STONERIDGE INVESTMENT PARTNERS, LLC V. SCIENTIFIC-ATLANTA, INC.: THE EVISCERATION OF INVESTOR PROTECTION

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I. INTRODUCTION

Stoneridge Investment Partners is an important case on many levels.[1] Hyped as a landmark ruling, the case could have opened up a new avenue for investor suits against businesses involved in fraudulent schemes. The *Stoneridge* plaintiffs presented the United States Supreme Court with the opportunity to expand the definition of a primary violator by adding aider and abettor liability based on a vendor's level of participation in a scheme to defraud investors.[2]

The claims were brought by disgruntled investors in Charter Communications, a leading cable operator that offers customers in forty states a variety of data transmission and networking services.[3] In addition to Charter, plaintiffs named as defendants Charter executives; former Charter executives; Arthur Andersen LLP, Charter's outside auditor during the two years and eight months at issue; and Scientific-Atlanta, Inc. ("Scientific-Atlanta") and Motorola, Inc. ("Motorola"), two of Charter's vendors.[4] Scientific-Atlanta and Motorola were accused of participating with Charter in a scheme to overstate Charter's revenues.[5]

Initially, the United States District Court for the Eastern District of Missouri dismissed the claims.[6] The Court of Appeals for the Eighth Circuit

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1. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008).
2. Andrew H. Schapiro, Timothy S. Bishop, and Andrew J. Pincus, *United States: Stoneridge Investment Partners v. Scientific-Atlanta, Inc., No. 06–43*, Jan. 28, 2008, http://www.mondaq.co.uk/article.asp?articleid=56240.
3. *In re* Charter Commc'ns, Inc., No. MDL 1506, 2004 WL 3826761, *1 (E.D. Mo. 2004), *aff'd* 443 F.3d 987 (8th Cir. 2006).
4. *Id*.
5. *Id.* Scheme liability, a concept derived from the language of SEC Rule 10b-5, "[allows] plaintiffs to assert an action against any party participant in a fraudulent scheme, regardless of whether the party directly made fraudulent misstatements to the investing public," DAVID A. LIPTON, BROKER-DEALER REGULATION § 5:33.50, ¶ 1 (West 2009).
6. *In re Charter Commc'ns*, 2004 WL 3826761 at *18.

affirmed.[7] Undeterred, plaintiffs appealed and the Supreme Court granted certiorari.[8] The Court's earlier 1992 ruling in *Central Bank of Denver v. First Interstate Bank* had limited private action rights for investors;[9] a favorable ruling could have put investors back in the driver's seat. Plaintiffs not only had to get past *Central Bank*'s aider and abettor limitation, but also had to overcome the bright line definition of a primary violator established by the United States Court of Appeals for the Second Circuit in *Wright v. Ernst & Young LLP* a few years after *Central Bank*.[10]

Ultimately, the Court in *Stoneridge* chose to adhere to the requirements contained in SEC Rule 10b-5 ("10b-5"),[11] to uphold its ruling in *Central Bank*, and to defer to Congress's intent in passing the Private Securities Law Reform Act ("PSLRA") of 1995.[12]

This paper will first present the elements of a 10b-5 violation, the rulings in *Central Bank* and *Wright*, and the sections of the PSLRA applicable to this discussion. The presentation of this foundation material will be followed by an analysis of *Stoneridge*–what was at stake for both sides, the complicated discussion about scheme liability and expanding definitions, and the impact of the ruling on investors and businesses.

II. SEC RULE 10b-5

"Rule 10b-5 was drafted almost nonchalantly in 1942 as an attempt to close a loophole in the existing rules" which somehow allowed insiders to make stock purchases using inside information.[13] Enacted in 1943, rule 10b-5

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7. *In re* Charter Commc'ns, Inc., 443 F.3d 987 (8th Cir. 2006), *aff'd sub nom.* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008).
8. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 549 U.S. 1304 (2007) (mem.) (Certiorari granted).
9. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 191 (1994).
10. Wright v. Ernst & Young LLP, 152 F.3d 169 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).
11. 17 C.F.R. § 240.10b-5 (2007) (hereinafter "Rule 10b-5"). Rule 10b-5 was promulgated by the SEC in 1948 under authority of 15 U.S.C. § 78(a) *et. seq.*; *see* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 729 (1975).
12. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104–67, 109 Stat. 737 (1995) (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).
13. Vincent D. Louwagie, *Private Securities Litigation Reform Act of 1995 and Investors' Rights*, HENNEPIN LAW., Mar.-April 1996, at 1.

is very straight-forward with a broad jurisdictional reach.[14] A common 10b-5 issue, and the focus of the argument here, is *"Who can sue*?"

This issue was briefly discussed in *Superintendent of Insurance of New York v. Bankers Life & Casualty Co*.[15] There the United States Supreme Court cited prior case law and other authorities to hold that "[i]t is now established that a private right of action is implied under [10b-5]."[16] For a 10b-5 violation to stick, plaintiffs must show:

1. The defendant made a "material representation or omission";
2. The defendant acted with "scienter", or a "wrongful state of mind";
3. The material representation or omission was made "in connection with the purchase or sale of a security";
4. The plaintiff who was allegedly victimized by the fraud relied upon the material misrepresentation or omission;
5. The plaintiff suffered an economic loss as a result of the alleged fraud; and
6. The plaintiff can allege and prove "loss causation."[17]

III. *CENTRAL BANK OF DENVER V. FIRST INTERSTATE BANK*

In *Central Bank*, the Court addressed aiding and abetting liability under rule 10b-5. First Interstate Bank of Denver bought $2.1 million worth of bonds out of a $26 million bond issue by the Colorado Springs-Stetson Hills Public Building Authority ("Authority").[18] Central Bank of Denver was the indenture trustee, obligated by contract to assure that the Authority complied with its covenants. The Authority, under one such covenant, was to hold land worth 160% of the bonds' value.[19] The bond underwriter notified Central Bank that, because of declining property values, the land value had dropped

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14. 17 C.F.R. § 240.10b-5 (2007). Rule 10b-5 states:

> [i]t 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 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.

15. Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6 (1971).
16. *Id*. at 13 n.9.
17. Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341 (2005).
18. *See* Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 167–68 (1994).
19. *Id*. at 167.

below 160%.[20] Central Bank exchanged letters with the developer and ultimately agreed to delay its review of the appraisals. The Authority defaulted before that independent review took place and First Interstate sued both the Authority and Central Bank. The suit against Central Bank was based on the theory that Central Bank had, through its inaction, recklessly aided and abetted the fraud.[21]

Prior to the *Central Bank* ruling, courts generally recognized aiding and abetting liability for securities violations when: 1) the primary person violated the securities statutes; 2) the aider had actual knowledge of the violation and his role in furthering it; and 3) the aider gave substantial intentional assistance.[22] *Central Bank* reversed this common law rule, finding that there is no private aiding and abetting liability under section 10(b) of the Securities Exchange Act ("section 10(b)") and rule 10b-5.[23] Reliance weighed heavily in the decision, and the Court reasoned that the language of rule 10b-5 requires a plaintiff to "show reliance on the defendant's misstatement or omission" in order to recover.[24] In other words, secondary actors must commit a misrepresentation or omission on which a securities purchaser or seller relies to be found liable under section 10(b).

In ruling, the Court curtailed investors' ability to bring a private action, allowing them to bring the action against only the violators on whose statements or omissions investors relied in making their securities purchase or sale. The logical next step was for plaintiffs to ensure that aiders and abettors fell into the primary violator group in order for the private action to proceed.

IV. *WRIGHT V. ERNST & YOUNG LLP*

It was a mere five years later, in 1999, that the United States Court of Appeals for the Second Circuit declined to adopt the substantial participation test used in other jurisdictions and elected to adhere to the bright line test for reliance.[25] If there was no private cause of action for aiders and abettors, as determined in *Central Bank*, then the distinction was important. In *Wright v. Ernst & Young LLP*, plaintiff was appealing the dismissal of her class action claim against Ernst & Young. The suit accused the accounting firm of substantially participating in the fraud of BT Office Products by certifying

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20. *Id*.
21. *Id*. at 168.
22. *Id.* at 194. The dissent cites cases that support aider and abettor theories. *See id.* at 192 n.1.
23. *See id.* at 191.
24. *Id*. at 180.
25. Wright v. Ernst & Young LLP, 152 F.3d 169, 175–76 (2d Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999).

BT's financial statements with the knowledge that the financial statements would be disseminated in a press release.[26]

The court reaffirmed its bright line test for determining primary violators, ruling that primary violators must actually make material misstatements or omissions to be liable.[27] Thus, third parties who review and approve documents containing fraudulent statements–such as Ernst & Young–do not fall into the category of primary violators. The decision supported *Central Bank*'s ruling by helping to distinguish when a violator is subject to private action and when the SEC would need to step in.

Although plaintiffs appealed, the Supreme Court denied certiorari, letting the test stand. However, while the Second Circuit had a clear test, other circuits were left to determine their own criteria for placing secondary actors in a primary spot.

V. PRIVATE SECURITIES LITIGATION REFORM ACT (PSLRA) OF 1995

The PSLRA was enacted in 1995, between the United States Supreme Court's 1994 ruling in *Central Bank* (no aiding and abetting liability under rule 10b-5) and the 1999 Second Circuit decision in *Wright* (bright line test for primary violators). The PSLRA was the product of pressure from sectors of the financial industry and from litigation-prone high-technology firms.[28] Although opposed by consumer advocates like Ralph Nader, litigation reform was also supported by public retirement funds and was a part of the Republican Party's "Contract with America."[29]

As noted in the House Conference Report, the PSLRA was designed to prevent "the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action . . . ."[30] In drafting the Act, Congress hoped to curtail unwarranted lawsuits (like those filed to coax a settlement offer to avoid costly litigation) and provide an alternative recourse. They did this by, among other things,

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26. *Id*. at 173.
27. *Id*. at 175.
28. *See* Louwagie, *supra* note 13, at 3 (referring to the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4 (2006)).
29. *Id*.
30. H.R. REP. NO. 104–369, at 31(1995) (Conf. Rep.), *reprinted in* 1995 U.S.C.C.A.N. 730, 730.

heightening the pleading standards for a securities fraud action and by granting SEC the express authority to prosecute aiders and abettors.[31]

Congress thus put a stop to investors who made a bad investment decision or failed to assess the risk and who chose to recoup losses by going after firms who they felt misled them. Further, as relates to aider and abettor prosecution, Congress expressly defined the SEC's authority, thereby resolving doubts raised by the *Central Bank* decision as to whether that authority permitted the prosecution of aiders and abettors.[32]

VI. *STONERIDGE INVESTMENT PARTNERS*

A. Overview

Eight years after the Second Circuit court in *Wright* established its bright line test for determining primary violators, *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* came before the United States Supreme Court. In *Stoneridge*, investors brought a securities fraud class action against cable television services provider Charter Communications, Inc., several Charter executives, and independent auditor Arthur Anderson LLC. Also named as defendants were Scientific-Atlanta, Inc. and Motorola, Inc., which were both suppliers to and customers of Charter.[33]

The two defendants (respondents) before the Court–Scientific Atlanta, Inc. and Motorola, Inc.–were accused of being involved in transactions that improperly inflated Charter's reported operating revenues and cash flow.[34] In an effort to promote favorable investor opinion,[35] Charter arranged with defendants to overpay them $20 for each set-top box Charter purchased through the end of the year 2000.[36] In return, defendants would return the overpayment by purchasing advertising from Charter. Charter would then record the advertising purchases as revenue and treat the purchase of the set-top boxes as capital.[37] In other words, by cooking the books, Charter created fraudulent financial statements showing that it was meeting projections.

Plaintiffs hoped to extend the definition of primary violators to include secondary actors who knowingly participate in a scheme, while defendants asked the Court to enforce *Central Bank*, *Wright*, and the PSLRA. Defendants

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31. 15 U.S.C. § 78(u) (2006). *See* MARK STEINBERG, SECURITIES REGULATION 495 (5th ed. 2008).
32. *See* Louwagie, *supra* note 13, at 8.
33. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 153 (2008).
34. *Id.* at 153–54.
35. *Id.* at 153.
36. *Id.* at 154.
37. *Id*.

suggested that the concept of "scheme liability" proposed by plaintiffs was simply aiding and abetting under a new label.[38]

B. *Stoneridge*–District Court

The case originated in the United States District Court for the Eastern District of Missouri. The District Court dismissed the claims in favor of Scientific-Atlanta and Motorola.[39] Stoneridge Investment Partners had previously agreed in principle to settle its claims against Charter, and its officers and shareholders for $144 million.[40] The court found that defendant vendors were aiders and abettors and that plaintiffs did not rely on any statements or omissions made by defendants and, therefore, did not meet the requirements for a 10b-5 suit.[41] The court also denied plaintiffs' request to amend the complaint to add allegations detailing Scientific-Atlanta and Motorola's participation in, and knowledge of, the fraudulent scheme to inflate Charter's revenues.[42] The court found that plaintiffs' motion for reconsideration "pleads additional particularity and merely reiterates in part the allegations of the complaint, and so fails to meet the cited criteria [for reconsideration]."[43]

C. *Stoneridge*–Court of Appeals

The Court of Appeals for the Eighth Circuit, reviewing *de novo*, affirmed the district court's ruling.[44] The court found: "[a]s in earlier cases considering conduct prohibited by section 10(b), we again conclude that the statute prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act . . . . The proscription does not include giving aid to a person who commits a manipulative or deceptive act."[45] The court went on to state:

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38. *Id.* at 160.

39. *In re* Charter Commc'ns, Inc., No. MDL 1506, 2004 WL 3826760 (E.D. Mo. 2004), *aff'd* 443 F.3d 987 (8th Cir. 2006).

40. *Id.* at *1.

41. *Id.* at *5–6.

42. *Id.* at *4.

43. *Id*. at *5.

44. *In re* Charter Commc'ns, Inc., 443 F.3d 987, 989 (8th Cir. 2006), *aff'd sub nom.* Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008).

45. *Id*. at 990 (quoting Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164, 177 (1994)).

> However, neither Motorola nor Scientific-Atlanta was alleged to have engaged in any such deceptive act. They did not issue any misstatement relied upon by the investing public, nor were they under a duty to Charter investors and analysts to disclose information useful in evaluating Charter's true financial condition. None of the alleged financial misrepresentations by Charter was made by or even with the approval of the Vendors.[46]

Aligning with the district court, the Eighth Circuit ruled, based on the plain language of the statute, that no misrepresentation means no private liability.[47]

D. *Stoneridge*–Granting Certiorari

The United States Supreme Court only granted certiorari because of conflicting rulings on primary versus secondary actors in the various courts of appeals.[48] Since denying certiorari in *Wright* in 1999, two appellate courts had addressed the issue with conflicting results.[49] Recognizing these inconsistencies, granting certiorari in *Stoneridge* gave the Court an opportunity to clarify when an investor may bring a private section 10(b) action.[50]

In 2006, the United States Court of Appeals for the Ninth Circuit ruled in favor of AOL Time Warner when a complaint against it unsuccessfully alleged that it participated in originally legitimate transactions that *later* became deceptive due to another party's fraud.[51] In the process, however, the court stated, "[w]ith respect to the making of false statements or omissions, we have held that 'substantial participation or intricate involvement in the preparation of fraudulent statements is grounds for primary liability even though that participation might not lead to the actor's actual making of the statements.'"[52] This statement is contrary to the Second Circuit's test in *Wright*, which requires an actual material misstatement or omission by the violator to raise that violator to the status of primary actor.[53]

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46. *Id*. at 992.
47. *Id.*
48. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 156 (2008).
49. Regents of Univ. of Cal. v. Credit Suisse First Boston (USA), Inc., 482 F.3d 372 (5th Cir. 2007) (actual misstatement or omission required for primary liability); *see* Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006) (having purpose and effect of fraud sufficient for primary liability);.
50. *Stoneridge*, 552 U.S. at 156.
51. *Simpson*, 452 F.3d 1040.
52. *Id*. at 1048 (quoting Howard v. Everex Sys., Inc., 228 F.3d 1057, 1061 n.5 (9th Cir. 2000)).
53. Wright v. Ernst & Young LLP, 152 F.3d 169, 175 (2d Cir. 1998) (quoting Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997)).

The following year, the United States Court of Appeals for the Fifth Circuit tackled the same issue.[54] The court acknowledged that its sister circuits were having problems reaching a consensus on liability. Specifically, the Fifth Circuit noted that the Supreme Court had left the appellate courts to their own devices:

> Though the Court conclusively foreclosed the application of secondary liability under section 10(b), it stated that secondary actors such as investment banks and accountants can be liable as primary violators in some circumstances. The Court has never, however, precisely delineated the boundary between primary and secondary liability. As the district court noted, the lower courts have struggled to do so, and our circuit has not previously announced a standard that conclusively governs this case.[55]

E. *Stoneridge*–Oral Arguments at the Supreme Court

The *Stoneridge* oral dialogue took many twists and turns.[56] The final five to three decision[57] reflected the Court's unwillingness to overturn *Central Bank* and, even more importantly, a reluctance to extend the definition of aiders and abettors laid out by the United States District Court for the Southern District of New York in *Wright*. The Justices, however, appeared to give the plaintiffs every opportunity to convince them to extend private liability to include aiders and abettors who actively participated in the scheme.[58]

Plaintiffs were at a disadvantage without Justice Stephen Breyer. Justice Breyer was not a part of the *Central Bank* decision and, thus, might have been more open to a reassessment of that ruling.[59] According to early reports, both Chief Justice John Roberts Jr. and Justice Breyer initially recused themselves in the case because, "[a]ccording to their 2006 financial disclosure forms, both justices owned between $50,001 and $100,000 of stock in Cisco Systems Inc., the parent company of Scientific-Atlanta . . . ."[60] However, in a later report, "Chief Justice Roberts indicated he is 'no longer recused' in *Stoneridge*

54. *Regents*, 482 F.3d 372.
55. *Id.* at 386 (referring to the Supreme Court's ruling in Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 564 (1994) (citations omitted)).
56. *See* Transcript of Oral Argument, Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148 (2008) (No. 06-43), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-43.pdf.
57. *See Stoneridge*, 552 U.S. at 150.
58. *See* Transcript of Oral Argument, *supra* note 56.
59. *See Stoneridge*, 552 U.S. at 150.
60. Tony Mauro, *Issue of 'Strategic Recusals' Arises in Key Supreme Court Case*, LEGAL TIMES, Aug. 20, 2007, http://www.law.com/jsp/article.jsp?id=1187341331268.

Investment Partners v. Scientific-Atlanta and *Motorola*. Roberts had originally recused, it appeared, because he owned stock in Cisco Systems, which owns Scientific-Atlanta. The fact that he rejoined the case suggests he sold the conflicting stock."[61]

With Justice Breyer recused, Justices Stevens, Souter, and Ginsburg made up the remaining liberal slant. All three were dissenters in the *Central Bank* decision.[62] These Justices were left to carry the torch for plaintiffs and, to no one's surprise, Justices Stevens, Souter, and Ginsberg ultimately made up the dissent in this case too.[63]

Stanley Grossman argued on behalf of the plaintiffs. With Justice Breyer on the sidelines and Justice Stevens apparently sleeping through the proceeding until the final moments of the defendant's time, it was up to Justices Ginsburg and Souter to help maneuver Grossman through his presentation.[64]

Chief Justice Roberts was quick to confront Grossman, taking note that Congress had specified in section 20(e) of the Securities Exchange Act of 1934 that it is the Securities and Exchange Commission that can bring an action against aiders and abettors.[65] Justice Roberts argued that there was no reason to infer Congress's intent because ". . . [Congress has] kind of taken over for us. They are imposing certain limits on when actions can be brought, proposing particular specific elements."[66] Roberts continued this line of thinking, apparently referring to the enactment of the PSLRA: "[a]nd isn't the effort by Congress to legislate a good signal that they have kind of picked up the ball and they are running with it and we shouldn't?"[67] Recall that the PSLRA limits private actions and reinforces the SEC's authority to prosecute aiders and abettors.

Ignoring Grossman's argument that Congress intended, by enacting the PSLRA, that private rights of action remain valid, Chief Justice Roberts concluded by suggesting "that we should get out of the business of expanding . . . [the private right of action], because Congress has taken over and is legislating in the area in a way they weren't back when we implied the right of action under 10(b)."[68] Chief Justice Roberts seemed content that

61. Tony Mauro, *Recusal Report*, LEGAL TIMES, Oct. 10, 2008, http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1159952725304 (citations omitted).
62. Cent. Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).
63. *Stoneridge*, 552 U.S. at 167.
64. Transcript of Oral Argument, *supra* note 56, at 14-15, 19-22, 24-25, 30-32.
65. *Id.* at 6.
66. *Id.*
67. *Id*.
68. *Id*. at 7.

Congress had further refined the aiders and abettors liability issue, and was hesitant here to expand Congress's directives in the PSLRA.

The discussion then shifted quickly as Chief Justice Roberts inquired as to whether it made a difference if defendant knew that Charter would undertake the deceptive practice.[69] This opened the door for Grossman to present plaintiff's proposed test to expand aider and abettor liability. Grossman maintained that "[t]he deceptive act for scheme liability has to be with the purpose of furthering a scheme to defraud investors."[70] Deceptive conduct was okay, but not if there was intent to further a scheme.[71]

It was Scalia's turn–"intended or known?" was his question.[72] It went downhill for Grossman from there; he began engaging in a back-and-forth dialogue with Justice Scalia over whether a defendant "knew" versus "knew it was in furtherance" versus importing "intent" if "in furtherance," and mercifully on to Grossman's belief that even if defendants didn't care what Charter did with the money, they would still be "reckless."[73] When it drifted to reckless behavior, Grossman was quick to regroup with a scienter argument.[74] Thank goodness for Justice Souter, who helped Grossman define intent: "[i]t's got to have either knowledge of or a willingness to maintain an indifference to the consequence."[75]

Finally arriving at the heart of the matter, Chief Justice Roberts surmised that plaintiffs were asking the Court to extend liability to secondary actors " . . . who put the deceptive conduct into the market."[76] After some back-and-forth about whether or not the accounting firm, Arthur Anderson, was deceived by defendants,[77] Chief Justice Roberts again summarized, "[n]obody bought or sold stock in reliance upon the way that Scientific-Atlanta and Charter structured their deal. They did so in reliance on the way that Charter communicated its accounting to the marketplace."[78] Justice Kennedy, concerned about opening litigation floodgates, noted " . . . there are any number of kickbacks and mismanagement and petty frauds that go on in the business, and business people know that any publicly held company's shares

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69. *Id*. at 8.
70. *Id*. at 8–9.
71. *Id.* at 9.
72. *Id*. at 9.
73. *Id*.
74. *Id.* at 10.
75. *Id.*
76. *Id*. at 12–13.
77. *Id.* at 13–17.
78. *Id.* at 17.

are going to be affected by its profits, so I see no limitation to your–to your proposal for liability."[79]

Kudos to Justice Souter who, again, tried to help Grossman articulate the distinction between aiders and secondary actors that should be lifted to the status of a primary violator:

> But as I understand your argument, it is the difference between aiding and abetting liability on the part of the respondents and liability as, in effect, as first line principles, is their intent, or at the very least in knowledge that they were committing a deceptive act as part of this scheme. Is that correct?[80]

In an effort to allay the Court's concern, Grossman pointed out that there are cases where aiders can engage in deceptive conduct but it would not be for the purpose of defrauding shareholders–such as placing an early order to help a sales associate win a sales incentive prize.[81] For Grossman, his ultimate test involved "whether or not . . . [the] deceptive act had the purpose and effect of furthering a scheme on investors."[82]

Next up, Stephen Shapiro argued on behalf of the respondents. Shapiro immediately pounced on what was at stake: " . . . diluting traditional requirements such as the reliance requirement and . . . eroding this Court's precedent in the *Central Bank* case."[83] This would also contradict, according to Shapiro, section 20(e) of the Securities Exchange Act.[84]

Summing it up beautifully, Justice Ginsberg asked ". . . I think the question is: is there a middle category between Charter, who is clearly primarily liable, and Central Bank, that didn't do anything deceptive?"[85] Shapiro stuck to his argument that all of the statutory terms of section 10(b), including those relating to deception, must be examined as a whole.[86] He further asserted that even though the vendors helped to consummate Charter's fraud on the public, Congress left it up to the administrative agency to decide whether to proceed with an action.[87]

Justice Ginsberg continued to struggle with the difference between *Central Bank*, where the bank engaged in no deceptive act, and the vendors

79. *Id*. at 18.
80. *Id*. at 19–20.
81. *Id*. at 20–21.
82. *Id.* at 23.
83. *Id*. at 26.
84. *Id*.
85. *Id*. at 27.
86. *Id*. at 28.
87. *Id*. at 28–29.

here who did.[88] Shapiro quickly recounted specifics in the *Central Bank* complaint where the bank was accused of entering into a "secret side agreement" that in turn led to the issuance of a "fraudulent prospectus."[89] This would, of course, put Central Bank in the same category as the vendors here because, if those allegations were true, that would mean they did aid in the fraudulent scheme.

Over and over, Shapiro addressed the requirements of the statute, the fact that each and every element of 10b-5 liability must be satisfied, and, specifically, the need to communicate with investors and for those investors to rely on that communication.[90] What is satisfied here, said Shapiro, is section 20(e) of the Securities Exchange Act:

> You are only a primary violator under–under Central Bank if each and every element of 10b-5 liability is satisfied, including reliance on your statement, including the "in-connection-with" test, and including loss causation. None of these tests are satisfied here, but what is satisfied is section 20(e), which says, did they knowingly give substantial assistance to somebody who is committing a fraud? And that–that fits this case like a glove.[91]

In the end, Justice Souter picked up Justice Ginsburg's fight and asked again if there was "an overlap" between primary liability and aider-and-abettor liability.[92] Referring to a vendor who actually makes an announcement that they are "jacking up" their price, he asks "[w]e know perfectly well why they are doing it, and they are doing it solely to aid and abet Charter in its scheme themselves enjoying a wash transaction. Why isn't that both primary and aiding-and-abetting?"[93] In reference to this example, Shapiro agreed that a vendor would be a primary violator, but only because they communicated to the market.[94] Such communication fulfills the requirements of 10b-5. Justice Souter insists that if it is both primary and aiding and abetting, how could there

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88. *Id.* at 30.
89. *Id*.
90. *Id*. at 31–36.
91. *Id*. at 36 (referencing the Securities Exchange Act of 1934, 15 U.S.C. § 78t(e) (2006). The section reads:

> (e.) Prosecution of persons who aid and abet violations. For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.)

92. *Id.* at 43.
93. *Id*. at 44.
94. *Id.*

not be an overlap as suggested by Justice Ginsburg?[95] Shapiro refused to take the bait, reiterating that there must be a statement to the market and there must be reliance by that investor.[96] He also used the opportunity to point out that the Eighth Circuit's decision below must be affirmed as Congress "intended to remove this category of case and commit it to an expert agency as part of its very important reform effort to deal with excessive litigation that was harming our economy."[97]

Grossman was asking the Court for a lot–to overrule their decision in *Central Bank* and now allow aiding and abetting liability under section 10(b) of the Securities Exchange Act, even when an investor did not rely on a misrepresentation or omission by the actor. It was a stretch and Grossman's fuzzy theories involving knowledge, intent, action "in furtherance of," and reckless behavior were difficult to grasp. In short, Grossman didn't provide enough for the Justices to hang their hats on. Shapiro, on the other hand, had the easier task of simply sticking with the elements of 10b-5 and the *Central Bank* decision. In the end, the stacked conservative court couldn't find reason to both overrule their prior decision and ignore Congress's recent PSLRA legislation.[98]

F. *Stoneridge*–The Opinion

The Court's opinion was difficult to follow because the Court seized the opportunity to cover the gambit: *Central Bank* decision; the elements of a section 10(b) private cause of action; Congress's response to requests for expanded liability; scheme liability; duty; the impact on the marketplace of expanding liability; and more.[99] The final outcome was a decision consistent with *Central Bank*, with the elements of section 10(b) and section 20(e) of the Securities Exchange Act, and with the PSLRA.

The Court acknowledged that its decision in *Central Bank* led to calls for Congress to create a statutory cause of action for aiding and abetting.[100] After Senate securities subcommittee hearings, however, Congress directed that prosecution of aiders and abettors is to be handled by the SEC.[101] Shapiro had held fast in his oral argument to the position that Congress had left it up to the

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95. *Id*. at 45.
96. *Id*.
97. *Id*.
98. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 167 (2008).
99. *See generally id.*
100. *Id.* at 158.
101. *Id.* (referring to § 104 of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78t(e) (2006)).

SEC, and not private litigants, to handle secondary actors. This meant that unless the Court was willing to expand the private actor definition, then there wasn't much wiggle room for the plaintiffs' claims.

Without expanding liability, however, there is no remedy for this wrong. Arguably, the SEC rights the wrong, but their investigations do not always result in a remedy for private parties duped by the actions of secondary violators.[102]

Defendants here emphasized the lack of reliance by those in the market, defending their secondary actor status under section 10(b). At first, the Court seemed to agree, noting that "[r]eliance by the plaintiff upon the defendant's deceptive acts is an essential element of the section 10(b) private cause of action."[103] They followed this statement, however, by acknowledging that "[w]e have found a *rebuttable presumption* of reliance in two circumstances. First, if there is an omission of a material fact by one with a duty to disclose . . . [and] [s]econd, under the fraud-on-the-market doctrine, reliance is presumed when the statements at issue become public."[104] But the Court quickly discounted these two rebuttable presumptions because the respondents here were not subject to a duty to disclose, nor were their acts communicated to the public.[105] This laid to rest the possibility, proposed by plaintiffs, that liability could attach to a vendor who helped to further a scheme on investors.[106] There is no middle ground–no reliance, no liability.

1. Fraud-on-the-Market

It is possible, however, that the Court dismissed the fraud-on-the market theory without appropriately considering the vendors' own dirty hands. Under that theory, ". . . a defendant's material misrepresentation regarding a security traded in the open market that affects the price of the security is presumed to have been relied on by a plaintiff who purchased the security and suffered a loss."[107] Scientific-Atlanta and Motorola are not small firms; both companies would understand the impact of their dealings on Charter's stock price.

Scientific-Atlanta was purchased by Cisco Systems, Inc. in 2006 in a cash sale at $43 per share, for an aggregate total price of approximately $6.9

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102. SECURITIES AND EXCHANGE COMMISSION, 2007 PERFORMANCE AND ACCOUNTABILITY REPORT 27 (2007), http://www.sec.gov/about/secpar2007.pdf.

103. *Stoneridge*, 552 U.S. at 159.

104. *Id.* (emphasis added).

105. *Id*.

106. *Id*. at 159–60.

107. Lawyers.com, Fraud on the Market Theory, http://research.lawyers.com/glossary/fraud-on-the-market-theory.html (last visited Mar. 28, 2010).

billion.[108] Prior to the purchase, Scientific-Atlanta was publicly traded[109]–meaning that it understood SEC regulations–and it is difficult to imagine that sales executives, negotiating deals with Charter, were not acutely aware of the impact of their misrepresentations on investors. There *should be* a rebuttable presumption of reliance on the part of investors that they relied on Charter's financials. In a 2000 *New York Times* report, the author noted that "[m]ajor customers–cable television networks, which need equipment to transmit and distribute broadcasts–are in a buying mood. And, after a mid-1980's shakeout among equipment suppliers, there isn't much competition for Scientific-Atlanta."[110] With cable television networks, such as Charter, as a major customer, and little competition among equipment suppliers, it is possible that Charter and Scientific-Atlanta felt empowered to construct a deal regardless of its ripple effect in the market.

Traded on the New York Stock Exchange and boasting $36.6 billion in sales in 2007, Motorola, too, was, and is, a major player in the equipment domain.[111] Using Motorola's own words, "Motorola, Inc. has been at the forefront of communication inventions and innovations for nearly eighty years."[112] Like Scientific-Atlanta, Motorola is an established firm, participating in high-powered, big-money business deals. Its honesty came into question when, in 2007, Motorola was involved in a class-action suit in relation to its dealings with the Turkish firm Telsim.[113] According to the report,

> New Jersey's state pension fund, which led the class action, had asserted that Motorola misled shareholders about the nature of its business dealings with Telsim . . . Motorola allegedly inflated sales and income regarding its relationship with the Turkish company but failed to disclose that it had loaned Telsim billions of dollars to enable the purchases.[114]

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108. Press Release, Cisco Systems, Inc., Cisco Systems, Inc. Announces Agreement to Acquire Scientific-Atlanta, Inc., ¶ 2, (Nov. 18, 2005), http://newsroom.cisco.com/dlls/2005/corp_111805.html?CMP=ILC-001.
109. *Id.* ¶ 1.
110. Barnaby J. Feder, *Why Wall Street Likes Scientific-Atlanta's Mr. Fixit*, N. Y. TIMES, Apr. 1, 1990, at 35, *available at* http://www.nytimes.com/ (search for "Scientific-Atlanta's Mr. Fixit," follow the "All Articles Since 1851" hyperlink, then follow the "Why Wall Street Likes Scientific-Atlanta's Mr. Fixit" hyperlink).
111. Motorola, Inc., About Motorola, at ¶ 2, http://www.motorola.com/content.jsp?globalObjectId=8892-11214 (last visited Mar. 28, 2010).
112. *Id*.
113. Stephen Taub & Dave Cook, *Motorola Settles Suit for $190 Million*, CFO, Apr. 18, 2007, at 4, *available at* http://www.cfo.com/article.cfm/9033458?f=related.
114. *Id*.

Again, it is possible that savvy business leaders at Motorola, much like the decision-makers at Scientific-Atlanta, elected to ignore any ripple effect of their dealings.

2. Misleading Statements

Noting that section 10(b) requires that the deception be "in connection with the purchase or sale of any security,"[115] the Court cut to the chase: "[i]t was Charter, not respondents, that misled its auditor and filed fraudulent financial statements; nothing respondents did made it necessary or inevitable for Charter to record the transactions as it did."[116] The plain language of the statute presented an uphill battle for plaintiffs: not only did they need to expand the reliance theory, but also needed to broaden its scope to connect defendants' actions to the injury sustained. This was a step the Court was unwilling to take.

Scheme liability can, however, impose liability even without making a statement to the public, at least according to attorney Grossman. Plaintiffs contend that investors are not simply relying on public statements made regarding a security, but also upon the behind-the-scenes transactions underlying those public statements.[117] The Court, however, felt that this expansive definition was too sweeping: "[w]ere this concept of reliance to be adopted, the implied cause of action would reach the whole marketplace in which the issuing company does business; and there is no authority for this rule."[118] Arguably, this would open the entire marketplace to litigation if an investment turns sour. Many business-to-business dealings impact a public company's performance; if each transaction is scrutinized for possible "scheme liabilities," companies could be prompted to settle lawsuits rather than be burdened with the expense of litigation, regardless of whether specific transactions were furthering a scheme to improve Wall Street reports.

Publicly traded companies are under great pressure to meet quarterly Wall Street projections. Last minute product discounts, pricing bundles, and accelerated roll-outs are common as quarters come to a close. A vendor who helps a company in these efforts could be accused of a "scheme to defraud," but honest business-to-business dealings should not be an issue. It is a scheme like the one concocted by Charter, Scientific-Atlanta, and Motorola that should be actionable.

115. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 160 (2008).
116. *Id.* at 161.
117. *Id*.
118. *Id*.

The Court did not need to identify a new scheme liability bright line test for Scientific-Atlanta and Motorola because the Court could have turned to the fraud-on-the-market theory. Scientific-Atlanta and Motorola made material omissions related to the transaction with Charter with full knowledge that those transactions were designed to report unearned revenues and bogus capital expenditures. Both Scientific-Atlanta and Motorola knew that Charter's financial statements would be the basis for investment decisions. Thus, the Court could have worked through both the material misstatement and the reliance issues in this case.

The majority states that "[s]ection 10(b) does not incorporate common-law fraud into federal law."[119] The mistake of the majority is that it treated the common law rule as the same as that in section 10(b) jurisprudence. It is not. Section 10(b) was designed by Congress to be broader than common-law fraud because of its defects.[120] The restrictive requirement of reliance should be construed to punish those who practice fraud. The concept of fraud on the market ". . . provides the requisite causal connection between a defendant's misrepresentation and a plaintiff's injury."[121]

3. *Court Assumes Actions of Congress Speak Volumes*

The United States Supreme Court also placed a lot of emphasis on Congress's quick adoption of the PSLRA in 1995.[122] Congress's action followed the Court's 1994 *Central Bank* decision in which the Court overturned common law theories and held that there is no aiding and abetting liability under section 10(b) for private parties:[123] ". . . we give weight to Congress's amendment to the Act restoring aiding and abetting liability in certain cases but not others. The amendment, in our view, supports the conclusion that there is no liability."[124]

The Act granted the SEC the authority to pursue actions against aiders and abettors and the Court feared that ruling in favor of private actions against aiders and abettors ". . . would undermine Congress's determination that this class of defendants should be pursued by the SEC and not by private

119. *Id*. at 162 (citing SEC v. Zandford, 535 U.S. 813 (2002)).

120. Herman & MacLean v. Huddleston, 459 U.S. 375, 388–89 (1983). "Indeed, an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections by establishing higher standards of conduct in the securities industry." *Id.* at 389.

121. *Stoneridge*, 552 U.S. at 170 (quoting Basic, Inc. v. Levinson, 485 U.S. 224, 243 (1988)).

122. *Id.* at 162–63.

123. *Id.* at 162.

124. *Id*. at 163.

litigants."[125] Investors have a private action against the primary violator, so they are not without recourse. Undoubtedly, there will be situations where the primary violator is without the resources to satisfy investors' claims; however, it is not prudent to punish the entire business community for those instances. Investors are left with their hands tied– investors lose the option to extend their claims to secondary actors who are just as responsible for publishing the misleading information.

According to the Court, the SEC's power over secondary actors has proven effective–the Court was quick to note the breadth of the SEC's administrative activities–"[s]ince September 30, 2002, SEC enforcement actions have collected over $10 billion in disgorgement and penalties, much of it for distribution to injured investors."[126] The Court concluded that the SEC has been effectively pursuing aiders and abettors, and has provided the appropriate remuneration to victimized investors–*why fix it if it isn't broken*? According to the SEC report, the SEC's enforcement cases in 2007 resulted in approximately $1.6 billion in disgorgement and penalties.[127] The report further notes that ". . . significant resources were devoted to the SEC's responsibility to distribute Fair Funds to injured investors under Sarbanes-Oxley, as well as to establish and support an accounting and recordkeeping system to appropriately track these distributions."[128] While this gives the appearance that the SEC is now working to ensure that investor victims are compensated to some degree, the report also indicates that only 38% of the cases that the SEC investigated related to "Financial Disclosure" or "Market Manipulation" due to the agency's desire to ". . . maintain a presence and depth so that no single area dominates its case mix . . . ."[129] The odds of a plaintiff group such as Stoneridge getting on the list for SEC enforcement *and* getting a distribution following a successful action are slim at best. It appears that the Court places too much emphasis on the work of the SEC in righting the wrongs.

4. A Judicially Created Cause of Action

Expanding the private cause of action to secondary actors was made even more problematic for the Court because the private cause of action was a judicial construct in the first place.[130] "Concerns with the judicial creation of a private cause of action caution against its expansion. The decision to extend

125. *Id.*
126. *Id*. at 166; *see* 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 102, at 26.
127. 2007 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 102, at 25.
128. *Id*. at 27 tbl. 2.3.
129. *Id*. at 27 tbl. 2.1.
130. *Stoneridge*, 552 U.S. at 163.

the cause of action is for Congress, not for us. Though it remains the law, the section 10(b) private right should not be extended beyond its present boundaries."[131] Justice Scalia would almost certainly take a non-expansive position, as he is known for his textualist approach.[132]

In the PSLRA, Congress had heightened the pleading standards, heightened the loss causation standard, and had given the SEC the power to prosecute aiders and abettors in class action suits.[133] The Court interpreted this to mean that expanding the liability would not be welcome and that Congress would most likely, if its post-*Central Bank* reaction was any indication, *quickly* amend the PSLRA to conclusively prohibit private action suits against aiders and abettors who, by virtue of an expansive ruling here, would now have standing to sue.[134] The Court ultimately decided to leave the issue alone.

VII. CONCLUSION

The United States Supreme Court took a winding path to arrive back at the beginning–no private actions against aiders and abettors. There was a lot at stake on both sides–increased exposure for public U.S. companies; additional protection for investors; a fear that foreign companies would be reluctant to set up shop in the U.S.; a possible rise in U.S. companies who elect to incorporate in foreign jurisdictions; and accusations of judicial activism.

Stoneridge received its share of pre-decision hype. Even the *Wall Street Journal* described *Stoneridge* as "the biggest securities-litigation court clash in a generation."[135] But, the hype was misguided. The deck was stacked against the plaintiffs, as it was hard to imagine this conservative Court changing a well-charted course. In an insightful piece appearing on *Forbes.com*, author Brian Wingfield summarized the status quo:

> First, two lower courts had already ruled in favor of Motorola and Scientific-Atlanta. In taking the case, the Supreme Court appeared to be sewing up a growing rift at the appeals level. The St. Louis-based 8th U.S. Circuit Court of Appeals had turned down Stoneridge's claim; however, the San Francisco-based 9th U.S. Circuit Court of Appeals ruled last year that if a third party furthered a 'scheme to defraud,' it could indeed be held liable . . . . In addition, the court ruled in several cases last year–*Bell Atlantic v. Twombly*,

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131. *Id*. at 165.
132. *See generally* David Kaiser, *Entering Onto the Path of Inference: Textualism and Contextualism in the Bruton Trilogy*, 44 U.S.F. L. REV. 95, 99–104 (2009).
133. 15 U.S.C. § 78u-4 (2006).
134. *Stoneridge*, 552 U.S. at 150.
135. Nick Timiraos, *Hot Topic: Can Shareholders Sue Third Parties?*, WALL ST. J., Oct. 6, 2007, at A19.

> *Credit Suisse Securities v. Billing* and *Tellabs v. Makor Issues & Rights*–to protect companies from frivolous class-action lawsuits.[136]

Plaintiffs' attempt to introduce the concept of scheme liability was regarded by opponents as nothing more than an attempt to establish a middle ground between secondary and primary violators. According to a joint brief by the American Bankers Association, the ABA Securities Association, the Clearing House Association, and the Financial Services Roundtable submitted to the Court in opposition to scheme liability: "[b]y any measure, petitioner's 'scheme' theory is an attempted end-run around Congress's decision not to allow private aiding-and-abetting claims."[137] The Court stuck to its guns, finding no middle ground. Even though its earlier *Central Bank* decision was focused on one side of the pendulum–because there were no affirmative acts on Central Bank's part–varying levels of participation, in the end, did not sway the Court.

The question remains, however: *should* the Court establish a bright line rule for a participant in a fraudulent scheme and establish liability for a heightened level of active participation? And, is it really *that* hard to do?

It is not necessary to change the statute–liability still requires a material misstatement or omission; still requires fraud; still requires that the action be in connection with the sale or purchase of a security. What changes is the point where an aider or abettor crosses the line and becomes a primary actor. For some reason, the Court draws the bright line with the communication to investors and their subsequent reliance on the information. However, actively participating in the creation of those material misstatements with full knowledge that you are creating deceptive information should lift that actor into another realm of responsibility. Those actors are, in effect, *creating* the communication. Business deals and barter agreements are one thing, but blatantly helping someone cook their books is altogether different. Even if you are not fudging your own numbers, and the investors are not your investors, there still has to be a level of responsibility–a level higher than a *possible* SEC investigation.

It is logical to assume that the 10b-5's "in connection with the purchase or sale of a security" language would apply to any vendor who is doing business with a publicly traded company. This could mean that all business dealings between a vendor doing business with a publicly traded company

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136. Brian Wingfield, *Stoneridge And The Court*, FORBES.COM, Jan. 15, 2008, http://www.forbes.com/ (search for "Stoneridge and the Court," then follow the "Stoneridge and the Court" hyperlink).

137. Brief of the American Bankers Association et. al. as Amici Curiae Supporting Respondents at 5, *Stoneridge*, 552 U.S. 148 (No. 06-43), 2007 WL 2329637.

could be connected to the purchase or sale of that company's security. The ramifications for businesses could be far-reaching–vendors could be saddled with higher liability insurance premiums, more internal policing costs, production slow-downs to examine business-to-business agreements, additional training of personnel, extra legal and accounting costs, and so on. These costs, too, could be passed back to the primary company, ultimately costing consumers more for products and services. The Court was not willing to possibly open litigation floodgates with a decision that would create an implied cause of action against aiders and abettors.[138]

But it is possible to identify wrongdoers while not overly exposing honest businesses. Using the well-established fraud-on-the-market theory to meet the reliance standard, the Court could have drawn the proverbial line at *overtly fraudulent* business transactions that meet the requirements for a 10b-5 action, regardless of *who* actually published the communication. The PSLRA is the proper tool for curtailing frivolous lawsuits.

This case is a perfect example of a time when it makes sense to elevate an actor to aider and abettor status based on the specific actions and intent of all the players. Here, defendants made a material misrepresentation when they knowingly altered Charter's quarterly earnings report to Wall Street. Defendants had the requisite scienter. They were savvy businessmen who knew that their dealings were designed to impact the purchase or sale of Charter's stock and they knew that investors' decisions would be swayed by their fraud because investors would rely on the earnings report.

An expansion of private actions would pose a risk that an innocent vendor would be required to defend their actions in court if a publicly traded firm with whom it has done business suffered losses that investors seek to recover. However, with the heightened pleading standards in the PSLRA,[139] this is more likely an alarmist reaction. The right firms would end up in the lawsuit, while other, smaller players would be subject to an SEC investigation as an aider and abettor.

The United States Supreme Court's opinion appeared more concerned with keeping the distinction between a primary and secondary actor, rather than finding a proper way for investors to recover their losses. The Court left it to the SEC to punish secondary wrongdoers, regardless of their level of involvement in the fraud, and left it up to the SEC to determine who, if anyone, is made whole. It is a disappointing decision because the PSLRA, coupled with the fraud-on-the-market theory, could have provided the bright line test needed to pull in the proper defendants.

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138. *Stoneridge*, 552 U.S. at 162–63.
139. *See* 15 U.S.C. § 78t (2006).

In the end, the Court declined to find a middle ground–you are either a primary actor or you are not and you are either welcome in federal court or you take your case up with the SEC. The PSLRA, however, should not have been used as an excuse to curtail investor actions.

> "[A]lthough the act establishes significant hurdles and disincentives to bringing federal securities law claims in federal court, it does not prohibit them. The best claims will still be brought and will still be successful. As with any significant legislation, judicial interpretation and future amendments will be important guides to practitioners."[140]

Unfortunately, the Court did not embrace the spirit of the Act and Congress's guidelines in conjunction with reasoned theories–it opted, instead, to extend the line to exclude guilty parties. For all of us waiting for the judicial interpretation of aider and abettor liability, we just got our answer.

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140. *See* Louwagie, *supra* note 13, at 8.