant by name. For example, suppose a company's annual report states that the company received a large equity investment but does not mention the investor's name, and the plaintiff contends that because of various hidden side arrangements the transaction is really just a loan, not an equity investment. Does the fact that the annual report did not mention the investor's name immunize the investor from a scheme liability claim? *Stoneridge* merely states that the defendant's deceptive acts need to be disclosed so that there can be reliance on them; it says nothing about whether the defendant's identify must be disclosed before liability for participation in a fraudulent scheme can attach.

There is another aspect of *Stoneridge* that suggests an additional way that scheme liability claims might survive in other contexts. In *Stoneridge*, the Court stressed that the defendants in that case were "suppliers" and "customers" of the issuer, who were acting "in the marketplace for goods and services, ***not in the investment sphere.***" 128 S. Ct. at 774 (emphasis added); *see also id. at 770* (criticizing the petitioner's effort to apply § 10(b) "beyond the securities markets — the realm of financing business — to purchase and supply contracts — the realm of ordinary business operations"). A post-*Stoneridge* commentator explains that the distinction was important in the Court's decision that the chain of reliance in *Stoneridge* was "too remote for liability":[31]

> The terms "indirect" and "remote" refer to the difference between the "realm of financing business," which includes transactions in securities markets, and the "realm of ordinary business operations," in which the sales contracts at issue took place.[32]

Therefore, the emphasis in *Stoneridge* on the fact that the fraud occurred in the marketplace for goods, not in the realm of financing business, suggests that in future cases involving deceptive schemes relating to securities and investment transactions, a different analysis of the chain of reliance for Rule 10b-5(a) and (c) claims might be justified.

It may be noted that the Supreme Court denied certiorari in *Regents v. Credit Suisse*, where the alleged fraud ***did*** take place in the investment sphere and not the marketplace for goods and services.[33] However, this ought not to blunt plaintiffs' reliance on the distinction, because "denial of certiorari imparts no implication or inference concerning the court's view of the merits." *Hathorn v. Lovorn*, 457 U.S. 255, 262 n.11 (1982); see *Farr v. Pitchess*, 409 U.S. 1243, 1245 (1973); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 365 n.1 (1973); *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 919 (1950).

Conclusion

While the *Stoneridge* decision provides an analytical framework for considering claims for scheme liability under Rule 10b-5(a) and (c), the opinion left open many questions concerning whether, on different facts, such claims might be sustained. It may be expected that the lower courts will be confronted with numerous cases testing the various possible distinctions that the Supreme Court's decision suggests.

1 Messrs. Grant and Sabella are directors in Grant & Eisenhofer P.A. ("G&E"). G&E filed an amicus brief on behalf of the California Public Employees' Retirement System the Los Angeles County Employees Retirement Association, New York City Board of Education Retirement System, New York City Employees' Retirement System, New York City Fire Department Pension Fund, New York City Police Pension Fund, New York City Teachers' Retirement System, and the Connecticut Retirement Plans and Trust Funds in the Supreme Court in the *Stoneridge* case.

2 Only eight justices participated, because Justice Breyer owned stock in one of the parties and therefore recused himself. Justice Roberts also owned stock and initially recused himself. He later sold his stock so that he could participate, and he joined the majority opinion.

3 15 U.S.C. § 78j(b).

4 17 C.F.R. § 240.10b-5.

5 *Id.* at 9.

6 *Id.* at 11 n.7.

7 406 U.S. at 152-53.

8 535 U.S. at 822.

9 *Id.* at 820-21.

10 This formulation closely tracked that proposed by the SEC in an amicus brief in that case. When *Stoneridge* reached the Supreme Court, however, according to news reports the Solicitor General rejected the SEC's request to file an amicus brief in support of the plaintiffs' position.

11 Numerous other cases in the lower courts similarly upheld claims under Section 10(b) based on the defendants' participation in fraudulent schemes. *See SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 111 (2d Cir. 1998) ("a primary violator is one who 'participated in the fraudulent scheme' or other activity proscribed by the securities laws"); *In re Parmalat Sec. Litig.*, 376 F. Supp. 2d 472, 506 (S.D.N.Y. 2005) (Section 10(b) claim upheld where the banks' conduct "created the appearance of revenue or assets where there was none and thus distorted the prices of Parmalat's securities"); *WM High Yield Fund v. O'Hanlon*, No. 04-3423, 2005 WL 1017811, at *8 (E.D. Pa. Apr. 29, 2005) ("given the massive fraudulent scheme set forth by Plaintiffs in their Complaint … it appears that they have set forth sufficient facts to survive a Motion to Dismiss as to all Defendants on the basis of Rule 10b-5(a)/(c) liability"); *Quaak v. Dexia, S.A.*, 357 F. Supp. 2d 330, 338 (D. Mass. 2005) ("Plaintiffs have alleged a primary violation of Rule 10b-5 by defendant through its participation in a manipulative or deceptive scheme intended to mislead investors."); *In re AOL Time Warner Sec. & ERISA Litig.*, 381 F. Supp. 2d 192, 217 (S.D.N.Y. 2004) (claim stated under Section 10(b) where it was alleged that defendants "engaged in a systematic scheme … to inflate AOL's reported advertising revenue … based on various sham transactions…"); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 335 (S.D.N.Y. 2004) ("a cause of action exists under subsections (a) and (c) [of Rule 10b-5] for behavior that constitutes participation in a fraudulent scheme, even absent a fraudulent statement by the defendant"); *In re Lernout & Hauspie Sec. Litig.*, 236 F. Supp. 2d 161, 173 (D. Mass. 2003) ("any person who substantially participates in a manipulative or deceptive scheme by directly or indirectly employing a manipulative or deceptive device (like the creation or financing of a sham entity) intended to mislead investors, even if a material misstatement by another person creates the nexus between the scheme and the securities market" is liable under Section 10(b)); *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1237 (N.D. Okla. 2003) (complaint sufficiently alleged primary Rule 10b-5 liability based on participation in scheme to defraud); *Rich v. Maidstone Fin., Inc.*, No. 98-2569, 2002 WL 31867724, at *8 n.6 (S.D.N.Y. Dec. 20, 2002) ("the Second Circuit continues to permit plaintiffs to allege 'participation in' a securities fraud scheme as one manner in which a plaintiff may state a claim under § 10(b) and Rule 10b-5.").

12 *Id.* at 386-87 & n.24.

13 *Id.* at 387 (quoting *Hochfelder*, 425 U.S. at 199).

14 *Id.* (quoting *Santa Fe Indus. v. Green*, 430 U.S. 462, 476 (1977)).

15 *Id.* at 388.

16 *Charter*, 443 F.3d at 992.

17 *Stoneridge*, 128 S. Ct. at 769.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.* at 768 (citing *Superintendent of Ins.*, 404 U.S. at 13 n.9).

22 *Id.* at 769.

23 *Id.*

24 See, e.g., Securities Act of 1933 § 11, 15 U.S.C. § 77k; *Dolphin & Bradbury, Inc. v. SEC*, 512 F.3d 634, 641 (D.C. Cir. 2008) ("An underwriter must investigate and disclose material facts that are known or 'reasonably ascertainable'") (internal citation omitted).

25 *See, e.g., Woolf v. S. D. Cohn & Co.*, 521 F.2d 225, 227-28 (5th Cir. 1975) (noting the "stringent disclosure requirements … in the private placement context"), v*acated on other grounds*, 426 U.S. 944 (1976); *see also Longden v. Sunderman*, 737 F. Supp. 968, 973-74 (N.D. Tex. 1990); *Spatz v. Borenstein*, 513 F. Supp. 571, 577 (N.D. Ill. 1981) ("the private placement exemption does not diminish the force or reach of the anti-fraud provisions of the securities laws").

26 There are cases stating that "[a]n ethical duty of disclosure does not create a corresponding legal duty under the federal securities laws." *Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991). Any argument basing a duty of disclosure on a lawyer's ethical obligations presumably would be confronted with such caselaw.

27 *Stoneridge*, 128 S. Ct. at 769.

28 *See, e.g., In re PeopleSoft, Inc. Sec. Litig.*, No. C 99-00472 WHA, 2000 WL 1737936, at *4 (N.D. Cal. May 25, 2000) ("Analysts have such clear and immediate influence on the stock market that, under the fraud-on-the-market theory approved by the Supreme Court, misleading the analysts is tantamount to misleading the market"); *Panzirer v. Wolf*, 663 F.2d 365, 367 (2d Cir. 1981), *vacated on other grounds sub nom. Price Waterhouse v. Panzirer*, 459 U.S. 1027 (1982). It may be noted that *Panzirer* was cited with approval by the Supreme Court when it approved the fraud-on-the-market doctrine in *Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988).

29 D. Wiltenburg, *Stoneridge: Supreme Setback for the "Scheme" Theory?,* New York Law Journal, Jan. 25, 2008, at 6, col. 5, available on Westlaw at 1/25/2008 NYLJ 4.

30 *Stoneridge*, 128 S. Ct. at 767.

31 *Id.* at 769.

32 Wiltenburg, *supra*, New York Law Journal, Jan. 25, 2008, at 6, col. 5, available on Westlaw at 1/25/2008 NYLJ 4.

33 *See Regents of the University of California v. Merrill Lynch*, No. 06-1341, 2008 WL 169504 (U.S. Jan. 22, 2008).

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