Lawyer Liability: In the Crosshairs, Again!

By C. Evan Stewart

Yogi Berra really did say: "It's déjà vu all over again!"[1] Three times the U.S. Supreme Court has held that there is no aider and abettor liability for secondary actors (e.g., lawyers); that to establish a 10b-5 claim under the '34 Act, the traditional elements of fraud/tort (defendants must speak; plaintiffs must show reliance; etc.) must be pleaded and proven.[2] The Securities and Exchange Commission has never really taken "no" for an answer, however, and has continually tried to work a way around it.[3] The Commission recently went at it again, for a fourth time; this time in a case encaptioned *Lorenzo v. S.E.C.*[4] Oral argument took place at the Supreme Court on December 3, 2018; and a decision came down March 27, 2019. *Lorenzo* is an important case for many reasons, and it deserves our full attention.

First, Some Context

Before diving into *Lorenzo,* it is important to provide some context for the history of seeking to hold secondary actors accountable for fraud. *Barker v. Henderson*[5] is a good starting point; it was one the first cases to examine an attorney's duties (and liabilities) in detail. In *Barker*, a Michigan religious foundation issued unregistered bonds to unsophisticated investors, who ended up taking a bath. Searching for deep pockets, the plaintiffs' lawyers sued, among others, the foundation's lawyers. Two law firms had been hired specifically to review the bonds' selling materials and to advise the foundation on securities law issues; those two firms wrote settlement checks. Left in the litigation was the foundation's regular legal counsel, who did not have expertise in securities matters but who also neither blew the whistle on their client nor did anything to stop the sale of the bonds (even after receiving the selling materials).

On behalf of a panel of the U.S. Court of Appeals for the Seventh Circuit, Judge Frank Easterbrook rejected claims that the law firm had aided and abetted fraud. Judge Easterbrook found it factually significant that the firm had not been consulted on any securities issues; there was no evidence, moreover, that the firm had seen any of the selling materials until after they were being utilized. With respect to the law firm's silence in the face of their client's actions, Judge Easterbrook wrote that the lawyers were not "required to tattle on their clients in the absence of a duty to disclose." And because there was no such duty under prevailing professional responsibility rules, he ruled that:

> [A]n award of damages under the securities laws is not the way to blaze the trail toward improved ethical standards in the legal . . . profession[ ]. Liability depends upon an existing duty to disclose. *The securities laws must lag behind changes in ethical and fiduciary standards*. [emphasis added]

In the aftermath of Judge Easterbrook's pronouncement that liability under the securities laws had to "lag behind" changes in lawyers' professional obligations came a number of important (and perhaps confusing) decisions. In *Schatz v. Rosenberg*,[6] for example, a law firm represented a fraudster. At the closing of a deal, the law firm handed to the other side a document its client had prepared, in which the client represented that nothing material had changed with respect to his financial condition. The representation was false, and the law firm knew it was false.

After the deal cratered (because of the client's true financial condition), the other side sued the law firm under multiple theories of fraud. The U.S. Court of Appeals for the Fourth Circuit, however, ruled that the law firm had no liability. How could this be?!

First off, Judge Robert Chapman, writing for a unanimous Fourth Circuit, addressed the claim that the firm was a primary violator of Rule 10b-5 fraud (i) by failing to disclose its client's misrepresentation, and (ii) by making affirmative misrepresentations of its own about the client's financial condition. With respect to the former, Judge Chapman determined there was no duty to disclose under the federal securities laws or applicable state law; he further ruled that there was no public policy in favor of disclosure (in fact, public policy would be in favor of non-disclosure, so as to enhance lawyers' fact-finding abilities).[7]

As to affirmative misrepresentations, Judge Chapman determined that the firm had made no independent representations of its own, but had only passed on its client's; put another way, the other side's reliance was on the client's misrepresentations, not on anything said or written by the law firm (which had "merely 'papered the deal,'" and whose role was only that of a "scrivener").

With respect to the claim of aiding and abetting fraud, Judge Chapman gave it short shrift. The law firm did not have the requisite scienter to abet the fraud because the firm owed no duty to the other party to the deal (which was represented by its own counsel). And the law firm did

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not provide "substantial assistance" to its client's fraud for the same reasons it was not a primary violator in the fraud.

In 1994, the U.S. Supreme Court stepped into this fray in *Central Bank of Denver v. First Interstate of Denver*.[8] There, the Court held that since the text of §10(b) does not cover those who aid and abet a §10(b) violation, private plaintiffs seeking money damages could not bring an aiding and abetting claim against a secondary actor. At the same time, the *Central Bank* Court left open that (i) criminal liability for aiding and abetting was still viable, (ii) an SEC enforcement action based upon aiding and abetting was still viable, and (iii) traditional secondary actors in the capital markets (e.g., lawyers) could be pursued by private plaintiffs as primary violators "assuming all of the requirements for primary liability under Rule 10b-5 are met."

Just as lawyers began to think the water was safe into which to wade, the third door left ajar by the Supreme Court was pounced upon by the plaintiffs' bar, and there began a wave of new cases, premised upon lawyers (or other secondary actors) being held to the same standard of accountability for fraud as their clients. This attack seemed to reach its height/nadir in *Klein v. Boyd*.[9]

In *Klein*, the plaintiff (supported by the Securities and Exchange Commission) argued, and a panel of the U.S. Court of Appeals for the Third Circuit agreed, that a law firm could be held liable as a primary violator of securities fraud, even where the lead lawyer did not sign the document(s) at issue and where the investor was never aware of the lawyer's role in the creation of document(s). In the Third Circuit's view, the law firm was a primary violator because it "elect[ed] to speak" by its authoring or co-authoring of document(s) with alleged material misrepresentations and/or material omissions; according to the Third Circuit, while the firm did not have an obligation to blow the whistle on its client, it did have a duty to correct its own "statements."

On an *en banc* review, the SEC made its position even clearer: a law firm should be held accountable for fraud where it helps to "create" a misrepresentation. Prior to a ruling by the entire Court of Appeals, the case was settled; but the original precedent lived on, with the SEC (and the plaintiffs' bar) continuing to espouse such theories of liability, especially in the aftermath of Enron and similar corporate train wrecks.

In the aforementioned corporate train wrecks' aftermath, various courts reached different results as to lawyers' duties to "speak" to third parties.[10] These different results (and disparate outcomes on the issue of secondary actor liability) ultimately became so profound that the Supreme Court in 2008 agreed to revisit the same ground it had gone over in *Central Bank*. In *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc*.,[11] the Court (i) re-affirmed its prior ruling in *Central Bank* (noting that Congress had explicitly declined to establish aiding and abetting liability for civil suits when it had passed various securities legislation since 1994), and (ii) rejected the concept of "scheme liability"—a theory consistent with the *Klein v. Boyd* court's rationale—because it failed to require a basic element of a cause of action for fraud (i.e., that the aggrieved plaintiff(s) relied upon some act or omission by an alleged primary violator defendant(s).[12]

Three years later, the Supreme Court felt compelled to weigh in once more, this time *in Janus Capital Group, Inc. v. First Derivative Traders*.[13] In that case, Janus Capital Group (JCG) was sued for allegedly making misleading statements in various of Janus funds' prospectuses. Although the district court dismissed the complaint, the Fourth Circuit reversed, ruling that even if JCG had not actually written the alleged statements in the fund prospectuses, one of its subsidiaries (Janus Capital Management/JCM) must have approved those statements (actually made by a different corporate entity in the Janus family—Janus Investment Fund/JIF) (JIF is a separate legal entity owned entirely by mutual fund investors).

Writing for a five Justice majority, which reversed the Fourth Circuit, Justice Clarence Thomas held that the "maker" of a statement is "the person or entity with ultimate authority over the statement"—in this case JIF, citing the Court's prior ruling in *Central Bank*. He further observed that to give "make" a broader meaning would substantially undermine *Central Bank* by rendering aider and abettor liability a nullity (and would also undermine the Court's *Stoneridge* decision on that score). With respect to the Government's argument that the Court should adopt the SEC's interpretation of "make"— i.e., that "make" is the same as "create," Thomas rejected that argument, writing that such wordsmithing "would permit private plaintiffs to sue a person who 'provides the false or misleading information that another person then puts into the statement'" (citing the Government's *amicus curiae* brief). Such a result, wrote Thomas, would be inconsistent with *Stoneridge*'s rejection of "scheme liability" and countless other Supreme Court precedents.[14]

On behalf of Justices Ginsburg, Sotomayor, and Kagan, Justice Stephen Breyer wrote a dissent, contending that "the majority has incorrectly interpreted [Rule 10b-5's] word 'make.'" After rejecting the direct applicability of *Central Bank* and *Stoneridge*, Breyer then opined that the corporate family structure of the various Janus entities was so closely interwoven (even if legally separate) that, based upon the allegations pleaded, it could be held that JCG "made" materially false statements in the prospectuses issued by JIF: "Unless we adopt a firm rule (as the majority has done here) that would arbitrarily exclude from the scope of the word 'make' those who manage a firm—even when those managers perpetrate a fraud through an unknowing intermediary—the management company at issue here falls within that scope."

Lorenzo (in the D.C. Circuit)

In October of 2009, Francis Lorenzo, the director of investment banking at a registered broker-dealer, sent allegedly false and misleading statements to two investors; the statements had originally been drafted by his boss (the head of the firm) and had been sent at his boss's behest. At the end of the emails containing the statements, Lorenzo block signed his name and urged the recipients to "call [him] with any questions."

In September of 2013, the SEC brought an enforcement proceeding against Lorenzo, his boss, and the broker-dealer; the latter two quickly settled with the Commission. Lorenzo decided to fight, and a SEC administrative law judge subsequently ruled that Lorenzo had "willfully violated the antifraud provisions" of the federal securities laws (Rules 10b-5(a), (b) & (c)).[15] She also opined that Lorenzo's "falsity" had been "staggering" and that his mental state had been at least "reckless." The full Commission, upon review of the ALJ's determinations, affirmed her decision, as well as her "imposition of an industry-wide bar, a cease-and-desist order, and a $15,000 civil penalty."[16] Lorenzo appealed that decision to the D.C. Circuit Court of Appeals.[17]

By a 2 to 1 vote, a D.C. Circuit panel (giving deference to the determinations of the Commission) found that Lorenzo's statements were false or misleading and that he acted with requisite scienter in sending them.[18] At the same time, however, the panel ruled that, under *Janus*, Lorenzo was not the "maker" of the statements, because they had been sent "on the behest of his boss" who had drafted and approved them (i.e., the boss had the "ultimate authority"). As a result, the panel found that Lorenzo had *not* violated Rule 10b-5(b).[19]

But the panel did not stop there. It also ruled that Lorenzo's conduct *did* violate the scheme liability provisions of 10b-5(a) and 10b-5(c).[20] Rejecting Lorenzo's argument that (at worst) what he had done was to aid-and-abet his boss's conduct, [21] the panel ruled that he was primarily liable under those other two anti-fraud provisions.[22]

The dissenting vote on the D.C. Circuit panel came from none other than then-Judge Brett Kavanaugh. And his dissent was a passionate one. First off, he noted that the factual record and the SEC ALJ's legal determinations did not "square up": "At most, the judge's factual findings may have shown some mild negligence on Lorenzo's part . . . . [I]t is impossible to find that Lorenzo acted 'willfully.'"[23] Kavanaugh then opined that the Commission had "simply swept the judge's factual and credibility findings under the rug" in its rush to judgment. In his view, the D.C. Circuit panel should not have given deference to the Commission, but should have instead looked *de novo* at the record developed before the ALJ to assess whether Lorenzo had *in fact* willfully engaged in a scheme to defraud.

Alternatively, Kavanaugh opined that the panel's decision "creates a circuit split by holding that mere misstatement, standing alone, may constitute the basis for so-called scheme liability under the securities laws." Citing contrary decisions directly on point by other circuits—that a scheme liability claim *must* be based upon conduct *beyond* misrepresentations or omissions to be actionable under Rule 10b-5(b),[24] Kavanaugh attributed his then-colleagues' decision to push the envelope as the result of the "SEC's attempts to unilaterally rewrite" the antifraud provisions of the securities laws—in the face of the Supreme Court's rulings which distinguished between primary and secondary liability: *Janus*, *Stoneridge*, and *Central Bank*.[25]

Oral Argument Before the Supremes

On June 18, 2018, the Supreme Court granted Lorenzo's cert petition. On December 3, 2018, the Court heard oral argument. In between those two dates, now-Justice Kavanaugh recused himself, so only eight Justices heard the argument and only they would decide the case.

Many speculated that the Court granted certiorari to once and for all resolve (for the fourth time) that primary liability for use of misleading statements *alone* is actionable only under Rule 10b-5(b) (and that it cannot be end-runned by the scheme liability provisions of Rules 10b-5(a) and 10b-5(c)). Such a result would be consistent with *Central Bank*, *Stoneridge*, *Janus*, case law following those decisions, and then-Judge Kavanaugh's dissent; it would also preserve the distinction between primary and secondary liability.[26]

But many observers of the *Lorenzo* oral argument seemed to believe that the Court's *Janus* divide of four to four might well be the outcome in Mr. Lorenzo's case, leaving the D.C. Circuit's decision in place. With such an outcome, we would have had a very strange state of affairs in the short to mid-term: for the time-being, there would be an expansive view of 10b-5 liability, allowing the SEC and private plaintiffs to bring primary liability fraud claims against secondary actor individuals (including lawyers) who did not "make" the alleged material misrepresentations; and then—presumably—when the next case reached the Court (with Justice Kavanaugh participating), liability exposure would be returned to the *Central Bank*, *Stoneridge*, *Janus* status quo.[27]

Were the speculators and observers correct? Unfortunately, no!

Lorenzo (in the Supreme Court)

Writing for a six Justice majority (Justices Roberts and Alito shifted from their *Janus* positions), Justice Breyer upheld the D.C. Circuit panel's decision. Unlike then-judge Kavanaugh, Justice Breyer started off his opinion by noting that "the relevant facts are not in dispute." He then observed that the panel's ruling on subsection (b) of Rule 10b-5 (*Lorenzo* was *not* a "maker" of the misrepresentations) was *not* a subject for the Supreme Court's review or re-visiting. Thus, the only issue before the Court was whether a non-"maker" could be subject to scheme liability under subsections (a) & (c) of Rule 10b-5. And Justice

Breyer, who had not participated in *Stoneridge*—but had made his views crystal clear in *Janus*, would re-write the Supreme Court's jurisprudence on that issue.[28]

Justice Breyer's first foray into this new jurisprudence emphasized the plain meaning of the words in subsections (a) & (c), and the fact that those words had to have substance beyond the words set forth in subsection (b).[29] Rejecting Lorenzo's argument (and a legion of decisions) that only a "maker" of misstatements could be accountable under subsections (a) & (c),[30] Justice Breyer opined that such a position "would render subsection b of Rule 10b-5 "superfluous" and (in his view) misunderstands the different and "considerable" overlapping ways the federal securities laws have been layered to capture as many fraudulent acts and actors as possible.[31]

As for the notion that allowing for actionable claims under subsections (a) & (c) would render *Janus* "a dead letter"—the dissent's view—Justice Breyer wrote: "we do not see how that is so." *Janus* only concerned the "maker" of the misrepresentation(s); there was nothing in *Janus* that addressed the "dissemination of false or misleading information." Thus, *Janus* would still preclude liability "where an individual neither *makes* nor *disseminates* false information." (emphasis in original)

As far as the majority undercutting the whole *raison d'etre* of *Central Bank*'s demarcation between primary and secondary liability (i.e., that, at best, Lorenzo aided and abetted the fraud; he was not a primary violator), Justice Breyer was unconcerned and waved off the notion that his opinion *greatly* expands potential liability for fraud.[32] He further justified this by citing to the investors who received Lorenzo's emails, and noting that those investors would "not view the deception" as less harmful coming from him, as opposed to coming from the actual "maker."

Finally, as for the undercutting/voiding the Court's *Stoneridge* decision, he first found that unavailing because the SEC, "unlike private parties, need not show reliance [by investors] in its enforcement actions."[33] But even more ominously (in the context of prospective private claims), Justice Breyer then wrote that "Lorenzo's conduct involved the direct transmission of false information intended to induce reliance [which] is far from the kind of concealed fraud at issue in *Stoneridge*." He concluded by rejecting (again) Lorenzo's *arguendo* argument that, at worst, he could only be held secondarily liable (based upon *Stoneridge*, *Central Bank*, et al.):

> That is not what Congress intended. Rather, Congress intended to root out all manner of fraud in the securities industry. And it gave to the Commission the tools to accomplish that job.[34]

Justice Clarence Thomas, the author of *Janus* (and on behalf of Justice Gorsuch), dissented. *Janus*, he declared, was now a "dead letter, " as were the Court's prior decisions in *Central Bank* and *Stoneridge*, and with them the "bright line" between primary and secondary violators, because "it is undisputed that Lorenzo did not engage in any conduct involving planning, scheming, designing, or strategizing," as required by subsection (a).[35] And subsection (c), which "seems broader at first blush," does not reach Lorenzo's conduct either (at least under the Court's prior jurisprudence). At bottom, and notwithstanding the majority's dicta suggestion that minor actors (e.g., mail clerks, secretaries) should not be caught up in the liability net,[36] Justice Thomas correctly noted that *any* person who "knowingly sen[ds] false statements" will now be exposed to primary violator liability.

Going Forward, Be Not a "Sender"

Previously, the key to avoiding fraud liability was to not be a "maker" of false statements. Obviously, that is no longer the case; it is evident, for example, that the conduct by the law firm in *Schatz v. Rosenberg* would be actionable under *Lorenzo*.[37]

More importantly, the SEC Enforcement Division has publicly promised to push the *Lorenzo* ruling beyond "dissemination," and has further predicted that the lower courts will be sympathetic to such an expansive reading.[38] Such a tack by the Commission (undoubtedly to be followed on closely by the private plaintiffs' bar) does not seem consistent with Justice Breyer's purported caution as to where the liability line will or should exist.[39] More importantly—at least to the readers of this august legal publication, think of what *Lorenzo* will likely mean to people who are tasked with preparing regulatory filings (i.e., lawyers) and/or those who play a role in communicating with the investing public. All of those folks now have a new reason to lose sleep and get gray hairs.[40]

Endnotes

1. Y. Berra, The Yogi Book ("I Really Didn't Say Everything I Said") 30 (1998) (Yogi's comment came after Mickey Mantle and Roger Maris hit back-to-back home runs for the umpteenth time.).
2. *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994); *Stoneridge Investment Partners LLC v. Scientific-Atlanta Inc.*, 552 U.S. 148 (2008); *Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).
3. *See, e.g., Klein v. Boyd*, 1998 WL 55245, Fed. Sec. L. Rep. (CCH) ¶ 90,136 (3d Cir. 1998); *S.E.C. v. Wolfson*, 539 F.3d 1249 (10th Cir. 2008). The Zelig-like reemergence of this issue has been the subject of my pencil before. *See, e.g.*, C.E. Stewart, *While Rome Burns: Fiddling With Reforming Reform in the Securities Industry* (November 1998; National Legal Center for the Public Interest); C.E. Stewart, *Legal Ethics for Securities Lawyers: Traditional Norms Reinvigorated*, BNA Securities Regulation & Law Report 1409 (October 1, 2001); C.E. Stewart, *Liability for Securities Lawyers in the Post-Enron Era*, 35 The Review of Securities & Commodities Regulation 171 (September 11, 2002); C.E. Stewart, *Regulating the Legal Profession: Sense or Nonsense?* New York Law Journal (May 15, 2008).
4. No. 17-1077 (certiorari granted June 18, 2018; argued December 3, 2018); 139 S. Ct. 1094 (March 27, 2019).
5. 797 F.2d 490 (7th Cir. 1986).
6. 943 F.2d 485 (4th Cir. 1991).
7. *See Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

8. 511 U.S. 164 (1994).
9. 1998 WL 55245, Fed. Sec. L. Rep. (CCH) ¶ 90,136 (3d Cir. 1998).
10. *See, e.g., Howard v. Everex Systems Inc.*, 228 F.3d 1057 (9th Cir. 2000); *Ziemba v.Cascade International Inc.,* 2001 U.S. App. LEXIS 15529 (11th Cir. 2001); *In re* Enron Corp. Derivative & ERISA Litig., 236 F. Supp. 2d 161 (D. Mass. 2003); *Simpson v. AOL Time Warner Inc*., 452 F.2d 1040 (9th Cir. 2006). Of particular note is/was *SEC v. Wolfson*, 539 F.2d 1249 (10th Cir. 2008), where the Tenth Circuit upheld the SEC itself going after a non-employee consultant as a primary violator. That court noted that, unlike in a private cause of action, the SEC is under no burden of proving reliance or damages. *Id.* at 1258 n.14. *Accord SEC v. Goble*, 682 F.3d 934 (11th Cir. 2012).
11. 552 U.S. 148 (2008).
12. *See Basic v. Levinson*, 485 U.S. 224, 243 (1998). This brought on a hue and cry from the three dissenters, who claimed that the ruling was part of "the Court's continuing campaign to render the private cause of action under § 10(b) toothless." Those dissenters would have their revenge in 2019!
13. 564 U.S. 135 (2011).
14. *Id.* at n. 8. The SEC's expansive view of "make" had previously been rejected by other, lower courts. *See, e.g., SEC v. Tambone*, 597 F.3d 436 (1st Cir. 2010) (en banc).
15. Rule 10b-5 reads in its entirety:

    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 (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. (Sec. 10; 48 Stat. 891; 15 U.S.C. 78j) [13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

16. The SEC also charged Lorenzo with violating § 17(a)(i) of the '34 Act, which essentially tracks subsection (a), making it unlawful to "employ any device, scheme, or artifice to defraud." SEC Release No. 74836, 111 SEC Docket 1761, 2015 WL 1927763, at *11 (April 29, 2015).
17. For some reason *Lorenzo* only challenged the industry bar and the monetary fine, not the cease-and-desist order.
18. *Lorenzo v. SEC*, 872 F.3d 578, 580 (D.C. Cir. 2017). On appeal to the Supreme Court, for some (unknown) reason Lorenzo did not challenge the panel's scienter finding.
19. Because of this ruling, the panel vacated the sanctions imposed by the Commission and remanded that issue for further consideration.
20. *Id.* at 589-90. *See supra* note 15.
21. The SEC did not charge Lorenzo with aiding and abetting, which the Central Bank Court ruled was still a valid claim for an enforcement proceeding. *See supra* note 8 and accompanying text.
22. The panel further opined that Sections 10(b) and 17(a)(i) of the '34 Act also "may encompass certain conduct involving the dissemination of false statements even if the same conduct lies beyond the reach of Rule 10b-5(b)." *Id*. at 592. *See supra* note 15.
23. Thus, according to Kavanugh the ALJ's decision violated "basic due process . . . [because] mens rea is essential to preserving individual liability," citing, *inter alia, Morissette v. United States*, 342 U.S. 246, 250-51, 263 (1952) (Justice Jackson).
24. *See Public Pension Fund Group v. KV Pharmaceutical Co.*, 679 F.3d 972, 987 (8th blob:https://teams.microsoft.com/5edaafd3-691e-41c2-8be8-8c21f936db7a Cir. 2012); *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc*., 655 F.3d 1039, 1057 (9th Cir. 2011); *Lantell v. Merrill Lynch &* Co., 396 F.3d 161, 177 (2d Cir. 2008). *Accord SEC v. Rio Tinto PLC*, 2019 U.S. Dist. LEXIS 43986, *51-52 (S.D.N.Y. March 18, 2019); *Alpha Capital Anstalt v. Schwell Wimpfheimer & Assocs*., 2018 U.S. Dist. LEXIS 54594, *34 (S.D.N.Y. March 30, 2018); *SEC v. Wey*, 246 F. Supp. 3d 894, 917-18 (S.D.N.Y. 2017); *SEC v. China Northeast Petroleum Holdings Ltd.*, 27 F. Supp. 3d 379, 391-92 (S.D.N.Y. 2014); *In re Smith Barney Transfer Agent Litig*., 884 F. Supp. 2d 152, 161 (S.D.N.Y. 2012).
25. 872 F.3d at 601. He cited one specific example of the SEC's attempts to "circumvent" these Supreme Court decisions: In the Matter of the John P. Flannery & James D. Hopkins, Release No. 3981 (December 15, 2017).
26. *See supra* note 24. It is important to remember that such a result would not have affected the SEC's ability to initiate aiding-and-abetting cases against secondary actors, nor would it have impacted the Commission's power to use Section 17 of the '33 Act to proceed against those who offer or sell securities "by means of any untrue statement of a material fact." *See, e.g., In re* The Reserve Fund Securities and Derivative Litigation, 2012 WL 12356742, at *9 (S.D.N.Y. October 8, 2012); *SEC v. Tambone,* 550 F.3d 106, 127-28 (1st Cir. 2008) and 597 F.3d 436, 450 (1st Cir. 2010).
27. *See* C.E. Stewart, *Fourth Time a Charm? The Supreme Court Takes Another Whack at Secondary Liability.* New York Law Journal (Dec. 27, 2018).
28. *See supra* note 12.
29. The same plain meaning analysis thus also applied to § 17(a)(1) of the '33 Act. *See supra* note 15.
30. This point had been the basis for rejecting liability in countless prior decisions. *See supra* note 24.
31. For this proposition, Justice Breyer cited, i*nter alia, United States v. Naftalin,* 441 U.S. 768, 77 (1979); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S, 128, 152-53 (1972*); SEC v. N.J. Howey Co., In re R.D. Boyle & Co*., 19 S.E.C. 73 (1945); *In re Arthur Hayes & Co*., S.E.C. 271 (1939).
32. Justice Breyer did seem to acknowledge that his opinion would expand fraud liability to "capture a wide[r] range of conduct." And that "[a]pplying [this new standard] may present difficult problems of scope in borderline cases." He then postulated, however, that "[p]urpose, precedent, and circumstances could lead to narrowing their reach in other contexts." Just what that means, or how it will play out, is quite unclear. But *see infra* note 38.
33. *See supra* note 10.
34. Justice Breyer cited no authority for this sweeping pronouncement. That is not surprising given that the Court had explicitly acknowledged the contrary in its prior decisions. *See supra* note 12 and accompanying text. Justice Breyer's imaginative interpretation of congressional intent would appear to be consistent with his theory of "delegated democracy," whereby he believes the Court should review and interpret legislation based upon what it believes a "reasonable member of Congress" must have meant when she passed a bill. *See* S. Breyer, Active Liberty, pp. 85-101 (Knopff 2005).
35. And § 17(a)(i) of the '34 Act.
36. *See supra* note 32.
37. *See supra note 6* and accompanying text.
38. *See* Securities Law360 (April 13, 2019). Indeed, in the first case "interpreting" *Lorenzo*, the SEC got the 10th Circuit to expand Lorenzo's scheme liability under Rule 10b-5(a) and (c), where the court found an individual liable for failing to correct another person's misstatement. *See Malouf v. SEC*, 933 F.3d 1248 (10th Cir. 2019).
39. *See supra* notes 32, 36 and 38 and accompanying text.
40. *See* G. Ballard & L. von Rigal, *Think Twice Before You Forward That Email!* New York Law Journal (July 15, 2019). Thus, as Bette Davis once famously emoted: "Fasten your seatbelts, it's going to be a bumpy [ride]!" *All About Eve* (20th Century Fox, 1950) (written and directed by Joseph L. Mankiewicz; produced by Darryl F. Zanuck).