UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

# Securities and Exchange Commission v. Tambone

573 F.3d 54 (1st Cir. 2009) · No. No. 07-1384 · Decided July 22, 2009

## SUMMARY

The First Circuit granted rehearing en banc on the Rule 10b-5(b) issues in the SEC's case against James Tambone and Robert Hussey, while denying review of the Section 17(a)(2) issue. The court withdrew its prior opinion, vacated the judgment, and established deadlines for supplemental and amicus briefs before the scheduled en banc hearing.

## CASE DETAILS

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| COURT | United States Court of Appeals for the First Circuit |
| WRITING FOR THE COURT | Lynch, Chief Judge; Torruella, Circuit Judge; Boudin, Circuit Judge; Lipez, Circuit Judge; Howard, Circuit Judge |
| JURISDICTION | Federal |
| DECIDED | July 22, 2009 |
| DOCKET | No. 07-1384 |
| DISPOSITION | vacated |
| PROCEDURAL POSTURE | Defendants petitioned for rehearing en banc of the panel's decision concerning primary liability under Rule 10b-5(b), aiding-and-abetting liability, and the Section 17(a)(2) claim. |
| PRECEDENTIAL VALUE | Published procedural order; the prior panel opinion and judgment were withdrawn and vacated in the specified respects. |
| PARTIES | Securities and Exchange Commission v. James Tambone, Robert Hussey |

## TOPICS

appellate procedure · commercial litigation

## PRACTICE AREAS

securities law · appellate procedure · en banc rehearing

## QUESTIONS PRESENTED

1. Whether rehearing en banc should be granted on the panel's Rule 10b-5(b) primary-liability issues.
2. Whether rehearing en banc should be granted on the panel's Section 17(a)(2) ruling.
3. What effect granting rehearing en banc would have on the previously issued opinion and judgment.

## HOLDINGS

1. Rehearing en banc was granted on the Rule 10b-5(b) issues challenged by the defendants.
2. The petitions for rehearing en banc were denied as to the panel's Section 17(a)(2) ruling.
3. The December 3, 2008 panel opinion was withdrawn and the judgment entered on that date was vacated.

## KEY QUOTATIONS

> *"A majority of the active judges of this court have voted to grant rehearing en banc on the Rule 10b-5(b) issues."* (55)

> *"In accordance with customary practice, the opinion released on December 3, 2008 is withdrawn, and the judgment entered on the same date is vacated."* (55)

## FACTUAL BACKGROUND

The supplied opinion addresses only the procedural status of defendants' petitions for rehearing en banc. The petitions challenged the panel's implied-statement theory of primary liability under Rule 10b-5(b), the Section 17(a)(2) ruling, and, as to Tambone, the aiding-and-abetting ruling.

## PROCEDURAL HISTORY

The panel issued an opinion and entered judgment on December 3, 2008. Defendants sought en banc review. A majority of the active judges voted to grant rehearing en banc on the Rule 10b-5(b) issues, while the petitions were denied as to the panel's Section 17(a)(2) ruling. The court withdrew the prior opinion and vacated the prior judgment, authorized limited supplemental briefing, and scheduled the case for en banc hearing.

## DISPOSITION

vacated

## REMAND INSTRUCTIONS

No remand was ordered. The court authorized simultaneous supplemental briefs limited to the Rule 10b-5(b) issues, solicited limited amicus briefing, and scheduled en banc argument for October 6, 2009.

## INSTRUCTIONS FOR AN AI ASSISTANT

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